

A DIGEST
OF
RAILWAY DECISIONS.

EMBRACING

*ALL THE CASES FROM THE EARLIEST PERIOD OF RAILWAY
LITIGATION TO THE PRESENT TIME*

IN THE

UNITED STATES, ENGLAND AND CANADA.

BY

STEWART RAPALJE

AND

WILLIAM MACK.

VOLUME II.

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DIGEST

OF

RAILWAY DECISIONS.

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I. DUTIES AND LIABILITIES OF CARRIER.

1. Duty to carry mails, generally.*
 —Congress cannot compel a non land grant road to carry the mail, but can restrict the compensation to land grant rates. *Alabama G. S. R. Co. v. United States*, 25 Ct. of Cl. 30.
 Upon an application by the postmaster-general to the railway commissioners for an injunction against the Highland R. Co., to compel them to carry the mails pursuant to the 18th section of the Regulation of Railways Act, 1873, it was objected by the company that the commissioners had no jurisdiction, as the complaint came within the arbitration clause, and should be determined

* Mail carriers and mail contractors are public agents and not carriers for hire, see note, 23 AM. & ENG. R. CAS. 729.

according to the statute 1 & 2 Vict. c. 98. *Held*, that this was not a "difference" within the meaning of the 19th sec., and that the words therein, "any other question," should be confined, by the preceding particular words, to questions of remuneration, compensation, and the like. *Postmaster-General v. Highland R. Co.*, 2 Ry. & C. T. Cas. 34.

2. Classification of mail carriers.—Railroads for the purpose of carrying the mails are divided into three classes: (1) Those which have never received aid from the government, the service being voluntary and regulated by statute, and the compensation fixed by contract. (2) Those which have received land grants, and upon which the carrying of mails is obligatory. (3) Those belonging to the Pacific railway system, which have received both land grants and a guaranty of bonds, and which are required to carry mails at fair and reasonable rates. *Alabama G. S. R. Co. v. United States*, 25 Ct. of Cl. 30.

3. Contracts of carriage construed.—A construction given to a contract for railway mail-carrying by the express declaration of one party and the silent acquiescence of the other, prior to and during the performance of a service, cannot be repudiated after a party has acted upon the faith of it. *Central Pac. R. Co. v. United States*, 28 Ct. of Cl. 427.

Where the postmaster-general states the terms upon which a mail transportation service may be performed, and a railroad acquiesces and performs, it constitutes an agreement. A contract entered into, the terms being specified, cannot be changed or

modified by the protest of one party. *Texas & P. R. Co. v. United States*, 28 Ct. of Cl. 379.

A suit for past railway mail service is a demand and notice of an existing claim, but not a protest against what may occur in the future. *Texas & P. R. Co. v. United States*, 28 Ct. of Cl. 379.

The orders of the postmaster-general and the business of carrying the mails are subject to the statutes and regulations of the department which constitute the terms of the contract; and a railroad by carrying the mails accepts those terms. *Minneapolis & St. L. R. Co. v. United States*, 24 Ct. of Cl. 350.

The uniform practice of the department, that the delivery of mails at post-offices within 80 rods of a station is not to be computed as mileage, is a correct construction of the regulation relating to delivery. *Minneapolis & St. L. R. Co. v. United States*, 24 Ct. of Cl. 350.

The suppliant had a contract to carry the queen's mails along a certain route. In the construction of a government railway the crown obstructed a highway used by the suppliant in the carriage of such mails, and rendered it more difficult and expensive for him to execute his contract. After the contract had been fully performed by both parties, the suppliant sought to maintain an action by petition and right for breach thereof, on the ground that there was an implied undertaking on the part of the crown in making such contract that the minister of railways would not so exercise the powers vested in him by statute as to render the execution of the contract by the suppliant more onerous than it would otherwise have been. *Held*, that such an undertaking could not be read into the contract by implication. *Archibald v. Queen*, 2 Can. Exch. 374.

4. Validity of contracts for carrying the mails.—The postmaster-general is authorized by the Revised Statutes to enter into contracts for carrying the mails, and the only limitation of time set upon him is that of section 3956, which restricts them to periods not exceeding four years. *New York C. & H. R. Co. v. United States*, 21 Ct. of Cl. 468.

If a contract for railway mail service, dependent upon an appropriation for its validity, does not exceed the appropriation it will be deemed valid, though the appropri-

ation be exhausted. *New York C. & H. R. Co. v. United States*, 21 Ct. of Cl. 468.

A contract for postal-car facilities, which makes the liability of the United States conditional upon future appropriations, is valid and becomes operative if appropriations are subsequently made. *New York C. & H. R. Co. v. United States*, 21 Ct. of Cl. 468.

An agreement by a railway company, that during the continuance of a lease it will not carry any passengers, goods, or other things over any part of the leased line to any point on the line of the lessee, is not illegal, as binding it not to carry the mails if the postmaster-general should require it, the agreement imposing no such obligation. *Shrewsbury & B. R. Co. v. London & N. W. R. Co.*, 17 Q. B. 652, 21 L. J. Q. B. 89.

5. Transfer by mortgage of road.—The transfer of a claim against the government for carrying mails on a railroad, by mortgage and foreclosure, is void under U. S. Rev. St. § 3477, making all transfers and assignments of claims against the government void if made before the claim has been ascertained and a warrant issued therefor. *St. Paul & D. R. Co. v. United States*, 112 U. S. 733, 5 Sup. Ct. Rep. 366.—DISTINGUISHING *Erwin v. United States*, 97 U. S. 392; *Goodman v. Niblack*, 102 U. S. 556.—FOLLOWED IN *Flint & P. M. R. Co. v. United States*, 112 U. S. 762.

The transfer of a contract with the government to carry mails on a railroad, by mortgage and foreclosure, is void under U. S. Rev. St. § 3737, providing that no contract or order, or any interest therein, shall be transferred, and that such transfer will annul the contract or order as to the United States. *St. Paul & D. R. Co. v. United States*, 112 U. S. 733, 5 Sup. Ct. Rep. 366; *affirming* 18 Ct. of Cl. 405.

A foreclosure of a railroad mortgage, conveying the road and franchise, with all tangible property, and the business thereof, with all endowments, income, advantages, issues, rents, and profits, does not pass title to the purchasers of a contract with the government for carrying mails, nor a claim for services in carrying mails before the foreclosure. *St. Paul & D. R. Co. v. United States*, 112 U. S. 733, 5 Sup. Ct. Rep. 366.—DISTINGUISHING *Chicago & N. W. R. Co. v. United States*, 104 U. S. 680; *Chicago, M. & St. P. R. Co. v. United States*, 104 U. S. 687.

Where no debts due to a railroad corporation are included in terms in a mortgage of its property and franchises, and where the law of the state likewise provides that debts due to a corporation shall not pass to the purchaser by virtue of a mortgage and sale, a claim against the government for mail transportation services does not pass. *Chesapeake & O. R. Co. v. United States*, 19 Ct. of Cl. 300.

Where there are two railroad corporations distinct in name and adverse in interest, the one having a claim without a suit and the other a suit without a claim, and the party with the suit is in danger of defeat because of a defect of title, and the party without a suit is barred from bringing one by the statute of limitations, the defect cannot be cured by amendment or change of parties, though both consent. *Chesapeake & O. R. Co. v. United States*, 19 Ct. of Cl. 300.

There is no privity between two corporations seeking to recover the same claim for railroad mail service if the one was never in law or in equity the owner of the claim and the other never assigned or attempted to assign it. Succession in franchises and property creates no privity as to a chose in action not assigned. *Chesapeake & O. R. Co. v. United States*, 19 Ct. of Cl. 300.

6. Bond.—Where the neglect or default of an employé of the post-office department prevents a railway company from performing its obligation to the crown in the matter of carrying the mails, this is a good defense to an action to forfeit the company's bond for the conveyance of the mails. *Attorney-General v. London & N. W. R. Co.*, 1 Johns. 28.

7. Liabilities of carrier, generally.—The acts of congress regulating the duties and liabilities of steamboats engaged in carrying the mail (U. S. Statutes at Large, vol. 4, p. 104, § 6; *Id.* vol. 5, p. 736, § 13) do not impose upon the owners of such boats the responsibility of common carriers, in favor of a person who contracts with them only for the diligence of a mandatary. *Haynie v. Waring*, 29 Ala. 263.

The contractor for carrying the mails, and not the carrier employed by him, is the public agent, if such contract constitutes an agency; and as to his liability for the acts and defaults of subordinates employed in the transmission, the court "approves and adopts the legal propositions asserted and

maintained in *Sawyers v. Corse*, 17 Gratt. (Va.) 230. *Central R. & B. Co. v. Lampley*, 23 Am. & Eng. R. Cas. 720, 76 Ala. 357, 52 Am. Rep. 334.

A railroad company is not responsible for the negligent acts of postal clerks or agents upon its trains. *Muster v. Chicago, M. & St. P. R. Co.*, 18 Am. & Eng. R. Cas. 113, 61 Wis. 325, 21 N. W. Rep. 223, 49 Am. Rep. 41.—DISTINGUISHED IN *Carpenter v. Boston & A. R. Co.*, 21 Am. & Eng. R. Cas. 331, 97 N. Y. 494, 49 Am. Rep. 540.—*Poling v. Ohio River R. Co.*, 38 W. Va. 645, 18 S. E. Rep. 782.

The regulations of the post-office department do not require the speed of mail trains to be slackened at catch-stations, where cranes are erected for the exchange of mails. *Muster v. Chicago, M. & St. P. R. Co.*, 18 Am. & Eng. R. Cas. 113, 61 Wis. 325, 21 N. W. Rep. 223, 49 Am. Rep. 41.—DISTINGUISHED IN *Hoppe v. Chicago, M. & St. P. R. Co.*, 19 Am. & Eng. R. Cas. 74, 61 Wis. 357.

A passenger who is hurt while waiting in a proper place, on a station platform, by a mail-bag thrown from the train according to custom, while running at full speed, may sue the railroad company for such injury. *Snow v. Fitchburg R. Co.*, 18 Am. & Eng. R. Cas. 161, 136 Mass. 552, 49 Am. Rep. 40.—QUOTED IN *Sargent v. St. Louis & S. F. R. Co.*, 114 Mo. 348.

Where a passenger entering a train is struck and hurt by a mail-bag thrown therefrom by a clerk in the employ of the post-office department, the railroad company is not liable. *Carpenter v. Boston & A. R. Co.*, 24 Hun (N. Y.) 104.—QUOTING AND REVIEWING *Putnam v. Broadway & S. A. R. Co.*, 55 N. Y. 108.—FOLLOWED IN *Mars v. Delaware & H. Canal Co.*, 54 Hun (N. Y.) 625.

Plaintiff, having purchased a ticket, went upon the platform prepared for passengers at defendant's depot at C. for the purpose of taking a train which was approaching. A postal car was attached to the train, and as it passed the platform the postal clerk, an employé of the United States, threw out a loaded mail-bag, which struck and injured plaintiff. In an action to recover damages for the injury, it appeared that this had been for a long time the customary method of discharging mail-bags from postal cars at said depot, at times when passengers were upon the platform, and under circumstances

from which notice to the defendant might be fairly implied. It did not appear that defendant had taken any precaution to prevent injury. *Held*, the fact that the postal agent was not in defendant's employ did not relieve it from liability, and that the circumstances authorized a finding of negligence upon its part; that it was not necessary, in order to charge defendant with the duty of care and vigilance, to show that on some former occasion a like injury had happened. *Carpenter v. Boston & A. R. Co.*, 21 *Am. & Eng. R. Cas.* 331, 97 *N. Y.* 494, 49 *Am. Rep.* 540.—**DISTINGUISHING** *Nolton v. Western R. Co.*, 15 *N. Y.* 444; *Blair v. Erie R. Co.*, 66 *N. Y.* 313; *Pennsylvania R. Co. v. Price*, 23 *Alb. L. J.* 69; *Putnam v. Broadway & S. A. R. Co.*, 55 *N. Y.* 113; *Muster v. Chicago, M. & St. P. R. Co.*, 61 *Wis.* 325.—**FOLLOWED IN** *Carpenter v. Boston & A. R. Co.*, 105 *N. Y.* 629. **QUOTED IN** *Sargent v. St. Louis & S. F. R. Co.*, 114 *Mo.* 348. **REVIEWED IN** *Ohio & M. R. Co. v. Simms*, 43 *Ill. App.* 260.

Where the contractors for the transportation of the mails negligently unload the mail-bags upon the station platform or sidewalk in such a manner as to cause injury to one, who recovers judgment therefor against the company, the company may maintain an action for indemnity against the contractors, the relation of the parties *inter se* not being that of joint tort-feasors. *Old Colony R. Co. v. Slavens*, 38 *Am. & Eng. R. Cas.* 382, 148 *Mass.* 363, 19 *N. E. Rep.* 372.

8. Liability for loss or delay of mail matter.—Contractors for the transportation of the public mail are not liable in assumpsit for money inclosed in a way-letter and lost by the neglect of the mail-carrier employed by them, on their route. *Hutchins v. Brackett*, 22 *N. H.* 252.

There is no privity of contract between the sender of a letter by mail and the contractor with the government for carrying the mails, nor has the latter any right to compensation from the former; consequently he is not liable as a common carrier to the sender of the letter, although he may be at the same time engaged in the business of a common carrier. *Central R. & B. Co. v. Lampley*, 23 *Am. & Eng. R. Cas.* 720, 76 *Ala.* 357, 52 *Am. Rep.* 334.

A railroad being by law an established post-road, and the mails being carried along its route by the directions of the post-office department of the government, the liability

of the railroad company for the loss of mail matter is not that of a common carrier, but of a bailee for hire; and while it would be liable to the sender of a registered letter if stolen or lost through the negligence or want of care of its agents or servants, the burden of proof is on the plaintiff to show that the theft or loss was caused by such negligence, and trover is not the proper form of action to enforce the liability. *Central R. & B. Co. v. Lampley*, 23 *Am. & Eng. R. Cas.* 720, 76 *Ala.* 357, 52 *Am. Rep.* 334.

The excuse that delinquencies in carrying railroad mails were unavoidable in being caused by the elements, is proper matter for consideration by the postmaster-general, but cannot be considered by the court in the absence of fraud or other irregularity. *Minneapolis & St. L. R. Co. v. United States*, 24 *Ct. of Cl.* 350.

II. COMPENSATION FOR CARRIAGE.

9. Under the statutes, generally.—

The act of congress of July 12, 1876, § 13, enacted "that railroad companies whose railroad was constructed in whole or in part by a land grant made by congress, on the condition that the mails should be transported over their road at such price as congress should by law direct, shall receive only 80 per cent of the compensation authorized by this act." *Held*, that the 80 per cent rate only applied to that part of a road receiving a grant, and not to a part that was unaided. *United States v. Alabama G. S. R. Co.*, 142 *U. S.* 615, 12 *Sup. Ct. Rep.* 306; *affirming* 25 *Ct. of Cl.* 30.—**DISTINGUISHED IN** *Wisconsin C. R. Co. v. United States*, 27 *Ct. of Cl.* 440.

The act of congress of July 1, 1862, requires certain Pacific railroads to transport mails, troops, and supplies of the government "at fair and reasonable rates, not to exceed the amounts paid by private parties." *Held*, that a "fair and reasonable" compensation was not determined by what the railroad charged individuals for like services, but that it was competent for the court of claims to hear proof and decide that a lower rate, as fixed by the accounting officers of the government, was fair and reasonable. *Union Pac. R. Co. v. United States*, 25 *Am. & Eng. R. Cas.* 396, 117 *U. S.* 355, 6 *Sup. Ct. Rep.* 772.—**FOLLOWED IN** *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.*, 37 *Fed. Rep.* 567, 2 *L. R. A.* 289, 2 *Int. Com. Rep.* 351.

The provisions of said act as to a "fair and reasonable compensation" apply to transportation over the bridge of the Union Pacific railroad across the Mississippi river between Omaha and Council Bluffs. *Union Pac. R. Co. v. United States*, 25 Am. & Eng. R. Cas. 396, 117 U. S. 355, 6 Sup. Ct. Rep. 772.—QUOTED IN *Union Pac. R. Co. v. Chicago, R. I. & P. R. Co.*, 51 Am. & Eng. R. Cas. 162, 51 Fed. Rep. 309, 2 C. C. A. 174.

A contract for carrying the mail is not affected by the sections of the U. S. Rev. St. declaring that the postmaster-general may fix the rate for such service when performed by railroad companies to which congress granted aid, and he had no authority to insist that it was not binding upon the United States. *Union Pac. R. Co. v. United States*, 9 Am. & Eng. R. Cas. 54, 104 U. S. 662; reversing 16 Ct. of Cl. 569.—REVIEWED IN *Ex parte Koehler*, 12 Sawy. (U. S.) 446.

The claimants were proprietors of a railway from Pittsburgh to Newark, 160 miles, with a branch to Cadiz, 8 miles, and had a right of way over a railway between Newark and Columbus, 23 miles; and they carried the mails between Columbus and Pittsburgh and on the branch. Compensation for this mail service was ascertained by multiplying the number of miles between Newark and Pittsburgh by a given number of dollars. This compensation was paid by the post-office department for the whole mail service, and received by the claimants without question. After termination of the service they set up a claim for further compensation for mail service between Newark and Columbus. *Held*, that the payments had been made and received in full satisfaction for the entire service. *Pittsburgh, C. & St. L. R. Co. v. United States*, 13 Ct. of Cl. 314.

When the Pacific Railroad Act of July 2, 1864, 13 Stat. L. 356, § 5, changed the law which then required that all earnings for carrying mails, etc., should be applied on the subsidy bonds, and in lieu thereof provided that "only one half" of such earnings should be so applied, it was a clear authority for the payment of the other half. *Union Pac. R. Co. v. United States*, 16 Ct. of Cl. 353.

Where the postmaster-general is prohibited by law from paying a claim, he is prohibited from referring it to the court of claims, under the Revised Statutes, § 1063; and the court acquires no jurisdiction

from the reference. *Chesapeake & O. R. Co. v. United States*, 20 Ct. of Cl. 49.

A limitation set by congress upon the price to be paid for mail transportation on railroads will bind the postmaster-general not to incur a greater liability, and be notice to the carrier. *Alabama G. S. R. Co. v. United States*, 25 Ct. of Cl. 30.

10. Under provisions for reducing compensation.—The act of 1879, § 5, does not repeal U. S. Rev. St., § 3962, which gives to the postmaster-general authority to deduct from the pay of mail contractors, whether they be private persons or corporations, the price of the trip in all cases where the trip is not made, and not to exceed three times the price of the trip, where the failure is caused by the fault of the contractor or carrier. *Chicago, M. & St. P. R. Co. v. United States*, 35 Am. & Eng. R. Cas. 508, 127 U. S. 406, 8 Sup. Ct. Rep. 1194.

A railroad company, in aid of which congress granted land, entered September, 1875, into a contract with the United States to transport for four years the mails over its road at a price which conformed to the statute then in force. It received from the postmaster-general due notice of his orders, reducing the rates of compensation, pursuant to the act of July 12, 1876, c. 179, 19 Stat. at L. 78, and the act of July 17, 1878, c. 259, 20 Id. 140. The company protested against the order but performed the stipulated service. *Held*, that it is entitled to recover the contract price therefor. Those acts apply only to contracts thereafter made, or to such as did not require the performance of the service for a specific period. *Chicago & N. W. R. Co. v. United States*, 9 Am. & Eng. R. Cas. 48, 104 U. S. 680.—DISTINGUISHED IN *St. Paul & D. R. Co. v. United States*, 112 U. S. 733. FOLLOWED IN *Chicago, M. & St. P. R. Co. v. United States*, 10 Am. & Eng. R. Cas. 621, 104 U. S. 687; *St. Paul & D. R. Co. v. United States*, 18 Ct. of Cl. 405; *Chicago, M. & St. P. R. Co. v. United States*, 18 Ct. of Cl. 359; *Eastern R. Co. v. United States*, 20 Ct. of Cl. 23. RECONCILED IN *Eastern R. Co. v. United States*, 129 U. S. 391.—*Chicago, M. & St. P. R. Co. v. United States*, 10 Am. & Eng. R. Cas. 621, 104 U. S. 687.—DISTINGUISHED IN *St. Paul & D. R. Co. v. United States*, 112 U. S. 733. FOLLOWED IN *Chicago, M. & St. P. R. Co. v. United States*, 18 Ct. of Cl. 359; *St. Paul & D. R. Co. v. United States*, 18 Ct. of Cl. 405; *East-*

ern R. Co. v. United States, 20 Ct. of Cl. 23.—*Chicago, M. & St. P. R. Co. v. United States*, 18 Ct. of Cl. 359. *Illinois C. R. Co. v. United States*, 18 Ct. of Cl. 118.—FOLLOWED IN *Hannibal & St. J. R. Co. v. United States*, 18 Ct. of Cl. 213.—*Chicago, M. & St. P. R. Co. v. United States*, 14 Ct. of Cl. 125.

It was not intended by congress that the provision of the Revised Statutes, § 3962, authorizing the postmaster-general to make deductions and impose fines in the mail transportation service should be repealed by the act of March 3, 1879, 20 Stat. at L. 33, §§ 5, p. 355, and act of June 11, 1880, 21 *Id.* 177 *Jacksonville, P. & M. R. Co. v. United States*, 21 Ct. of Cl. 155.

Where a railroad admits its delay in delivering the mails and concedes the reasonableness of the postmaster-general's reduction therefor, it cannot recover. The maximum compensation authorized by congress and the amount allowed by the postmaster-general are for the whole service according to schedule time. *Jacksonville, P. & M. R. Co. v. United States*, 21 Ct. of Cl. 155.

An order of the postmaster-general making a mail service "subject to fines and deductions" is authorized by U. S. Rev. Stat. § 3962. *Minneapolis & St. L. R. Co. v. United States*, 24 Ct. of Cl. 350.

Where a mail contract authorizes the government to discontinue the service at any time, in whole or in part, allowing the contractor one month's extra pay, and congress during the term of the contract enact that the postmaster-general shall deduct 10 per cent from the compensation allowed to all railroads for carrying the mail, and the contractors continue to carry the mail without objection, it will be held that the statute was, in effect, a notice under the contract that the service would be discontinued under the old rates and continued, if at all, under the new rates. *Chicago, M. & St. P. R. Co. v. United States*, 14 Ct. of Cl. 125.

11. Waiver of right to full compensation.—The performance by the railroad company of the service imposed upon it by its contract, protesting against the reduction of compensation, is not a waiver of any rights under the contract. *Chicago & N. W. R. Co. v. United States*, 9 *Am. & Eng. R. Cas.* 48, 104 U. S. 680. *Union Pac. R. Co. v. United States*, 9 *Am. & Eng. R. Cas.* 54, 104 U. S. 662.

Where the postmaster-general, under the

authority of the act of congress of March 3, 1873, has adjusted a railway contract for carrying mails according to the weight of the mails, and the carrier has received a reduced amount without protest, he must be held to have accepted it in full payment, and cannot afterwards sue for the balance of the contract price. *Eastern R. Co. v. United States*, 129 U. S. 391, 9 *Sup. Ct. Rep.* 320; *affirming* 20 Ct. of Cl. 23.—RECONCILING *Chicago & N. W. R. Co. v. United States*, 104 U. S. 684.

12. Estoppel.—Where a railway mail-transportation contractor renders a service within the route of another, and allows the latter to receive pay therefor without objection, it is a case of estoppel, and the government cannot be made to pay a second time. *Utica, I. & E. R. Co. v. United States*, 22 Ct. of Cl. 265. *Philadelphia & B. C. R. Co. v. United States*, 103 U. S. 703; *affirming* 13 Ct. of Cl. 199.

The doctrine of equitable estoppel is applicable where a railway mail carrier ought to have notified the postmaster-general that he would not carry the mails and post-office inspectors on the terms prescribed by the regulations, and his silence is deemed his acquiescence. *Central Pac. R. Co. v. United States*, 28 Ct. of Cl. 427.

13. Effect of war.—The act of March 3, 1877, 19 Stat. at L. 362, by implication, prohibits the executive officers from paying for mail transportation services rendered after the state in which they were performed "engaged in war against the United States." *Chesapeake & O. R. Co. v. United States*, 20 Ct. of Cl. 49.

A railway corporation controlled by the enemy, located and operated within his jurisdiction, and employed in carrying on the war must be regarded, so far as its contracting power is concerned, as a person who promoted, encouraged, and sustained the rebellion. *Chesapeake & O. R. Co. v. United States*, 20 Ct. of Cl. 49.

Virginia "engaged in war against the United States" April 17, 1861, the day on which she passed her secession ordinance. West Virginia, however, although then a part of Virginia, never so engaged in war, and, therefore, a railway mail contractor in West Virginia may claim compensation from the United States for services rendered after that date. *Chesapeake & O. R. Co. v. United States*, 20 Ct. of Cl. 49.

Under the act of congress of March 3,

1877, providing that when certain claims by railroads for carrying mails had been paid by the Confederate government they should not be paid again—*held*, that the burden is on a claimant to show that his claim is not of that class. *Selma, R. & D. R. Co. v. United States*, 139 U. S. 560, 11 *Sup. Ct. Rep.* 638.

14. Defenses—Limitation.—Where a railroad has rendered services in carrying mails which are not against public policy, it is no defense to say that the road was operated by a combination intended to neutralize competition. *Southern Pac. R. Co. v. United States*, 28 *Ct. of Cl.* 77.

Where the original claim was for carrying the mail in 1861, and the petition was filed in 1886, an account stated by the sixth auditor, approved by the first comptroller under Rev. St. § 270, showing a balance due to a contractor, does not constitute an award nor take the case out of the statute of limitations, *Mississippi C. R. Co. v. United States*, 23 *Ct. of Cl.* 27.

15. Amount of compensation.—The act of congress of July 1, 1862, c. 120, § 6, incorporating the Union Pacific R. Co. (12 Stat. at L. 489), constitutes a contract between the United States and the company, whereunder the latter, for its service in transporting on its road, from Jan. 1, 1876, to Oct. 1, 1877, the mails and the agents and clerks employed in connection therewith, is entitled to compensation at fair and reasonable rates, not to exceed those paid by private parties for the same kind of service. *Union Pac. R. Co. v. United States*, 9 *Am. & Eng. R. Cas.* 54, 104 U. S. 662.

A railroad in receiving a land grant from the government was required to carry mails at such price as congress should fix. After carrying the mails for four years under a written contract it continued for another four years. Once during the latter four years the postmaster-general reduced the pay, and twice it was reduced by congress, and the company received pay at the reduced rates. *Held*, that no continuance of the written contract could be implied from a continuance of service, so as to bind the government to pay the same compensation as under the written contract. *Jacksonville, P. & M. R. Co. v. United States*, 28 *Am. & Eng. R. Cas.* 82, 118 U. S. 626, 7 *Sup. Ct. Rep.* 48.

A well-established practice, such as railroads receiving and delivering mail matter

at all offices within 80 rods of the road without extra charge, must be deemed to have been considered by congress and the department when fixing the rate of compensation for railroad mail transportation; and performing that service without objection, in accordance with the established practice, will preclude the road from seeking additional pay for it. *Jacksonville, P. & M. R. Co. v. United States*, 21 *Ct. of Cl.* 155.

A land grant road which has no option, but must transport the mails for such compensation as congress may by law direct, cannot be misled by any misinterpretation of a statute on the part of the postmaster-general. *Wisconsin C. R. Co. v. United States*, 27 *Ct. of Cl.* 440.—**APPROVING** *Duval v. United States*, 25 *Ct. of Cl.* 46. **DISTINGUISHING** *United States v. Alabama G. S. R. Co.*, 142 U. S. 615.

A railroad is not necessarily entitled to the maximum rate allowed by law for mail service. The postmaster-general has discretion to make contracts at lower rates. *Minneapolis & St. L. R. Co. v. United States*, 24 *Ct. of Cl.* 350.

16. Recovery back of money overpaid.—Where the responsible officers of the government give a construction to a statute, upon the faith of which a railroad mail contractor renders a service and receives his pay, the government cannot subsequently open the transaction and recover back the money upon a different interpretation of the law. *Alabama G. S. R. Co. v. United States*, 25 *Ct. of Cl.* 30.

An overpayment made to a railroad for carrying the mails at full rates, upon the supposition of the postmaster-general that it was not a "land grant road," when in fact it was, is a payment in mistake of fact which may be recovered back. *Duval v. United States*, 25 *Ct. of Cl.* 46.—**APPROVED IN** *Wisconsin C. R. Co. v. United States*, 27 *Ct. of Cl.* 440.

For the purpose of rectifying mistakes, the balances certified by the sixth auditor for carrying the mails may be regarded as running accounts. *Duval v. United States*, 25 *Ct. of Cl.* 46.

An overpayment made to a former railroad company before the property passed by purchase to the present claimant, and before contract relations existed between the government and the present claimant, cannot be set up by way of counterclaim. *Duval v. United States*, 25 *Ct. of Cl.* 46.

Estoppel cannot ordinarily be set up against the government; but a party purchasing a land grant road may rely upon settlements between the postmaster-general and the previous owner. If no overpayments were asserted in the settlements, none can be set up against the purchaser after the purchase. *Duval v. United States*, 25 Ct. of Cl. 46.

III. RAILWAY MAIL CLERKS, INSPECTORS, Etc.

17. Duty of company to transport—Compensation.—When the post-office regulations authorize inspectors "to open and examine the mails whenever and wherever they may find it necessary to do so," and require railroad companies "to convey free of charge all duly accredited special agents of the department," a company carrying the mails cannot carry the inspectors with apparent acquiescence in the terms of the regulations for many years and then sue for the service. *Central Pac. R. Co. v. United States*, 28 Ct. of Cl. 427.

A postal clerk whose commission has been honored by the railroad company has the right to presume that it will still be honored and that he is entitled to a free pass on said line; and it is the conductor's duty to see that all persons on the train are rightfully there. *Cleveland, C., C. & St. L. R. Co. v. Ketcham*, 133 Ind. 346, 33 N. E. Rep. 116.

The post-office department cannot compel a railway company, in the absence of a special contract, to carry a mail-guard with the mail-bags at the same rate as an ordinary passenger. *Reg. v. Irish S. E. R. Co.*, 1 Ir. C. L. 29.

18. Liability of company for injuries to them.*—A railway mail clerk travelling upon a train in the service of the government is a passenger for hire, so far as the company's liability for his injury is concerned. *Arrowsmith v. Nashville & D. R. Co.*, 57 Fed. Rep. 165. *Cleveland, C., C. & St. L. R. Co. v. Ketcham*, 133 Ind. 346, 33 N. E. Rep. 116.—APPROVING *Seybolt v. New York, L. E. & W. R. Co.*, 95 N. Y. 562. QUOTING *Blair v. Erie R. Co.*, 66 N. Y. 313; *Mellor v. Missouri Pac. R. Co. (Mo.)*, 14 S. W. Rep. 758,

10 L. R. A. 36.—*Libby v. Maine C. R. Co.*, 85 Me. 34, 26 Atl. Rep. 943.—FOLLOWING *Blair v. Erie R. Co.*, 66 N. Y. 313; *Baltimore & O. R. Co. v. State*, 72 Md. 36.—*Magoffin v. Missouri Pac. R. Co.*, 47 Am. & Eng. R. Cas. 489, 102 Mo. 540, 15 S. W. Rep. 76.—DISTINGUISHING *Pennsylvania R. Co. v. Price*, 96 Pa. St. 256; *Price v. Pennsylvania R. Co.*, 113 U. S. 218.—*Mellor v. Missouri Pac. R. Co.*, 47 Am. & Eng. R. Cas. 450, 105 Mo. 455, 16 S. W. Rep. 849. *Nolton v. Western R. Corp.*, 15 N. Y. 444; affirming 10 How. Pr. 97.—DISTINGUISHED IN *Carpenter v. Boston & A. R. Co.*, 21 Am. & Eng. R. Cas. 331, 97 N. Y. 494, 49 Am. Rep. 540. FOLLOWED IN *Seybolt v. New York, L. E. & W. R. Co.*, 18 Am. & Eng. R. Cas. 162, 95 N. Y. 562, 47 Am. Rep. 75. QUOTED IN *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30.—*Seybolt v. New York, L. E. & W. R. Co.*, 18 Am. & Eng. R. Cas. 162, 95 N. Y. 562, 47 Am. Rep. 75; affirming 31 Hun 100.—FOLLOWING *Nolton v. Western R. Corp.*, 15 N. Y. 444; *Blair v. Erie R. Co.*, 66 N. Y. 313. RECONCILING *Pennsylvania R. Co. v. Price*, 96 Pa. St. 256.—APPROVED IN *Cleveland, C., C. & St. L. R. Co. v. Ketcham*, 133 Ind. 346; *Houston & T. C. R. Co. v. Hampton*, 22 Am. & Eng. R. Cas. 291, 64 Tex. 427. DISTINGUISHED IN *Brewer v. New York, L. E. & W. R. Co.*, 124 N. Y. 59; *Scott v. Third Ave. R. Co.*, 36 N. Y. S. R. 838, 59 Hun 456, 13 N. Y. Supp. 344. FOLLOWED IN *Newell v. Ryan*, 40 Hun (N. Y.) 286. QUOTED IN *Maher v. Manhattan R. Co.*, 53 Hun (N. Y.) 506, 26 N. Y. S. R. 742, 6 N. Y. Supp. 309.—*Hammond v. North Eastern R. Co.*, 6 So. Car. 130.—QUOTING *Collett v. London & N. W. R. Co.*, 16 Q. B. 71 E. C. L. 984.—*Houston & T. C. R. Co. v. Hampton*, 22 Am. & Eng. R. Cas. 291, 64 Tex. 427.—APPROVING *Seybolt v. New York, L. E. & W. R. Co.*, 95 N. Y. 562.—*Collett v. London & N. W. R. Co.*, 16 Q. B. 984, 15 Jur. 1053, 20 L. J. Q. B. 411.

The fact that a postal clerk does extra work on a train, while not on his regular run, does not make him a trespasser, or render him any the less a passenger, or affect the liability of the company for damages sustained by reason of the company's negligence. *Cleveland, C., C. & St. L. R. Co. v. Ketcham*, 133 Ind. 346, 33 N. E. Rep. 116.

Where the evidence shows that postal clerks holding photographic commissions are entitled to ride as passengers on trains

* Liability of company for personal injuries to mail agents, see notes, 47 AM. REP. 83; 19 L. R. A. 339. See also CARRIAGE OF PASSENGERS, 54.

while on duty and in returning home, and that by the permission of the conductor a postal clerk holding such a commission travelled while off duty in the mail car and was injured in a collision, he is not guilty of contributory negligence *per se* so as to defeat a right of action for his death, although there was greater risk of injury in the mail car, and he would have escaped injury if he had continued his journey in the smoking car, where he commenced it. *Baltimore & O. R. Co. v. State*, 41 *Am. & Eng. R. Cas.* 126, 72 *Md.* 36, 18 *Atl. Rep.* 1107.—*REVIEWING* *Carroll v. New York & N. H. R. Co.* 1 *Duer* (N. Y.) 578; *Pennsylvania R. Co. v. Langdon*, 92 *Pa. St.* 27.—*FOLLOWED IN* *Libby v. Maine C. R. Co.*, 85 *Me.* 34.—*Gulf, C. & S. F. R. Co. v. Wilson*, 79 *Tex.* 371, 15 *S. W. Rep.* 280.

A "route or mail agent" in the employ of the United States post office department, when travelling on railroad trains in the pursuance of his duties, is not a passenger within the meaning of Pa. act of April 4, 1868, P. L. 58, which provides: "That when any person shall sustain personal injury or loss of life while lawfully engaged or employed on or about the roads, works, depots, and premises of a railroad company, or in or about any train or car therein or thereon, of which company such person is not an employé, the right of action or recovery in all such cases against the company shall be only such as would exist if such person were an employé. *Provided* this section shall not apply to passengers." *Pennsylvania R. Co. v. Price*, 1 *Am. & Eng. R. Cas.* 234, 96 *Pa. St.* 256.—*QUOTING* *Catawissa R. Co. v. Armstrong*, 49 *Pa. St.* 186.—*DISTINGUISHED IN* *Magoffin v. Missouri Pac. R. Co.*, 102 *Mo.* 540. *RECONCILED IN* *Seybolt v. New York, L. E. & W. R. Co.*, 18 *Am. & Eng. R. Cas.* 162, 95 *N. Y.* 562, 47 *Am. Rep.* 75.

Where a person enters a car which he knows is not provided for the transportation of passengers, but is devoted to other purposes,—e.g., the railway mail service,—and he is on the train without the knowledge or consent of the company and in a place where its employés would not, in the discharge of their ordinary duties, discover him, he is not a passenger, although he was there in good faith and with the intention

of paying fare; and the company owes no duty to safely carry him. *Bricker v. Philadelphia & R. R. Co.*, 40 *Am. & Eng. R. Cas.* 688, 132 *Pa. St.* 1, 18 *Atl. Rep.* 983.

It is the duty of a railroad company, which carries the mail under a contract with the government of the United States, and by whose regulations postal clerks on mail trains are required to receive at the cars stamped letters and sell stamps, to furnish a reasonably safe passage to and from its mail trains while stopping at its regular stations, for the purpose of mailing letters; and a failure to provide such passage is actionable negligence. *Hale v. Grand Trunk R. Co.*, 60 *Vt.* 605, 7 *N. Eng. Rep.* 48, 15 *Atl. Rep.* 300, 1 *L. R. A.* 187.

A suit by a United States railway mail clerk against the railroad for personal injuries is not reviewable in the supreme court on account of the position of plaintiff. The federal statute only provides that such clerks shall be carried on mail trains without charge, but in no way limits or enlarges the liability of railroads so as to raise a federal question. *Price v. Pennsylvania R. Co.*, 18 *Am. & Eng. R. Cas.* 273, 113 *U. S.* 218, 5 *Sup. Ct. Rep.* 427.—*DISTINGUISHED IN* *Magoffin v. Missouri Pac. R. Co.*, 102 *Mo.* 540.

19. Salaries.—The postmaster-general may appoint railway postal clerks, each of whom shall be paid "a salary at the rate of not more than one thousand four hundred dollars a year to the head clerks." *Rev. St.* § 4025. The appointment is not for a definite period, and the right to continue a clerk in the service is within the discretion and power of the postmaster-general, who may remove from office or reduce the compensation. *Gleeson v. United States*, 23 *Cl. of Cl.* 207.—*QUOTING* *Eastern R. Co. v. United States*, 20 *Cl. of Cl.* 23; *Union Pac. R. Co. v. United States*, 20 *Cl. of Cl.* 70.—*Gleeson v. United States*, 22 *Cl. of Cl.* 82.

The act of congress of July 31, 1882, to designate, classify, and fix the salaries of persons in the railway mail service, cannot affect the prior rights of postal clerks, but may be referred to as explanatory of legislation, and as indicating a policy on the part of congress. *Gleeson v. United States*, 23 *Cl. of Cl.* 207.

CARRIAGE OF MERCHANDISE.

- Actions against carriers for loss or damage, see also CARRIAGE OF LIVE STOCK, 134-162; EXPRESS COMPANIES, 80-91.
- As to bills of lading, see also BILLS OF LADING.
- As to carriage of live stock, see that title.
- carrying the mails, see CARRIAGE OF MAILS.
- connecting lines, see also that title.
- tolls and charges, see also CHARGES.
- Attachment against carrier holding goods after transit ended, see ATTACHMENT, 14, 25.
- By canal, see CANALS, 2, 4, 6, 7.
- express, see EXPRESS COMPANIES, II.
- ferry, see FERRIES, 10.
- Care required from the carrier, generally, see NEGLIGENCE, 1-19.
- Carriers of goods and carriers of passengers distinguished, see CARRIAGE OF PASSENGERS, 6.
- when liable as warehouseman, see also BAGGAGE, 68-74; EXPRESS COMPANIES, 56-59.
- Charges for special services, see CHARGES, 64-67.
- Claims against United States for, see CLAIMS AGAINST UNITED STATES, 7, 8.
- Classification of freights, see INTERSTATE COMMERCE, 72-86.
- Collection of tolls by distress, see DISTRESS, 2.
- Connecting lines, see also BAGGAGE, 17-28; CARRIAGE OF LIVE STOCK, 101-108; EXPRESS COMPANIES, 75-79.
- Construction and shipping contracts, see also CARRIAGE OF LIVE STOCK, 60, 61; CONTRACTS, 109.
- Contracts for weighing grain, see CONTRACTS, 107.
- of, made by agents, see AGENCY, 52-56.
- Control of the subject by Interstate Commerce Commission, see INTERSTATE COMMERCE, 14-20; 215-226.
- Costs in actions for overcharges, see COSTS, 10.
- Damages for delay in carrying goods, see DAMAGES, 55.
- loss or destruction of goods, see DAMAGES, 56.
- Delivery by the carrier, generally, see CARRIAGE OF LIVE STOCK, 50-56; EXPRESS COMPANIES, 39-55.
- to carrier, when completes contract of sale, see SALES, 5.
- Duty of carrier during transit, see CARRIAGE OF LIVE STOCK, 21-49.
- to deliver grain at elevator, see ELEVATORS, 6-9, 11.
- furnish cars, see also CARRIAGE OF LIVE STOCK, 4-10.
- Duty to ship promptly, see CARRIAGE OF LIVE STOCK, 11-20.
- Effect of contributory negligence of shipper, see CARRIAGE OF LIVE STOCK, 45-49.
- Excessive and overcharges, see CHARGES, 26-58.
- Excuses for delay, see also STRIKES, 1-3.
- Facilities for the interchange of traffic, see INTERSTATE COMMERCE, 99-108.
- Filing and publishing freight schedules, see INTERSTATE COMMERCE, 131-138.
- Goods of wife shipped by husband as her agent, see HUSBAND AND WIFE, 3.
- Implied power of company's agent to receive goods, see AGENCY, 14.
- Just and reasonable charges, see CHARGES, 20-25; INTERSTATE COMMERCE, 30-52.
- Leases of cars, see CAR TRUST ASSOCIATIONS, 2.
- Legislative regulation of charges, see CHARGES, 4-19.
- Liability as warehouseman, see also WAREHOUSEMEN.
- for injuries caused by carrying explosives, see EXPLOSIONS, 5.
- loss or injury to goods, see also EXPRESS COMPANIES, 29-38.
- of lessee company for loss of goods, see LEASES, ETC., 63.
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- trustees in possession of road for loss of goods carried, see MORTGAGES, 152.
- Lien for charges, see CHARGES, 69-72.
- Limitations of actions against carrier, see LIMITATIONS OF ACTIONS, 26, 27, 36, 37.
- Limitation of liability, generally, see also BILLS OF LADING, 62-107; CARRIAGE OF LIVE STOCK, 62-100; EXPRESS COMPANIES, 60-74; LIMITATION OF LIABILITY.
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— carrier to mortgage rolling stock, see MORTGAGES, 47-60.

— — — tolls and income, see MORTGAGES, 29-34.

— station agent to contract for transportation, to furnish cars, etc., see STATION AGENTS, 3-6.

— to limit common-law liability, see also LIMITATION OF LIABILITY, 1-26.

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1. GENERAL NATURE OF COMPANY'S LIABILITY.

1. Who are Common Carriers.

1. In general—Definitions.*—A common carrier is one that undertakes for hire or reward to carry, or cause to be carried, goods, for all persons indifferently who may choose to employ him, from one place to another. *United States Exp. Co. v. Backman*, 28 *Ohio St.* 144, 14 *Am. Ry. Rep.* 82.

All persons following the occupation of carrying goods by land or water are common carriers. *Kirby v. Adams Exp. Co.*, 2 *Mo. App.* 369.

A person who undertakes, though it may be only *pro hac vice*, to carry by river, for hire, without special contract, incurs the responsibility of a common carrier. *Moss v. Bettis*, 4 *Heisk.* (Tenn.) 661.

Railroad companies are common carriers, and liable as such. *Faley v. Georgia R. Co.*, 76 *Ga.* 597. *Selma & M. R. Co. v. Butts*, 43 *Ala.* 385. *Mobile & G. R. Co. v. Prewitt*, 46 *Ala.* 63.

A railroad company organized under the statutes of Ohio is a common carrier of freights, and is subject to judicial control to prevent the abuse of its powers and privileges. *Scofield v. Lake Shore & M. S. R. Co.*, 23 *Am. & Eng. R. Cas.* 612, 43 *Ohio St.* 571, 54 *Am. Rep.* 846, 3 *N. E. Rep.* 907.—*QUOTING Railroad Com'rs v. Portland & O. C. R. Co.*, 63 *Me.* 269; *Talcott v. Pine Grove Tp.*, 1 *Flipp.* (U. S.) 120; *Erie & N. E. R. Co. v. Casey*, 26 *Pa. St.* 287.

A transportation company not owning or controlling any means of conveyance itself, but engaging on its own behalf in the business of transporting goods through the agency and over the lines of other carriers of its own selection and employment, is a common carrier, and subject to all the responsibilities attaching to that character. *Merchants' Dispatch Transp. Co. v. Bloch*, 86 *Tenn.* 392, 6 *Am. St. Rep.* 847, 6 *S. W. Rep.* 881.

Sub-carriers employed by such company in the course of its business are its agents, and not agents of the shippers or consignees. *Merchants' Dispatch Transp. Co. v. Bloch*, 86 *Tenn.* 392, 6 *Am. St. Rep.* 847, 6 *S. W. Rep.* 881.

*Who are common carriers, see note, 35 *AM. & ENG. R. CAS.* 195; 40 *AM. DEC.* 100; 42 *Id.* 496; 47 *Id.* 648; 10 *L. R. A.* 415.

A stipulation in its bills of lading exempting such company from responsibility for damage or loss of goods occasioned by the default of its agents—the sub-carriers—is contrary to public policy, and void. *Merchants' Dispatch Transp. Co. v. Bloch*, 86 *Tenn.* 392, 6 *Am. St. Rep.* 847, 6 *S. W. Rep.* 881.—*DISTINGUISHING Louisville & N. R. Co. v. Campbell*, 7 *Heisk.* (Tenn.) 253; *East. Tenn. & V. R. Co. v. Rogers*, 6 *Heisk.* 143; *Western & A. R. Co. v. McElwee*, 6 *Heisk.* 208; *Louisville & N. R. Co. v. Weaver*, 9 *Lea* 38; *East. Tenn., V. & G. R. Co. v. Brumley*, 5 *Lea* 401; *Dillard v. Louisville & N. R. Co.*, 2 *Lea* 288.

Under the laws of Alabama, railroad companies are common carriers, and subject to all the liabilities of such carriers; and where suit is brought against a railroad company for failure to deliver freight received for transportation (under a contract made and to be performed wholly in another state), it will be presumed, in the absence of proof to the contrary, that the common law, as to common carriers, prevailed in the state where such contract was entered into and was to be performed. *Southwestern R. Co. v. Webb*, 48 *Ala.* 585.

The words "common carriers of goods, wares, and merchandise," as used in *Tex. Rev. St.* § 278, are not to be construed as either limiting or extending the class of property to be embraced by the carrier undertaking to transport goods for hire. The terms are used descriptively rather than as a limitation and are intended to embrace all common carriers, including as well those of live stock as of any other property, and at the same time having no operation to change any rule of a common law which would, without the influence of the statute, determine the relation of the carrier to any given or specified kind of property for transportation. *Missouri Pac. R. Co. v. Harris*, 1 *Tex. App. (Civ. Cas.)* 730.

2. Must carry for hire as a public employment.—To make a person a common carrier he must exercise it as a common employment; he must undertake to carry goods for persons generally, and he must hold himself out as ready to engage in the transportation of goods for hire as a business and not as a casual occupation *pro hac vice*. *Fish v. Chapman*, 2 *Ga.* 349. *Missouri Pac. R. Co. v. Harris*, 1 *Tex. App. (Civ. Cas.)* 730.

A common carrier is one who, for a re-

ward, undertakes to carry goods for persons generally, as a public employment; or one who holds himself out as ready to engage in the transportation of goods for hire. It is the receipt of, or the right to, the freight or charge for the carriage of goods, together with the public nature of their employment, that constitute railway companies common carriers. *Place v. Union Exp. Co.*, 2 *Hill* (N. Y.) 19.

Carrying goods for hire makes a man a common carrier under the custom and answerable for any loss arising from the want of care, skill, or diligence. *M'Clures v. Hammond*, 1 *Bay* (So. Car.) 99.

Common carriers are classified as carriers of goods and carriers of passengers because their employment is quasi-public, and the public have an interest in the faithful performance of their duties. *Thompson-H. Elect. Co. v. Simon*, 47 *Am. & Eng. R. Cas.* 51, 20 *Oreg.* 60, 25 *Pac. Rep.* 147.

The distinctive characteristic of a common carrier is that he transports goods for hire, for the public generally, and it is immaterial whether this is his usual or occasional occupation, his principal or subordinate pursuit. *Chevallier v. Straham*, 2 *Tex.* 115.—APPROVING *Coggs v. Bernard*, 2 *Ld. Raym.* 209, 918. QUOTING *Gordon v. Hutchinson*, 1 *Watts & S. (Pa.)* 285; *Forward v. Pittard*, 1 *T. R.* 27.—FOLLOWED AND QUOTED IN *Haynie v. Baylor*, 18 *Tex.* 498.

If one is accustomed to undertake, for hire, to transport the goods of those who choose to employ him, though it be not his constant or usual, but only an occasional occupation, he is a common carrier, at least whenever he holds himself out in any way to the public as a carrier, or undertakes as a matter of business and profit the transportation of goods. *Haynie v. Baylor*, 18 *Tex.* 498.—FOLLOWING AND QUOTING *Chevallier v. Straham*, 2 *Tex.* 115.

To make a carrier liable as insurer of goods there must be privity of contract, expressed or implied, and a right to compensation for his services. *Central R. & B. Co. v. Lampley*, 23 *Am. & Eng. R. Cas.* 720, 76 *Ala.* 357, 52 *Am. Rep.* 334.

3. Must be legally bound to receive and carry.—The true test as to whether a party is a common carrier or not is his legal duty and obligation with reference to transportation. If it is optional with him whether he will carry or not, he is a private carrier; if he must carry for all, he

is a common carrier. *Piedmont Mfg. Co. v. Columbia & G. R. Co.*, 16 *Am. & Eng. R. Cas.* 194, 19 *So. Car.* 353.

The duty of common carriers with respect to the transportation of persons or property is a duty independent of contract, arising by implication of law from the fact that persons or property are received in the course of business of such employment. *Johnson v. East. Tenn., V. & G. R. Co.*, 90 *Ga.* 810, 17 *S. E. Rep.* 121. *Delaware, L. & W. R. Co. v. Trautwein*, 41 *Am. & Eng. R. Cas.* 187, 52 *N. J. L.* 169, 7 *L. R. A.* 435, 13 *N. J. L. J.* 72, 19 *Atl. Rep.* 178.—QUOTING *Austin v. Great Western R. Co.*, 1 *L. R.* 2 *Q. B.* 442.

No one can become bound as a common carrier unless he consents to be bound in that character, or has so acted as to justify the belief that he intends to be so bound; and he is not so bound unless he is under a legal obligation to receive and carry the goods, and would be liable to an action if, without reasonable excuse, he refused to receive them. *Varble v. Bigley*, 14 *Bush* (Ky.) 698.

A person engaging to transport goods for hire is not by virtue of such engagement merely, a common carrier, and as such liable for all accidents, whether negligent or not. *Benedict v. Arthur*, 6 *U. C. Q. B.* 204.

Where it is optional with a railway company whether it will carry on the business of a common carrier or not, if it elects to do so it is subject to all the liabilities of carriers at common law. *Palmer v. Grand Junction R. Co.*, 4 *M. & W.* 749, 7 *D. P. C.* 232, 1 *H. & H.* 489, 3 *Jur.* 559.

4. Who are private carriers.—Private carriers and bailees for hire are liable only for the injury or loss of goods intrusted to them when it results from the failure of themselves or their servants to exercise ordinary care, and they are not bound to carry for any person unless they enter into a special agreement to do so. *Varble v. Bigley*, 14 *Bush* (Ky.) 698.

When a special contract is made for the carriage of goods, the carrier becomes, as to that transaction, an ordinary bailee and private carrier for hire. *Moriarty v. Harneden's Exp. Co.*, 1 *Daly* (N. Y.) 227.

One who contracts to transport goods from one point to another, and deliver them in good order and condition, unavoidable accidents only excepted, is not a common carrier, but is responsible on his contract as

one. *Fish v. Chapman*, 2 Ga. 349.—CRITICISING *Gordon v. Hutchinson*, 1 Watts & S. (Pa.) 285.

One whose principal occupation is farming, and who at certain seasons carries the goods of those who choose to employ him, does not incur the responsibility of a common carrier at all seasons, and in reference to every contract he may make to carry goods under special circumstances. *Haynie v. Baylor*, 18 Tex. 498.

5. Carrying goods on passenger trains.—If a railroad company receives goods on its passenger trains as freight it has a right to charge therefor, and is liable for a loss of the same. So where a traveller took a package to the baggage-master, who refused to check it as personal baggage, knowing that it was not such, but received it, the company was held liable for a loss; and it was not necessary that the freight be paid in advance to entitle the owner to recover. *Butler v. Hudson River R. Co.*, 3 E. D. Smith (N. Y.) 571.—DISAPPROVED IN *Humphreys v. Perry*, 148 U. S. 627. DISTINGUISHED IN *Pfister v. Central Pac. R. Co.*, 70 Cal. 169.

A private arrangement between a railroad company and an express company for the transportation of light freight will not relieve the railroad company from liability as a common carrier for packages received on the cars from persons having no notice of the arrangement, and it is immaterial whether the article was given at the cars to the agent of the express company or to a baggage-master or other agent of the railroad company. *Langworthy v. New York & H. R. Co.*, 2 E. D. Smith (N. Y.) 195.

Evidence that the conductor of a passenger train carried goods and eggs to market for an individual does not show that the company are common carriers by such trains, where it does not appear that he rendered such services by virtue of any authority derived from the company, or that any compensation was received by him, either for the company or himself. *Elkins v. Boston & M. R. Co.*, 23 N. H. 275.—FOLLOWED IN *Smith v. Boston & M. R. Co.*, 44 N. H. 325. RECONCILED IN *Wilson v. Grand Trunk R. Co.*, 57 Me. 138. REVIEWED IN *Atchison, T. & S. F. R. Co. v. Headland*, 18 Colo. 477.

6. Carrying money, bank bills, etc.*—A charter of a railroad company,

granted at a time when it was not incumbent on common carriers to carry money, and requiring it to transport "all merchandise and property," does not make it a common carrier of money; nor does transporting money for an express company under a special contract have that effect. *Kuter v. Michigan C. R. Co.*, 1 Biss. (U. S.) 35.

Money and bank bills may for certain purposes be regarded as goods, but ordinarily, in speaking of "goods, wares, and merchandise," neither is included, and a common carrier of "goods, wares, and merchandise" will not necessarily be presumed to be a common carrier of money and bank bills. *Lee v. Burgess*, 9 Bush (Ky.) 652.

The liability of a carrier for the loss of bank bills delivered to him to be carried will depend upon the fact whether or not he received the bank bills to carry them for compensation; and though there be no stipulated price for the service, yet if the usage in such cases implies an agreement to pay the carrier for such service he will be liable for any loss which may occur, unless such loss be caused by inevitable accident or the public enemies. *Kirtland v. Montgomery*, 1 Swan (Tenn.) 452.

Where one is sought to be held liable as a common carrier of money and bank bills, it must be shown that he is such, if that class of carrying is not within the ordinary business in which he is engaged. *Lee v. Burgess*, 9 Bush (Ky.) 652. *Allen v. Sewall*, 6 Wend. (N. Y.) 335; reversing 2 Wend. 327.

Where there is no proof that a railroad company has at any time carried bank bills or money of any kind, or held themselves out to the public as carriers of such property, and no express contract to carry money has been proved, such contract cannot be implied from the fact that the company held itself out as a carrier of "goods, freight, and passengers;" and it not being the business of the company to take bank bills as freight, before it can be liable for such there must be proof that its agent was authorized to receive them; and proof that the agent was authorized to receive "goods and freight" is not enough to show an implied power to receive bank bills at ordinary freight rates. *Chicago & A. R. Co. v. Thompson*, 19 Ill. 578.

The driver of a stage-coach, in the general employ of the proprietors of the coach, and in the habit of transporting packages of money for a small compensation, which was

*See also BAGGAGE, 40, and post, 250.

uniform whatever might be the amount of the package, is a bailee for hire, answerable for ordinary negligence, and not subject to the responsibilities of a common carrier, there being no evidence to show him a common carrier further than the fact that he took such packages of money as were offered. *Sheldon v. Robinson*, 7 N. H. 157.

Having received money to transport, the burden of proof is on him to excuse a non-delivery; and evidence to show that third persons have admitted that another package of money was stolen from the stage on the same day when he received the money in question is not competent evidence to be submitted to a jury to prove a loss. *Sheldon v. Robinson*, 7 N. H. 157.

7. Car-switching companies.—The defendant railroad company's principal business was switching cars for other railroad companies. Its tracks were connected with those of the other railroads by a transfer switch, and with mills, elevators, and manufacturing in and around the city where its business was transacted. The plaintiff corporation brought a car, loaded with freight, to the city and placed the same on the transfer track, with orders to the defendant to ship the same to a certain distillery, to which place it was taken and unloaded. When unloaded it was taken by the defendant, without orders from the plaintiff, to a sugar refinery to be loaded and then switched to the transfer track for shipment. On the same day the sugar refinery was burned and also the car. *Held*, that the defendant was liable, as a common carrier, to the plaintiff for the value of the car so destroyed. *Peoria & P. U. R. Co. v. Chicago, R. I. & P. R. Co.*, 18 Am. & Eng. R. Cas. 506, 109 Ill. 135, 50 Am. Rep. 605.—DISTINGUISHED IN *Peoria & P. U. R. Co. v. United States Rolling Stock Co.*, 136 Ill. 643. EXPLAINED IN *East St. Louis C. R. Co. v. Wabash, St. L. & P. R. Co.*, 32 Am. & Eng. R. Cas. 522, 123 Ill. 594, 15 N. E. Rep. 45, 12 West. Rep. 834. FOLLOWED IN *Missouri Pac. R. Co. v. Chicago & A. R. Co.*, 23 Am. & Eng. R. Cas. 718, 25 Fed. Rep. 317.

8. Carters—Expressmen.—A carter who takes goods from one railroad office at the end of its line and transfers them to a connecting line is not a common carrier but a mere agent of the first road, though he is in the habit of advancing its freight charges and collecting them, with his own transfer charges, from the connecting car-

rier. *Hooper v. Chicago & N. W. R. Co.*, 27 Wis. 81.

A common carrier who receives and undertakes to carry a trunk from a railroad depot to the owner's residence is answerable for all losses, except such as are inevitable, that may occur whilst the trunk is in his possession. *Parmelee v. Lowitz*, 74 Ill. 116.

9. Company hauling cars of other companies.*—Where a railroad company takes a car, though on its own tracks, over their railroad, and have the sole charge of it, they are, as to the article transported, common carriers, and will be liable for damage caused the car by being derailed. *New Jersey R. & T. Co. v. Pennsylvania R. Co.*, 27 N. J. L. 100.

10. Road in process of construction.—A. sued a railroad company for the loss of goods. The company pleaded that at the time the goods were transported it was not engaged in the carrying business, its road not being fully opened for traffic, and that its servants were not authorized to contract for their carriage. The evidence showed that the road was in process of construction; the company had no agent at the station where the goods were received, but it was in the habit of carrying, for pay, goods and passengers on flat cars in a construction train over the completed part of the road; that the conductor received the goods properly marked, and that at the terminus they were delivered to a stranger by mistake, and thereby lost to the owner. *Held*, that the company was liable. *Little Rock, M. R. & T. R. Co. v. Glidewell*, 18 Am. & Eng. R. Cas. 539, 39 Ark. 487.

2. Liability as Insurer—Common-law Liability.

a. Generally.

11. Liability independent of contract.—The liability of a common carrier does not rest on his contract, but is a liability imposed by law. It exists independent of the contract, having its foundation in the policy of the law; and it is upon this legal obligation that he is charged as carrier for the loss of the property entrusted to him. *Merritt v. Earle*, 29 N. Y. 115.—QUOTED IN *Carroll v. Staten Island R. Co.*, 65 Barb. (N. Y.) 33.—*Thurman v. Wells*, 18 Barb. (N. Y.) 500.

* See also *post*, 23.

† Common-law liabilities of carriers, see notes, 2 L. R. A. 102, 3 *Id.* 342.

The liability of a common carrier, in the absence of a special contract or proven custom, is that of an insurer until delivery or what is tantamount to delivery. Such liability remains until either the property transported is actually delivered at its destination, or notice is given to the consignee to remove it and the expiration of a reasonable time for such removal. *McKinney v. Jewett*, 9 Am. & Eng. R. Cas. 209, 90 N. Y. 267; affirming 24 Hun. 19. *Packard v. Taylor*, 35 Ark. 402, 37 Am. Rep. 37.

Where a common carrier undertakes to carry an article for a compensation, the legal presumption is that he does it subject to his common-law liability—and this presumption holds until disproved. *New Jersey R. & T. Co. v. Pennsylvania R. Co.*, 27 N. J. L. 100. *Park v. Preston*, 108 N. Y. 434, 15 N. E. Rep. 705, 13 N. Y. S. R. 809; affirming 37 Hun 645, *mem.*

A common carrier received goods on his boat and gave a bill of lading to deliver them at the point of destination, without excepting the dangers of the river. *Held*, that the contract was not absolute to deliver at all events, but was subject to the common-law qualifications of loss occurring by the act of God or the public enemy. *Neal v. Sanderson*, 10 Miss. 572.

12. Insurers except as to act of God or the public enemy.*—The common law holds the common carrier liable for damage to and loss of goods committed to him for transportation, unless the damage or loss result from the act of God (which is limited to inevitable accident), or from the public enemy. His responsibility begins with the reception and terminates with the delivery of the property at the place of destination. Subject to these limitations, his undertaking is absolute and unqualified. No palliation or excuse is admitted. He is an insurer of the faithful performance of his duty. *Mobile & O. R. Co. v. Weiner*, 49 Miss. 725. *Hooper v. Wells*, 27 Cal. 11. *Fish v. Chapman*, 2 Ga. 349. *Chicago & A. R. Co. v. Shea*, 66 Ill. 471. *Robertson v. Kennedy*, 2 Dana (Ky.) 431. *Hall v. Renfro*, 3 Metc. (Ky.) 51. *Fillebrown v. Grand Trunk R. Co.*, 55 Me. 462. *Davis v. Wabash, St. L. & P. R. Co.*, 26 Am. & Eng. R. Cas. 315, 89 Mo. 340, 1 S. W. Rep.

327; reversing 13 Mo. App. 449. *Merritt v. Earle*, 29 N. Y. 115. *Harrell v. Owens*, 1 Dev. & B. (N. Car.) 273.—CRITICISED IN *Boner v. Merchants' Steamboat Co.*, 1 Jones (N. Car.) 211.—*Arnold v. Jones*, 26 Tex. 335. *Texas & P. R. Co. v. Morse*, 1 Tex. App. (Civ. Cas.) 179.

Where there is no special contract a common carrier is liable for all losses of or injuries to goods received by him for carriage not occasioned by the act of God or the public enemies. *Texas Exp. Co. v. Scott*, (Tex.) 16 Am. & Eng. R. Cas. 111. *Wilson v. Memphis & C. R. Co.*, 9 Heisk. (Tenn.) 255.

Nor can he vary his responsibility by notice or special acceptance, such being void, as contravening the policy of the law; but he may require the nature and the value of the goods to be made known to him, and may avail himself of any fraudulent acts or sayings of his employers. *Fish v. Chapman*, 2 Ga. 349.

Railroad companies are common carriers, and as such are liable by the rules of the common law for losses occurring from any accident which may befall the goods during the transit, except such as result from the act of God or the public enemy. *Bansmer v. Toledo & W. R. Co.*, 25 Ind. 434. *Culbreth v. Philadelphia, W. & B. R. Co.*, 3 Houst. (Del.) 392. *Heinemann v. Grand Trunk R. Co.*, 31 How. Pr. (N. Y.) 430, 1 Sheld. 95.

Where a railroad undertakes, as a common carrier, to carry goods to a certain point, it is its duty to deliver them there at all events, unless they are lost by the act of God or the public enemy; and the burden of proof to show that the goods were so lost is upon the carrier.* *Jackson v. Sacramento Valley R. Co.*, 23 Cal. 269.

When a railroad company, by its agents, agrees to deliver goods within a prescribed time, it does not thereby become an absolute insurer of the goods, and required, at all events, to deliver or pay for them. If they were destroyed by the act of God or the public enemy before the time for delivering, the carrier is excused. *Strohn v. Detroit & M. R. Co.*, 23 Wis. 126.

The law holds the carrier responsible as insurer for all loss and damage to goods in-

* See also *post*, 104.

Carriers as insurers of transported property, see notes, 1 L. R. A. 702, 3 Id. 424, 6 Id. 849.

2 D. R. D.—2

* Burden of proof where carrier sets up act of God as excusing failure to carry goods, see note, 97 AM. DEC. 410.

trusted to his care, whether it arise from his own negligence or that of his servants or of third persons, or whether it be caused by the tortious acts of himself or others who are not the public enemies, or whether it be by unavoidable accident not caused by the act of God. *Hove v. Oswego & S. R. Co.*, 56 Barb. (N. Y.) 121.

If a common carrier has reasonable grounds for not receiving goods offered to him for transportation, he may do so; but if he once receives them he becomes an insurer, and can only exonerate himself from liability by showing that the loss arose from the act of God or the public enemy. *Porcher v. North Eastern R. Co.*, 14 Rich. (So. Car.) 181.

13. Liability extends to carriers by water.—The rule that persons engaged as common carriers of goods for hire are responsible for all damages done them while in their charge, unless such injury be caused by the act of God or the public enemy, applies as well to common carriers by water as by land. *Houston & G. Nav. Co. v. Dwyer*, 29 Tex. 376.

14. Cannot be limited in Texas.*—The old rule that a common carrier is answerable for all losses which are not occasioned by the act of God or the public enemy, being founded in justice and sound policy, ought never to be departed from; and the carrier will not be allowed to limit, by contract, his common-law liability nor excuse himself from liability for losses attributable to the negligence of his servants. *Heaton v. Morgan's L. & T. R. & S. Co.*, 1 Tex. App. (Civ. Cas.) 427. *Texas Exp. Co. v. Scott*, 2 Tex. App. (Civ. Cas.) 59.

The common-law provision allowing a common carrier of goods to relieve himself from the obligation to carry particular kinds of goods by giving a public notice does not extend to railroad companies under the Texas statute, with respect to any property which they are adapted to transport and which the public have a right to expect them to transport. They are common carriers for the benefit of the citizens of the state, as to all such property, as, according to modern usage, railroads have been accustomed to transport, and cannot limit their liability as such with respect thereto. *Missouri Pac. R. Co. v. Harris*, 1 Tex. App. (Civ. Cas.) 730.

* See also *post*, 481.

15. What is an act of God.*—The act of God denotes such causes as are beyond the control of the carrier and produce loss without the intervention of human agency. *Truax v. Philadelphia, W. & B. R. Co.*, 3 *Houst. (Del.)* 233.

By the act of God is meant something superhuman or something in opposition to the act of man. *Chicago & N.W. R. Co. v. Sawyer*, 69 *Ill.* 285.—QUOTING *Elliott v. Rossell*, 10 *Johns.* (N. Y.) 1.

The phrase "act of God," as applied to carriers, denotes natural accidents that could not have happened by the intervention of man, such as storms, lightning, and tempest, and excludes all human agency, and must be distinguished from what is called "inevitable accident." *Merritt v. Earle*, 29 *N. Y.* 115.

The act of God, which will excuse a common carrier, must be a direct and violent act of nature. *Friend v. Woods*, 6 *Gratt. (Va.)* 189.—QUOTING *Forward v. Pittard*, 1 *T. R.* 27; *McArthur v. Sears*, 21 *Wend. (N. Y.)* 196.

It is not necessary that there should be a sudden and irresistible act of nature to constitute an act of God, which will relieve a carrier from liability; nor is it necessary to show that the carrier could not, by any amount of ability, foresee or prevent its effect. *Nugent v. Smith, L. R.* 1 *C. P. D.* 423, 45 *L. J. C. P. D.* 697, 34 *L. T.* 827, 25 *W. R.* 117; *reversing L. R.* 1 *C. P. D.* 19, 45 *L. J. C. P. D.* 19, 33 *L. T.* 731, 24 *W. R.* 237.

A loss is caused by the act of God if it is occasioned by the elementary forces of nature unconnected with the agency of man; and for such a loss a carrier is not liable, provided reasonable care would not have prevented it. *Nugent v. Smith, L. R.* 1 *C. P. D.* 423, 45 *L. J. C. P. D.* 697, 34 *L. T.* 827, 25 *W. R.* 117; *reversing L. R.* 1 *C. P. D.* 19, 45 *L. J. C. P. D.* 19, 33 *L. T.* 731, 24 *W. R.* 237.

The words "inevitable accident," when used in law to designate a mode by which loss has happened or may happen to goods while in the hands of a common carrier, are synonymous with the words "act of God." *Neal v. Sanderson*, 10 *Miss.* 572.

Unavoidable is synonymous with inevit-

* Accidents resulting from act of God, see notes, 2 *AM. & ENG. R. CAS.* 171, 97 *AM. DEC.* 408, 11 *L. R. A.* 615.

able, and inevitable or unavoidable accidents are the same as the acts of God, which mean any accident produced by physical causes which are inevitable; such as lightnings, storms, perils of the sea, earthquakes, inundations, sudden death or illness. *Fish v. Chapman*, 2 Ga. 349. *Walpole v. Bridges*, 5 Blackf. (Ind.) 222.

An unusual and extraordinary flood in a river is such an act of God as to excuse a common carrier from his undertaking to transport goods; but in such case the carrier is bound to exercise the care of a very prudent man to preserve the freight intrusted to him. *Wallace v. Clayton*, 42 Ga. 443.

Defendant railroad company was delayed in carrying cotton to market by one of its bridges being washed out by an unusual freshet. During the delay there was a decline in the price of cotton in the market and the cotton was damaged by bad handling. *Held*, that the company was not liable for the decline in the price, as the delay was attributable to what the law terms the act of God, but it was liable for any damage to the cotton. *Lipford v. Charlotte & S. C. R. Co.*, 7 Rich. (So. Car.) 409.—REVIEWED IN *Kyle v. Laurens R. Co.*, 10 Rich. (So. Car.) 382.

Where, in an action for damage to certain trees caused by delay in delivery, the carrier pleaded that its road was rendered impassable by high water, but there was no proof that such floods were not to be anticipated or that the railroad had been so constructed as to withstand the same, or that the company was unable to transmit the trees promptly over another line—*held*, not to be an act of God exonerating the carrier. *Chicago, B. & Q. R. Co. v. Manning*, 35 Am. & Eng. R. Cas. 618, 23 Neb. 552, 37 N. W. Rep. 462.

Damage to goods while in the hands of a carrier resulting from the explosion of a boiler is not the act of God or of the public enemy, or a *vis major*, so as to relieve the carrier from liability. *Houston & G. Nav. Co. v. Dwyer*, 29 Tex. 376.

16. What is an act of the public enemy, generally.*—A common carrier is liable for a loss of goods unless he is prevented from safely carrying them by the

act of God or the public enemy; and by the public enemy is not to be understood thieves and robbers, but open and armed enemies in hostility to the government. *Lewis v. Ludwick*, 6 Coldw. (Tenn.) 368.—QUOTING *Cobb v. Barnard*, 2 Salk. 919. REVIEWING *Mauran v. Alliance Ins. Co.*, 6 Wall. (U. S.) 1.

A capture by public enemies of property entrusted to a carrier releases him from all further obligation respecting it, for that act puts it out of his power to do what he engaged to do. *Spaids v. New York Mail Steamship Co.*, 3 Daly (N. Y.) 139.

If access to the consignee and delivery of the goods at the end of the route is prevented by a state of war, it is the carrier's duty to take care of the goods for the consignor and notify him within a reasonable time of its inability to make the delivery, after which its liability is only that of a bailee. *Baltimore & O. R. Co. v. Morehead*, 5 W. Va. 293.

Where goods are shipped to be safely transported and delivered, "unavoidable accidents excepted," a loss occurring through a lieutenant in the United States army and 15 soldiers stopping the train and taking the goods is not within the exception; neither could such destruction be said to be by the public enemy. *Seligman v. Armijo*, 1 N. Mex. 459.

17. Acts of the Confederate army.—A carrier will not be liable for the loss of property occasioned by the military forces of the Confederate states, but the burden is upon it to establish this fact by sufficient evidence. *Wallace v. Sanders*, 50 Ga. 134; *former appeal*, 42 Ga. 486. *Lewis v. Ludwick*, 6 Coldw. (Tenn.) 368.

Acts done under the authority of an insurgent body, actually organized as a government within a large extent of territory, not merely in hostility to the regular and lawful government but in complete exclusion of it from the whole territory subject to insurgent control, cannot be recognized as lawful; but acts of individual subjects of such *de facto* government may be lawful. *Keppel v. Petersburg R. Co.*, *Chase* (U. S.) 167.

Confederate troops who, during the civil war, made a raid into one of the states adhering to the Union, were public enemies; and a carrier is not liable for goods taken from it by such forces. *Bland v. Adams Exp. Co.*, 1 Duv. (Ky.) 233.—REVIEWED IN

*Losses caused by public enemy, mobs, riots, etc., see note, 18 AM. & ENG. R. CAS. 557.

Delay or loss of goods by public enemy, see note, 6 AM. & ENG. R. CAS. 402.

Hubbard v. Harnden Exp. Co., 10 R. I. 244.

Where property was delivered to a carrier in one of the Confederate states during the civil war and within the Confederate military lines, the carrier is not liable for a loss where it was seized and destroyed by the Confederate forces acting under military orders; and the fact that the carrier gave no notice to the consignor of the loss would not affect its liability. *Nashville & C. R. Co. v. Estes*, 3 Am. & Eng. R. Cas. 492, 10 Lea (Tenn.) 749.—REVIEWED *Illinois C. R. Co. v. Ashmead*, 58 Ill. 487; *Western & A. R. Co. v. Hurst*, 11 Heisk. (Tenn.) 625.

Whether spirits delivered to a railroad company for transportation were destroyed by the order of the Confederate authorities as a military measure to prevent their falling into the hands of the approaching Federal army, or as a matter of public necessity for the safety of the people in the neighborhood, in either case such destruction would be a good defense for the company whose road was at the time in the hands of said authorities. *Nashville & C. R. Co. v. Estis*, 7 Heisk. (Tenn.) 622.

The destruction of property by the Confederate army cannot be set up by a common carrier in Tennessee as the act of the "public enemy." *Nashville & C. R. Co. v. Estis*, 7 Heisk. (Tenn.) 622. *Patterson v. North Carolina R. Co.*, 64 N. Car. 147.—REVIEWED IN *Hubbard v. Harnden Exp. Co.*, 10 R. I. 244.

A railroad company ceased to be a common carrier while its road was in the hands of the Confederate authorities, appropriated to military uses. *Nashville & C. R. Co. v. Estis*, 7 Heisk. (Tenn.) 622.

During the civil war, goods being transported within the Confederate lines by common carriers were captured and destroyed by the United States forces. Held, the loss was occasioned by the "public enemy," and the carriers were not liable. *Southern Exp. Co. v. Womack*, 1 Heisk. (Tenn.) 256.—REVIEWED IN *Hubbard v. Harnden Exp. Co.*, 10 R. I. 244.

18. Strikes.*—A common carrier cannot be held liable for a delay in carrying goods where it is caused by a "strike" of irresist-

*See also *post*, 48, 143, and title STRIKES. Strikes and boycotts, see note, 53 AM. & ENG. R. CAS. 325.

Relation of strikers and receivers, see note, 25 AM. & ENG. R. CAS. 618.

ible force and violence. *Missouri Pac. R. Co. v. Levi*, 4 Tex. App. (Civ. Cas.) 29.—FOLLOWING *International & G. N. R. Co. v. Tisdale*, 74 Tex. 8, 11 S. W. Rep. 900.

Whether a common carrier would or would not be excused for any delay in delivering goods resulting entirely from a strike by some of its employes, in which there was neither violence nor lawlessness, yet where it affirmatively appears that the delay was caused in part by the disobedience and failure in the performance of their duties of other employes who did not engage in the strike, but were retained in the company's service, and the carrier not having shown that the injury resulted from the delay caused solely by the striking employes, it is liable for failing to deliver in what would usually be a reasonable time a car-load of fruit which became worthless from inherent qualities, solely because of detention *en route* beyond such reasonable time. *Central R. & B. Co. v. Georgia F. & V. Exch.*, 55 Am. & Eng. R. Cas. 606, 91 Ga. 389, 17 S. E. Rep. 904.

Where a delay in carrying or delivering goods is caused merely by the refusal of the employes of the carrier to perform their duties as such the carrier is liable for the delay; but where such employes suddenly refuse to work and are either discharged or abandon their employment, and their places are promptly supplied by other competent men, who are prevented from working by the strikers, by the use of lawless and irresistible violence, the carrier is not responsible for delay caused solely by such violence, provided he has used reasonable efforts and diligence to suppress such interference. *International & G. N. R. Co. v. Server*, 3 Tex. App. (Civ. Cas.) 534.

A provision in a contract of affreightment, to the effect that the carrier should not be liable for damages by reason of delay caused by strikes, is unreasonable and invalid, so far as it undertakes to exempt the carrier from liability for damages caused by negligent delay. *International & G. N. R. Co. v. Server*, 3 Tex. App. (Civ. Cas.) 534.

19. Vis major—Robbery—Piracy.—In the absence of any contract limiting the common-law liability of a carrier of freight, he is liable for goods destroyed by a mob of rioters, under the provision of Tex. Rev. St. art. 277, that "the duties and liabilities of carriers in this state shall be the same as are prescribed by the common law." *Gulf*,

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C. & S. F. R. Co. v. Levi, (Tex.) 40 *Am. & Eng. R. Cas.* 115, 12 *S. W. Rep.* 677.—
QUOTING Cook v. Gourdin, 2 Nott & M. (So. Car.) 19.

Where goods are shipped from Mexico into the United States, the liability of the carrier is to be determined by the law of the former country. The civil law, as in force in Mexico, does not hold a carrier liable where the goods shipped are taken away or destroyed by a *vis major*; and robbery is so considered when perpetrated by an irresistible force. *Cantu v. Bennett, 39 Tex.* 303.

The owners of a steamboat are liable, as common carriers, for a loss of goods by robbery; and where the only exception specified in the bill of lading is "dangers of the river," parol evidence cannot be received to show a custom among the persons who were engaged in navigating the river which exempted the owners of the boat from liability for a loss caused by the forcible and illegal seizure of the boat by a body of armed men, without fault or neglect on the part of the officers or crew. *Boon v. Steamboat Belfast, 40 Ala.* 184.—**OVERRULING** *Steele v. McTyer, 31 Ala.* 677.

At common law, piracy was a defense to a common carrier for the loss of goods, but robbery was not; and this principle of the common law is not in any manner changed or affected by the act of congress of 1820, (1 Bright's Dig. 208, § 35), which declares robbery on any river where the tide ebbs and flows to be piracy. *Steamboat Belfast v. Boon, 41 Ala.* 50.

20. The act of God must be the proximate cause of the loss.*—When the act of God is relied upon to excuse a carrier it must be shown to be the proximate cause of the loss, and without any concurrent negligence on the part of the carrier. *Missouri Pac. R. Co. v. Barnes, 2 Tex. App. (Civ. Cas.)* 507. *Adams Exp. Co. v. Jackson, 92 Tenn.* 326, 21 *S. W. Rep.* 666.

The mere failure of a common carrier to forward goods promptly will not render him liable for a loss occasioned proximately by the "act of God," if guilty of no wrongful detention of them at the place of shipment, or of no negligence or want of care and diligence in securing them from loss in

transitu. Lamont v. Nashville & C. R. Co., 9 Heisk. (Tenn.) 58, 19 *Am. Ry. Rep.* 284.—**APPROVING** *Memphis & C. R. Co. v. Reeves, 10 Wall. (U. S.)* 176. **REVIEWING** *Morrison v. Davis, 20 Pa. St.* 171; *Denny v. New York C. R. Co., 13 Gray (Mass.)* 481; *Michaels v. New York C. R. Co., 30 N. Y.* 564; *Read v. Spaulding, 30 N. Y.* 630.

In an action against a railroad company to recover the value of an express package alleged to have been lost through the negligence of the company, and the failure to make proper efforts to save it, in a disaster to the train, it appearing that the express car, with three others, was blown from the track by a violent gale of wind into such a position that all the goods must have been thrown into one corner at the top of the car; that the car was immediately set on fire by the stove or lamp therein and so quickly consumed that the messenger escaped with difficulty; that the wind was so violent as to make it almost impossible to stand or walk at the time, and that the package could not have been rescued by the exercise of proper exertion and diligence, the finding of the jury that the "act of God" was the proximate cause of the loss, and that there was no negligence, was fully warranted by the circumstances. *Blythe v. Denver & R. G. R. Co., 15 Colo.* 333, 25 *Pac. Rep.* 702.—**QUOTING** *Aetna Ins. Co. v. Boon, 95 U. S.* 130.—**FOLLOWED IN** *Denver, T. & G. R. Co. v. Robbins, 2 Colo. App.* 313.

While the immediate resulting cause producing the loss was the fire, which might be termed an "inevitable accident," and this grew out of the disaster caused by the wind, which was the "act of God" and the proximate cause, yet the following charge could not have prejudiced the plaintiff, even if not technically correct: "Where one is pursuing a lawful avocation in a lawful manner, and something occurs which no human skill or precaution could foresee or prevent, and as a consequence the accident takes place, this is called 'inevitable accident,' or the 'act of God.'" *Blythe v. Denver & R. G. R. Co., 15 Colo.* 333, 25 *Pac. Rep.* 702.

A railroad company negligently delayed the transportation of goods, but afterwards safely transported them to the place of destination and placed them in its depot, where they were destroyed by a flood. It appeared that the goods would have passed through

*Liability of carriers for loss occasioned partly by act of God and partly by other means, see note, 97 *AM. DEC.* 409.

the depot before the flood if it had not been for the delay. *Held*, that as the flood, and not the delay, was the proximate cause of the injury, the company was not liable. *Denny v. New York C. R. Co.*, 13 *Gray (Mass.)* 481.—DISTINGUISHED IN *Fox v. Boston & M. R. Co.*, 37 *Am. & Eng. R. Cas.* 632, 148 *Mass.* 220, 19 *N. E. Rep.* 222, 1 *L. R. A.* 702. NOT FOLLOWED IN *Condict v. Grand Trunk R. Co.*, 54 *N. Y.* 500. REVIEWED IN *Cutting v. Grand Trunk R. Co.*, 13 *Allen (Mass.)* 381; *Read v. Spaulding*, 30 *N. Y.* 630; *Lamont v. Nashville & C. R. Co.*, 9 *Heisk. (Tenn.)* 58.

A freight train carrying, among other things, whiskey was compelled to stop by an unusual flood near a city that had been almost completely destroyed, and the men in charge of the train were forced by the rising waters to leave it for a time. Upon returning some time afterward they found men wading about with axes, breaking open the cars, who, upon being asked what they were doing, replied that there were 500 people starving and if there was anything to eat in the train they meant to have it, whereupon the trainmen left, and the whiskey with the other things to eat and drink were taken. *Held*, in an action to recover for the loss of the whiskey, that a verdict in favor of the owner would not be disturbed, as the flood could not be said to be the proximate cause of the loss. *Lang v. Pennsylvania R. Co.*, 2 *Pa. Dist.* 125.

21. Liability where carrier's negligence contributes to loss.*—The carrier is responsible if the inevitable accident is the remote, and not the immediate cause of the loss, and the loss could have been avoided by prudence and proper care. *Baltimore & O. R. Co. v. Morehead*, 5 *W. Va.* 293.

A carrier must take reasonable care of property after it is removed from its cars by the public enemy, and for failure to do so will be liable. *Wallace v. Sanders*, 50 *Ga.* 134.

Common carriers may be liable for a loss where their negligence is not the sole cause of the loss. If their negligence contributes to the loss it is for the court or jury to say in what proportion or degree; and they will be liable unless it appears that the loss would have occurred independent of their negligence. *Lamb v. Camden & A. R. & T. Co.*, 2 *Daly (N. Y.)* 454.

Where a common carrier undertakes to excuse a loss of goods caused by an unprecedented rise of the river, it is for the jury to determine whether the carrier had such premonitions of approaching danger as to awaken the apprehensions of men of prudence, or whether in view of the means for escape, he used actively and energetically all the means at his command to meet the emergency and save the property. If he did and failed, he is not liable; if he did not, he is liable. *Lamont v. Nashville & C. R. Co.*, 9 *Heisk. (Tenn.)* 58, 19 *Am. R. Rep.* 284.—DISTINGUISHED IN *East. Tenn., V. & G. R. Co. v. Kelly*, 91 *Tenn.* 699.

The rule of "extraordinary" diligence imposed upon common carriers by § 2066 of Ga. Code requires the exercise of that degree of diligence to avoid needlessly exposing goods to injury or destruction by an unforeseen act of God, such as an extraordinary flood or freshet, and also to protect and preserve the goods after the peril has become apparent. And generally, in order for the carrier to avail himself of the act of God as an excuse, the burden of proof is upon him to establish, not only that the act of God ultimately occasioned the loss, but that his own negligence did not contribute thereto, for "in cases of loss the presumption of law is against him." *Richmond & D. R. Co. v. White*, 88 *Ga.* 805, 15 *S. E. Rep.* 802.—EXPLAINING *Columbus & W. R. Co. v. Kennedy*, 78 *Ga.* 646.

When a common carrier proves that a loss of goods was such as to release it, as by the act of God or the public enemy, it is not required to further prove affirmatively that it did not contribute to the loss. If, after the carrier has proved the cause of the loss such as will excuse it, it be further charged that its negligence contributed to the loss, the party asserting this, or relying on it, must prove it. And a carrier is not liable because its negligence may have contributed remotely to the loss, if it appears that the proximate cause is some act of God, such as an unusual flood. *Memphis & C. R. Co. v. Reeves*, 10 *Wall. (U. S.)* 176.—APPROVED IN *MacVeagh v. Atchison, T. & S. F. R. Co.*, 3 *N. Mex.* 205; *Lamont v. Nashville & C. R. Co.*, 9 *Heisk. (Tenn.)* 58. FOLLOWED IN *Witting v. St. Louis & S. F. R. Co.*, 101 *Mo.* 638. NOT FOLLOWED IN *Condict v. Grand Trunk R. Co.*, 54 *N. Y.* 500. QUOTED IN *Davis v. Wabash, St. L. & P. R. Co.*, 26 *Am. & Eng. R. Cas.* 315, 89 *Mo.* 340; *Childs*

* See also *post*, 105.

v. Little Miami R. Co., 1 Cin. Super. Ct. 480; *Nashville & C. R. Co. v. David*, 6 Heisk. (Tenn.) 261. REVIEWED AND QUOTED IN *Little Rock, M. R. & T. R. Co. v. Talbot*, 47 Ark. 97.

If a common carrier receives goods directed to be carried in a particular manner and position, he is bound to carry them in that manner and position; and if he carries them otherwise and they are lost or damaged, the burden will be upon him to prove that the loss or damage was in no degree attributable to his breach of contract, but was occasioned solely by the act of God or a public enemy, or the act or fault of the owner himself. *Hastings v. Pepper*, 11 Pick. (Mass.) 41.

Where from the plaintiff's own evidence it appears that the act of God caused the injury to the goods the carrier is exonerated from liability, unless plaintiff shows the carrier was guilty of some specific negligence which actually co-operated to produce the loss. *Davis v. Wabash, St. L. & P. R. Co.*, 26 Am. & Eng. R. Cas. 315, 89 Mo. 340, 1 S.W. Rep. 327; reversing 13 Mo. App. 449.—REVIEWED IN *Witting v. St. Louis & S. F. R. Co.*, 28 Mo. App. 103.

Precautions for the protection of property which would have been available as against any previous flood of which the carrier (or railroad company) had knowledge would not necessarily fill the measure of extraordinary diligence, inasmuch as history or tradition might make it incumbent on the carrier to have more knowledge than that actually possessed. In such matters it might be just to treat the means of knowledge as equivalent to actual notice. *Richmond & D. R. Co. v. White*, 88 Ga. 805, 15 S.E. Rep. 802.

If a loss is occasioned partly by the act of God and partly by some other cause, which, if it had been the sole cause of the loss, would have furnished a defense, the carrier will be entitled to immunity in respect of such loss if he can show that it could not have been prevented by the exercise of reasonable care. *Nugent v. Smith, L. R. 1 C. P. D. 423*, 45 L. J. C. P. D. 697, 34 L. T. 827, 25 W. R. 117; reversing *L. R. 1 C. P. D. 19*, 45 L. J. C. P. D. 19, 33 L. T. 731, 24 W. R. 237.

A carrier is relieved of liability for loss if he can prove that no reasonable precaution could have prevented it. It is not necessary to prove that it was absolutely impossible to

prevent the loss. *Nugent v. Smith, L. R. 1, C. P. D. 423*, 45 L. J. C. P. D. 697, 34 L. T. 827, 25 W. R. 117; reversing *L. R. 1 C. P. D. 19*, 45 L. J. C. P. D. 19, 33 L. T. 731, 24 W. R. 237.

In an action for injury to casks of oil, alleged by the carrier to have arisen from defects in the casks, it was properly left to the jury to say whether it arose from such defects and whether, even if it did, the carrier knew or ought to have known thereof, and had acted negligently in sending them on in that state. *Cox v. London & N. W. R. Co.*, 3 F. & F. 77.

Melons were shipped in refrigerator cars, well iced, the shippers furnishing the company with ice to be used *en route*. At an intermediate point the further progress of the train was delayed by an unusual storm; the melons were found to be in a state of decay, and it appearing that there would be an entire loss before reaching their destination, the company sold them, and the shipper brought suit as for a conversion. It appeared on the morning after the car reached the place where it was stopped the melons were examined, and it was found that they were already damaged and decayed. The company set up as a defense that the loss was attributable solely to the act of God. *Held*, inasmuch as the evidence showed that decay had set in before the train was stopped by the storm, the prior neglect of the company was the proximate cause of the loss, and that the plea was not a good defense. *Missouri Pac. R. Co. v. Barnes*, 2 Tex. App. (Civ. Cas.) 507.

22. Anticipating and providing against extraordinary emergencies.*—A carrier is not bound to provide against an unprecedented emergency, such as a greater flood than was ever known before in that locality, unless he has reason to suspect that such emergency is about to arise; then he is bound to take such precautionary measures as prudent and skillful men in the same business under like circumstances might fairly be expected to use. *Nashville & C. R. Co. v. David*, 6 Heisk. (Tenn.) 261, 12 Am. Ry. Rep. 9.—DISTINGUISHED IN *Louisville, N. A. & C. R. Co. v. Thompson*, 27 Am. & Eng. R. Cas. 88, 107 Ind. 442, 57 Am. Rep. 120. QUOTED IN

* Company not bound to provide against extraordinary floods, see notes, 30 AM. & ENG. R. CAS. 199, 12 *Id.* 196.

Dillard v. Louisville & N. R. Co., 2 Lea (Tenn.) 288.

Where there was a contract to carry freight at a particular time, proof that its transportation was prevented by an unexpected rush of freight is not admissible. *Deming v. Grand Trunk R. Co.* 48 N. H. 455.

23. Liability where carrier does not own cars.*—While a railway company is transporting cars of another company, and has the complete and uninterrupted control of them, it will be liable as a carrier for any injury to the cars not caused by the act of God or the public enemy. *Peoria & P. U. R. Co. v. United States Rolling Stock Co.*, 136 Ill. 643, 27 N. E. Rep. 59; reversing 28 Ill. App. 79.

A common carrier cannot escape responsibility for the loss of freight not caused by the act of God or the public enemy, by showing that it employed the means of transportation furnished to it by others. *Austin v. St. Louis & St. P. Packet Co.*, 15 Mo. App. 197.

24. Liability under English statutes.†—A railway company is under no obligation, either at common law or under the Railway Traffic Act, to carry goods otherwise than according to its public profession. *Oxlade v. North Eastern R. Co.*, 15 C. B. N. S. 680.

The Railways Clauses Act, 8 & 9 Vict. c. 20, s. 86, does not impose on railway companies acting as carriers any further liabilities than those which attached to common carriers. *Johnson v. Midland R. Co.*, 6 Railw. Cas. 61, 4 Ex. 367, 18 L. J. Ex. 366.

b. Modifications of Common-law Liability.

25. Loss arising from act of shipper.—A common carrier, when there is no special contract limiting his responsibility, is bound as an insurer of goods received by him for transportation, as against loss occasioned by any cause other than the act of God, the public enemy, or by the conduct of the shipper. *Southern Exp. Co. v. Moon*, 39 Miss. 822.—DISAPPROVED IN *Hart v. Pennsylvania R. Co.*, 112 U. S. 331. DISTINGUISHED IN *Muller v. Cincinnati, H. & D. R. Co.*, 2 Cin. Super. Ct. 280. FOLLOWED IN *Chicago, St. L. & N. O. R. Co. v. Moss*, 21 Am. & Eng. R. Cas. 98, 60 Miss.

1003. QUOTED IN *Mobile & O. R. Co. v. Franks*, 41 Miss. 494.

Except so far as limited by valid special contract, a common carrier is an insurer against all losses except those caused by the act of God, the public enemy, or contributory negligence on the part of the consignor. *Alabama G. S. R. Co. v. Thomas*, 89 Ala. 294, 7 So. Rep. 762. *Louisville & N. R. Co. v. McGuire*, 79 Ala. 395. *Louisville, N. A. & C. R. Co. v. Nicholas*, 4 Ind. App. 119, 30 N. E. Rep. 424. *Bohannon v. Hammond*, 42 Cal. 227.

26. Loss of perishable goods, or from bad packing.*—In the absence of negligence on their part, carriers are not liable for losses arising from the inherent qualities of the goods they transport, or from their ordinary wear and tear in the course of carriage, or from the insecure or imperfect manner in which they are packed by the owner. *Goodman v. Oregon R. & N. Co.*, 49 Am. & Eng. R. Cas. 87, 22 Oreg. 14, 28 Pac. Rep. 894. *American Exp. Co. v. Smith*, 33 Ohio St. 511.

The common-law rule, making carriers liable for loss or damage to goods, except such as result from the act of God or the public enemy, does not apply to a loss which results from deterioration in quantity or quality, or from any inherent natural infirmity, or tendency to damage, or decay of perishable articles, or ordinary wear or tear, or rubbing in course of transportation, where these things occur without negligence on the part of the carrier; nor are they liable for injuries that arise from bad packing by the shippers. *Truax v. Philadelphia, W. & B. R. Co.*, 3 Houst. (Del.) 233.

The rule that a common carrier is an insurer of goods, and can only avoid liability for loss by showing that it happened by the act of God or the public enemy, does not apply where the damage results from delay in their delivery by accident or misfortune, although not inevitable or produced by the act of God. So where the delivery of perishable freight is delayed by a mob of rioters, the carrier is not liable for the depreciation in its value caused thereby, notwithstanding Tex. Rev. St. art. 277, providing that "the duties and liabilities of carriers shall be the same as prescribed by the common law, except when otherwise provided." *Gulf, C. & S. F. R. Co. v. Levi*, 42 Am. &

* See also *ante*, 9.

† See also *post*, 518-538.

* See also *post*, 110, 180, 187.

Eng. R. Cas. 439, 76 *Tex.* 337, 13 *S. W. Rep.* 191, 8 *L. R. A.* 323; *reversing* 40 *Am. & Eng. R. Cas.* 115, 12 *S. W. Rep.* 677.—**APPLIED** IN *International & G. N. R. Co. v. Hynes*, 3 *Tex. Civ. App.* 20.

A carrier may refuse to receive for carriage an article of property which is improperly packed. But if he receives it he is bound to exercise due care for its safe carriage; and if, while in his charge, the property is injured, the duty rests on him to show that the injury is attributable to the defective packing, and not to any fault or neglect on his part. *Union Exp. Co. v. Graham*, 26 *Ohio St.* 595.

Freezing weather causing a loss of goods cannot be deemed the act of God, and does not come within the definitions given of that term. But if the goods transported are frozen it comes within the exceptions to that principle, and exempts the carrier from liability, provided he has been guilty of no previous negligence and misconduct by which such loss or damage may have been occasioned. The previous misconduct or negligence, to make the carrier liable in such case, must be immediately or proximately connected with the loss. *McGraw v. Baltimore & O. R. Co.*, 9 *Am. & Eng. R. Cas.* 188, 18 *W. Va.* 361, 41 *Am. Rep.* 696.

27. Seizure under legal process.*—Seizure by judicial process of property while in the hands of a carrier, without the latter's fault, is one of the implied exceptions in the carrier's contract, and excuses a non-delivery, if prompt notice is given of the seizure. *The M. M. Chase*, 37 *Fed. Rep.* 708.—**FOLLOWING** *Stiles v. Davis*, 1 *Black (U. S.)* 101; *Robinson v. Memphis & C. R. Co.*, 16 *Fed. Rep.* 57, 9 *Fed. Rep.* 129; *Mierston v. Hope*, 2 *Sweeney (N. Y.)* 561; *Ohio & M. R. Co. v. Yohe*, 51 *Ind.* 181; *Eliven v. Hudson River R. Co.*, 36 *N. Y.* 403.

28. Delay caused by another carrier blocking road.—Where a delay in the carriage of goods is imputable solely to the act of a third party, without negligence or fraud on the part of the carrier, the delay will be regarded as caused by inevitable accident, for which the carrier is not liable. So held, where one carrier was adjudged not liable for a delay caused by another carrier blocking the railroad track by a collision. *Conger v. Hudson River R.*

Co., 6 *Duer (N. Y.)* 375.—**FOLLOWING** *Wibert v. New York & E. R. Co.*, 12 *N. Y.* 245, 19 *Barb.* 36.—**DISTINGUISHED** IN *Sisson v. Cleveland & T. R. Co.*, 14 *Mich.* 489. **FOLLOWED** IN *Kirkland v. Leary*, 2 *Sweeney (N. Y.)* 677. **QUOTED** IN *Evans v. Fitchburg R. Co.*, 111 *Mass.* 142.

A railway company is not liable for a delay in the carriage of goods caused by an obstruction of its line resulting from the negligence of another company having parliamentary running powers over the line. *Taylor v. Great Northern R. Co.*, *L. R.* 1 *C. P.* 385, 35 *L. J. C. P.* 210, 12 *Jur. N. S.* 372, 14 *L. T.* 363, 14 *W. R.* 639.

A railway company fulfils its contract to deliver goods within a reasonable time if, where its track has been obstructed through the negligence of another company, it delivers the goods as soon as possible under the circumstances. *Great Northern R. Co. v. Taylor*, 1 *H. & R.* 471, *L. R.* 1 *C. P.* 385, 12 *Jur. N. S.* 372, 35 *L. J. C. P.* 210, 14 *W. R.* 639, 14 *L. T.* 363.

29. Perils of the sea.—Where goods are shipped by vessel to be safely carried, the "perils of the sea excepted," it is incumbent upon the owners of the vessel to show that a loss occurred through the perils of the sea; and if it fails to do so it is liable for the loss. *Hooper v. Rathbone*, 1 *Taney (U. S.)* 519.

Jettison is not justifiable unless rendered necessary by the act of God or the public enemies, under the strict rule of the common law; but later, carriers by water were relieved of the dangers or perils of the sea, which are natural accidents peculiar to that element, not brought about by the intervention of man, and which cannot be prevented by human prudence. *Bentley v. Bustard*, 16 *B. Mon. (Ky.)* 643.

30. Hauling private cars.—Where a railway company undertakes to haul along their line wagons belonging to private traders, the extent of their obligation is to use reasonable care and diligence. *Watson v. North British R. Co.*, 3 *Sc. Sess. Cas. (4th series)* 637, 3 *Ry. & C. T. Cas.* xvii.

3. Carriers Distinguished from Forwarders, etc.

31. Who are forwarders.—A forwarder is one who, for a compensation, takes charge of goods entrusted or directed to him and forwards them; that is, puts them on the way to their place of destina-

* See also *post*, 161, 295, 302.

tion by the ordinary and usual means of conveyance, or according to the instructions he receives. His compensation is limited to his care and trouble and the charges paid by him in receiving, keeping, and duly forwarding; and, when he has placed the goods in the course of transit by the proper conveyance, his duty is at an end. He has no interest in and receives no part of the compensation paid for the carriage and due delivery of the goods. *Place v. Union Exp. Co.*, 2 *Hill*. (N. Y.) 19.

A person who receives and forwards goods, taking upon himself all the expenses of transportation, for which he receives a compensation from the owner, but who has no concern in the vessel by which they are transported or interest in the freight charges, is not a common carrier. *Roberts v. Turner*, 12 *Johns*. (N. Y.) 232.—FOLLOWING *Garside v. Trent & M. Nav. Co.*, 4 *T. R.* 581.

32. When liable only as forwarders.*—The liabilities of common carriers and forwarders, independent of any express stipulation in the contract, are entirely different. Mere forwarders are not insurers like common carriers, but they are responsible for all injuries to property while in their charge resulting from negligence or misfeasance of themselves, their agents, or employés. *Hooper v. Wells*, 27 *Cal.* 11.

A mere forwarder is absolved from liability upon showing that he used ordinary diligence in sending on the goods by careful, suitable, and responsible carriers. *Christenson v. American Exp. Co.*, 15 *Minn.* 270, (Gil. 208).

A corporation established for the transportation of goods for hire between certain points, and receiving goods directed to a more distant place, is not responsible, beyond the end of its own line, as a common carrier, but only as a forwarder, unless it makes a positive agreement extending its liability. *Burroughs v. Norwich & W. R. Co.*, 100 *Mass.* 26.—FOLLOWED IN *Washburn & M. Mfg. Co. v. Providence & W. R. Co.*, 113 *Mass.* 490. REVIEWED IN *Gray v. Jackson*, 51 *N. H.* 9.

An express company received a package, agreeing "to forward and deliver at destination, if within their route, and if not to deliver to the connecting express stage, or other means of conveyance, at the most

convenient point." *Held*, that if the goods were to go beyond its line that it was liable only as a forwarder. *Plantation No. 4 v. Hall*, 61 *Me.* 517.

33. Liability for loss—C. O. D. goods.*—A warehouseman who receives goods on storage, to be forwarded by him to the owner, is liable, as for a conversion, for the value of such goods if he delivers them to a person not authorized to receive them, and they are lost to the owner. *Jeffersonville R. Co. v. White*, 6 *Bush* (Ky.) 251.

Goods marked "J. F." were delivered to a forwarding merchant, who sent them to J. Flannagan, when in fact they were intended for J. Frysinger. The goods were seized by the sheriff as the property of Flannagan. *Held*, that the forwarder was liable for the loss, and the fact that the goods were only marked by initials could afford no protection. *Forsythe v. Walker*, 9 *Pa. St.* 148.

Where a forwarder of C. O. D. goods failed to ship them as such, as he had been instructed by the owner, but delivered them to an express company, and without any instructions to collect the price, the value of the goods is the loss the parties had in contemplation, and the full amount may be recovered against the forwarder. *Hutchings v. Ladd*, 16 *Mich.* 493.

Defendant was engaged in a forwarding business, and received C. O. D. goods, but delivered them to an express company without any statement of the shipper's charges, and they were delivered to the consignee without the price being paid. He had been specially instructed how to ship the goods and to forward the instructions for the collection of the price. *Held*, that defendant was liable for a failure to ship according to instructions; and sending the instructions sealed with the goods was not a compliance therewith. *Hutchings v. Ladd*, 16 *Mich.* 493.

34. When liable as common carriers.—A common carrier to whom is tendered goods as a common carrier cannot, without the shipper's knowledge and consent, receive them as a mere forwarder. *Mellier v. St. Louis & N. O. Transp. Co.*, 14 *Mo. App.* 281.

A simple engagement to forward goods marked for a particular destination is dis-

* See also *post*, 573-592.

* See also *post*, 270.

charged by shipping by the usual or most direct conveyance to the place designated; but an agreement to forward to the place of destination, the charge for freight for the whole distance being specified in the agreement, is an agreement to carry them to that place or to be responsible for their safe carriage and delivery. *Kreuder v. Woolcott*, 1 *Hill*. (N. Y.) 223.

Parties doing business under the name and style of a "transportation company," advertising for patronage as such, and in that name contracting with owners to forward goods from New York to Chicago, for a compensation agreed upon as an equivalent for the entire service, are to be deemed carriers and not forwarders merely, although they employ the conveyances of third parties only in the performance of the contract. *Mercantile Mut. Ins. Co. v. Chase*, 1 *E. D. Smith* (N. Y.) 115.—DISTINGUISHED IN *Alabama G. S. R. Co. v. Thomas*, 32 *Am. & Eng. R. Cas.* 464, 83 *Ala.* 343, 3 *So. Rep.* 802. FOLLOWED IN *Read v. Spaulding*, 5 *Bosw.* (N. Y.) 395.

Defendants, who were carriers and warehousemen, received goods and gave a receipt reciting that they were received "to be forwarded." The agreed rate of transportation included both freight for carrying and warehouse charges. The goods were destroyed in the warehouse before transportation proper had commenced. *Held*, that defendants were liable as common carriers. *Blossom v. Griffin*, 13 *N. Y.* 569.

Goods were shipped from New York to Charleston for the plaintiffs, doing business in Columbia, S. C., to the care of the South Carolina Railroad Company, whose course of business it was to receive and forward goods so addressed. *Held*, that the company were not liable as common carriers until the goods were received by them for carriage; that, considering them as forwarding agents, the rule as to their liability was not the same as that which applied to them as common carriers; that, considering them as forwarding agents, they would be liable for refusing to receive, unless they showed good excuse for not receiving; and after receiving, they would be liable for not taking all the care which a prudent man would take about his own business. *Maybin v. South Carolina R. Co.*, 8 *Rich. (So. Car.)* 240.

Goods were received and a receipt given stating that the property was received in

store, and in all other respects it seemed to be the contract of a forwarder and not of a carrier, except that it had written thereon the amount of freight over a certain portion of a canal. There was no evidence that the one giving the receipt was the agent of the company engaged in transporting the goods over the canal except that he received goods from it and delivered goods to it. *Held*, in an action against the persons navigating the canal, that it was proper to submit the question to the jury as to whether the contract made was the contract of the defendant. *Parmelee v. Western Transp. Co.*, 26 *Wis.* 439.

44. DUTY OF COMPANY TO RECEIVE AND CARRY.

1. Generally.

35. How far carrier bound to carry all goods offered, generally.*—Common carriers are bound to receive and carry for any person who tenders freight at the proper place and in the proper condition, the law implying the contract. Hence it is not necessary to prove a special contract in order to charge the carrier. *Doty v. Strong*, 1 *Pinn. (Wis.)* 313. *Adams Exp. Co. v. Nock*, 2 *Duv. (Ky.)* 562.

A railway company cannot close its office and refuse to receive goods for carriage, while at the same time it continues to receive similar goods from a particular individual. *Garton v. Bristol & E. R. Co.*, 1 *B. & S.* 112, 7 *Jur. N. S.* 1234, 30 *L. J. Q. B.* 273, 9 *W. R.* 734.

A railway company is under the same obligations as a common carrier undertaking to carry in accordance with the provisions of the Railway and Canal Traffic Act 1854; therefore questions as to how far a sender of goods may require delivery at any station he may appoint, or as to how far a railway company is liable to carry goods of every kind, or for all persons alike, are to be determined in each case, not with reference to what a railway company may choose to do, or may ordinarily do, but with reference to what may be within its powers, and at the same time a reasonable requirement. *Thomas v. North Staffordshire R. Co.*, 3 *Ry. & C. T. Cas.* 1.

While it is true that at common law, and

* Duty of company to receive and transport goods, see note, 9 *AM. & ENG. R. CAS.* 13.

Compulsory duty of common carrier to serve public, see note, 15 *L. R. A.* 321.

in the absence of charter or statutory regulations to the contrary, a common carrier may discriminate as to rates, so that no unreasonable charge is made, yet he must carry for all, and for a reasonable remuneration. *Avinger v. South Carolina R. Co.*, 35 *Am. & Eng. R. Cas.* 519, 29 *So. Car.* 265, 7 *S. E. Rep.* 493.—*QUOTING Johnson v. Pensacola & P. R. Co.*, 16 *Fla.* 623.

Railway companies have delegated to them, as part of their franchises, much of the sovereign power of the state, in consideration of their providing the means of commerce and intercourse by constructing the roads which are the avenues of that commerce, and performing the additional duty of common carriers when authorized; and if so authorized they are obliged to transport all merchandise and passengers on the terms fixed in the grant through which they obtained their franchises. *Rogers L. & M. Works v. Erie R. Co.*, 20 *N. J. Eq.* 379.

A common carrier has no right to refuse to receive and transport goods because the shipper will not assent to a special contract of shipment which limits his common-law responsibility. *Southern Exp. Co. v. Moon*, 39 *Miss.* 822. *Garton v. Bristol & E. R. Co.*, 1 *B. & S.* 112, 7 *Jur. N. S.* 1234, 30 *L. J. Q. B.* 273, 9 *W. R.* 734.

A regulation of a railroad company that owns a dock, that it will not receive coal from vessels landing at the dock unless the owners will employ persons in moving it designated by the company, and at wages fixed by it, which are at the ordinary price, is unreasonable, and will not be enforced. 318½ *Tons of Coal. 12 Blatchf. (U. S.)* 453.

Cal. Civ. Code § 2169, does not compel carriers to receive and carry all goods that may be offered, but only such as it has undertaken and is accustomed to carry.* *Pfister v. Central P. R. Co.*, 70 *Cal.* 169, 11 *Pac. Rep.* 686.

The 86th section of the Railway Clauses Consolidation Act (8 & 9 *Vict. c.* 20), is an enabling provision; and if a company act as carriers they are not bound to carry all kinds of goods from and to every station on the line, but only such goods to and from such places as they have publicly professed to do and have convenience for. *Johnson v. Midland R. Co.*, 4 *Ex.* 367, 6 *Railw. Cas.* 61, 1 *Ry. & C. T. Cas.* 16.

* Carrier is not bound to receive certain goods. see note, 30 *AM. & ENG. R. CAS.* 122.

If a railway company does not hold itself out as a common carrier of coal, it is not obliged to carry coal from station to station, or for coal merchants, and may restrict its coal traffic to the carriage of coal for colliery-owners, from the pit's mouth to stations where such colliery-owners have their depots. *Oxlade v. North Eastern R. Co.*, 15 *C. B. N. S.* 680.

The court refused to require the company to provide trucks for the carriage of coal and coke for a merchant who refused to pay demurrage therefor at the same rate as was charged to all other merchants under similar circumstances, or to carry coals to the extremity of their line (where it joined the *M. Ry.*) and then shift them into other trucks or wagons, they having no convenience at that place for that purpose, and not affording such facility to any other person; and as to the first branch of the rule—held, that the company were not common carriers of coal. *Oxlade v. North Eastern R. Co. (No. 1)*, 1 *C. B. N. S.* 454, 26 *L. J. C. P.* 129, 1 *Ry. & C. T. Cas.* 72.—*FOLLOWING Ransome v. Eastern Counties R. Co. (No. 1)*, 1 *Ry. & C. T. Cas.* 63.

Although a company carries coal and other goods for hire from one end of its line to the other, and carries goods other than coal from an intermediate station, it is not bound to carry coal from that station unless it has publicly professed to do so; and even if it has held itself out as a carrier of coal from that station, no action for refusing to carry coal from it will lie, unless it is shown that the company has conveniences at the station for receiving and carrying the coal. *Johnson v. Midland R. Co.*, 6 *Railw. Cas.* 61, 4 *Ex.* 367, 18 *L. J. Ex.* 366.

The fact that a railway company posts up in a particular station a list of tolls, including those for coals, is not sufficient evidence that it holds itself out as a common carrier of coal from that station. *Oxlade v. North Eastern R. Co.*, 9 *W. R.* 272, 3 *L. T.* 671.

36. Duty to carry engines and cars as freight.—A railroad chartered with usual powers to carry persons and property, and provided with the necessary facilities for doing so, is bound to carry, as common carriers, cars shipped by a builder as freight, and in the absence of a fixed rate by contract, or by the directors, the charges must be a reasonable compensation. *Greene v. St. John & M. R. Co.*, 22 *New Brun.* 252.

A railway company engaged in the trans-

portation of freights for hire as a common carrier is bound to transport or haul upon its road the cars of any other railroad company when requested so to do, and will hold the same relation as a common carrier to such cars that it does to ordinary freight received by it for transportation; and in case of loss will be held to the same measure and character of liability to the owner of the cars so received for transportation as would attach in respect to any other property. *Peoria & P. U. R. Co. v. Chicago, R. I. & P. R. Co.*, 18 Am. & Eng. R. Cas. 506, 109 Ill. 135, 50 Am. Rep. 605.—ADHERED TO IN *Peoria & P. U. R. Co. v. United States Rolling Stock Co.*, 136 Ill. 643.

Plaintiffs filed a bill showing that they manufacture locomotive engines, and charged a combination between a railroad company over whose road the engines must be shipped and certain directors, to organize an express company to do all the business of shipping over the road, with reduced liabilities, whereby the cost of shipping locomotives would be increased from about \$31 to \$250 each. Held, that plaintiffs had no adequate remedy at law, and that an injunction would issue to restrain the parties from doing anything to prevent carrying such engines as ordinary freight. *Rogers L. & M. Works v. Erie R. Co.*, 20 N. J. Eq. 379.

37. Duty to forward in a reasonable time.—It is the duty of common carriers in all cases to transport without unnecessary delay all goods received for carriage, whether they are intended for a particular purpose or not. *Rankin v. Pacific R. Co.*, 55 Mo. 167.

Where goods are delivered to a carrier without request that they shall be forwarded at once, or without a contract that they shall be forwarded at any stated time, the carrier is allowed a reasonable time in which to forward them. *Stedman v. West-ern Transp. Co.*, 48 Barb. (N. Y.) 97.

The N. C. statute (§1907) fixes five days as such reasonable time. *McGowan v. Wilmington & W. R. Co.*, 27 Am. & Eng. R. Cas. 64, 95 N. Car. 417.

In such a case the carrier cannot excuse a failure to forward the goods on account of an extraordinary or unexpected pressure of business. *Dawson v. Chicago & A. R. Co.*, 18 Am. & Eng. R. Cas. 521, 79 Mo. 296.

Where the contract for the transportation of goods is silent with reference to the time

of shipment, the law imports into it an obligation to ship within a reasonable time after the goods have been delivered for that purpose; and this element becomes a substantial provision of the contract, as much as if it had been expressly written in it, and its effect cannot be changed, altered, or modified by parol. *Pennsylvania Co. v. Clark*, 2 Ind. App. 146, 27 N. E. Rep. 586.—DISTINGUISHING *Cincinnati, I., St. L. & C. R. Co. v. Case*, 122 Ind. 310.

38. Special instructions to forward forthwith.—If goods are received by common carriers, with orders to "ship immediately," and are stored in their warehouse (the navigation being obstructed), and there consumed by fire, they are liable for the value to the owner as common carriers. *Clarke v. Needles*, 25 Pa. St. 338.

A delivery to the carrier with the name and address of the consignee marked upon the goods is, in the absence of some directions or agreements otherwise, equivalent to an express direction to transport them to such consignee at once. *Gregory v. Wabash R. Co.*, 46 Mo. App. 574.

Instructions to forward goods forthwith may be inferred from an established course of dealing between the owner and carrier, without direct evidence of such instructions. *Moses v. Boston & M. R. Co.*, 24 N. H. 71.

Where the owner has given the carrier instructions to forward immediately goods which are to be afterwards delivered by a cartman, and the cartman at the time of the delivery, without authority from the owner, gives contrary directions, the owner is not bound by such directions of the cartman, nor can the carrier protect himself by them. *Moses v. Boston & M. R. Co.*, 24 N. H. 71.

A special contract by a railway company to forward goods on the same evening on which they were received was shown by the evidence, although the company had given notice that goods received after 4 o'clock would be forwarded the next day. *Pickford v. Grand Junction R. Co.*, 12 M. & W. 766.

39. Giving preference to perishable freights.—There is no invariable rule requiring freight to be carried in the order in which it is received, without regard to its character and condition, or its liability to perish. *Peet v. Chicago & N. W. R. Co.*, 20 Wis. 594.

Where two kinds of property are delivered to a carrier at the same time by different owners, one of which is perishable and the

other no., preference is to be given in the transportation to that which is perishable. *Marshall v. New York C. R. Co.*, 45 Barb. (N. Y.) 502; *affirmed in (?)* 48 N. Y. 660, *mem.*—FOLLOWED IN *Tierney v. New York C. & H. R. R. Co.*, 76 N. Y. 305, 67 Barb. 538.

And the same rule of preference must be observed in forwarding accumulated freight. *Tierney v. New York C. & H. R. R. Co.*, 76 N. Y. 305; *affirming* 10 Hun 569, 67 Barb. 538.—FOLLOWING *Marshall v. New York C. R. Co.*, 45 Barb. 502; *affirmed in* 48 N. Y. 660.

40. Statutory penalty for failure to forward promptly—Constitutionality of North Carolina act.*—Under N. Car. act of 1875, ch. 240, prescribing a penalty against railroads for a delay beyond five days in the shipping of goods after their receipt, five full running days is meant, including Sunday whenever it intervenes. *Keeter v. Wilmington & W. R. Co.*, 9 Am. & Eng. R. Cas. 165, 86 N. Car. 346.

Section 2 of the act imposing the penalty is valid, and the act is not to be deemed unconstitutional on the ground that it contravenes the charters of railroad companies formerly granted, or because it may indirectly operate upon commerce outside of the immediate jurisdiction of the state. *Whitehead v. Wilmington & W. R. Co.*, 9 Am. & Eng. R. Cas. 168, 87 N. Car. 255.

In an action to recover the penalty provided by the act, the provisions thereof are to be construed strictly in favor of those charged with violating its provisions. The rigid rules of the common law with reference to the liability of common carriers should not be applied where, in such case, it appears that the delay in shipping the goods has been caused by circumstances which the railroad company could not have been expected to provide for, and which have occurred entirely without fault on the company's part. *Whitehead v. Wilmington & W. R. Co.*, 9 Am. & Eng. R. Cas. 168, 87 N. Car. 255.

In an action for the penalty, evidence which goes to show that other freight was delivered by agents of the plaintiff, who gave instructions to the agent of the corporation in regard to its shipment, is immaterial, and it is not error to exclude it.

* Penalties; when railroad company is liable to as common carrier, see note, 27 AM. & ENG. R. CAS. 70.

McGowan v. Wilmington & W. R. Co., 27 Am. & Eng. R. Cas. 64, 95 N. Car. 417.

41. When road is under military control.*—Where a road is under the military control of the government and is not permitted to receive freights from individuals, except upon an order of a proper army officer, it is not liable for refusing to receive freights from individuals. *Illinois C. R. Co. v. Phelps*, 4 Ill. App. 238.

In such a case the fact that goods had been sold to the government does not authorize it to receive them for shipment without an order from such army officer. *Illinois C. R. Co. v. Phelps*, 4 Ill. App. 238.

The fact that a railroad is under military control, which requires it to give preference to government freights, does not excuse it from delivering goods with reasonable promptness, though it might excuse it for not receiving the freight. *Illinois C. R. Co. v. Cobb*, 64 Ill. 128.

The fact that a railroad was under the control of the military authorities in a time of war will not excuse the carrier from his obligation to deliver goods within a reasonable time, it appearing that the military authorities gave express permission for that purpose; and especially where the carrier had failed to limit his liability in respect to such contingencies. *Illinois C. R. Co. v. McClellan*, 54 Ill. 58.—DISTINGUISHED IN *Illinois C. R. Co. v. Ashmead*, 58 Ill. 487. RECONCILED IN *Cobb v. Illinois C. R. Co.*, 38 Iowa 601.

An order of the military power of the government that a railroad company should transport government freights to the exclusion of all private property, if necessary, will not release the company from its obligation to receive and transport private property, where it appears that the government did not actually assume control of the road and where the company still held itself out as a common carrier, and there was no evidence of a necessity to exclude private property; and especially is this so where the parties offering freights are government contractors and the freights tendered are military supplies. *Cobb v. Illinois C. R. Co.*, 38 Iowa 601.—RECONCILING *Illinois C. R. Co. v. McClellan*, 54 Ill. 58.

Where a person desirous of shipping a large quantity of corn over a railroad to Cairo stored the same in a warehouse

* See also *post*, 431.

on promise of the railroad company to transport it as soon as cars could be procured for the purpose, but the company never received or receipted for the same, and was unable to forward the same for want of cars and for the reason that the road was controlled by the military authorities of the United States, who refused to give permits to ship the same, and in consequence of which the grain was injured by exposure, etc.—*held*, that under the circumstances the company was not liable to the owner of the grain for the delay in furnishing transportation, there being no contract to transport the same, and the same never having come to its possession for transportation. *Illinois C. R. Co. v. Hornberger*, 77 Ill. 457.

42. When charges must be prepaid.*—A common carrier is bound to receive and carry goods only when offered by their owner or his authorized agent, and then only upon payment for the carriage in advance, if required. *Fitch v. Newberry*, 1 Dougl. (Mich.) 1.—COMMENTING ON *Yorke v. Grenaugh*, 2 Ld. Raym. 866. DISTINGUISHING *Brown v. Walters*, 14 E. C. L. 424.—NOT FOLLOWED IN *Patten v. Union Pac. R. Co.*, 29 Fed. Rep. 590.

Whether a railroad company can excuse a refusal to accept and carry freight on the ground that the charges were not prepaid, will depend upon its custom in collecting charges, which is a question for the jury. *Reed v. Philadelphia, W. & B. R. Co.*, 3 *Houst. (Del.)* 176.

If a company receives freight and undertakes to carry it without prepayment of freight charges, it is bound to exercise the same care in carrying, storing, and holding it as if the charges had been prepaid. *St. Louis, A. & T. H. R. Co. v. Flannagan*, 23 *Ill. App.* 489.

Where a carrier has informed the owner that goods would be held until the freight charges were prepaid, but afterward ships the goods without prepayments, and without notice to the owner, it is liable for any loss that may occur by reason of its manner of shipping. *Campion v. Canadian Pac. R. Co.*, 43 *Fed. Rep.* 775.

In order to maintain an action against a carrier for refusing to receive and carry grain, the plaintiff must prove a tender of

the customary freight charges, or a readiness and willingness to pay according to the course and usage of the company, whether that was required to be paid in advance or not. Slight evidence, however, of readiness and willingness to pay is sufficient, and that may be presumed or inferred from surrounding circumstances. *Galena & C. U. R. Co. v. Rae*, 18 Ill. 488.

43. When liability is limited to carrier's own road.*—In the absence of any express contract the law implies, from the delivery and acceptance of goods for carriage, a contract to carry according to the course and usage of the carrier's business, and, if marked for a point beyond his terminus, to deliver there to the next carrier on the route. *Converse v. Norwich & N. Y. Transp. Co.*, 33 *Conn.* 166.

In the absence of a special contract a railroad is not bound, as a matter of course, to carry freight beyond the terminus of its own line, but only to deliver it safely to the proper custody. *Rome R. Co. v. Sullivan*, 25 *Ga.* 228.—REVIEWED IN *Gray v. Jackson*, 51 *N. H.* 9.

The implied obligation of a common carrier arising from his relation to the public is limited by the termini of its own route, and the fact that it has connections with other routes, but which it does not operate, control, or own, does not, in the absence of a special contract, make it liable as a common carrier for a failure to transport, or furnish means of transportation about such other routes. *Pittsburgh, C. & St. L. R. Co. v. Morton*, 61 *Ind.* 539.—DISTINGUISHING *Crouch v. London & N. W. R. Co.*, 25 *Eng. L. & Eq.* 287; *Wheeler v. San Francisco & A. R. Co.*, 31 *Cal.* 46. QUOTING *Gordon v. Hutchinson*, 1 *Watts & S. (Pa.)* 285.

44. When it extends to connecting lines.†—Where a company shows that it was its unvarying usage to deliver goods at the terminus of its road, that it only undertook to transport over its own line, and that this fact was known to the shipper; and that it charged the shipper freight, and collected it from him for transportation over its own line only, these facts would suffice to rebut the implied contract for through carriage. *Western & A. R. Co. v. McEwee*, 6 *Heisk. (Tenn.)* 208.

A railway company is bound to accept goods for carriage to a place beyond the

* Carriers may demand prepayment of freight, see note, 49 AM. & ENG. R. CAS. 75. See also *post*, 120, 290, 715.

* See also *post*, 573-592, 668, 674.

† See also *post*, 665, 671, 672.

confines of England if it holds itself out as a carrier to such place, and is subject to the common-law liability of a carrier for hire. *Crouch v. London & N. W. R. Co.*, 14 C. B. 255, 7 Railw. Cas. 717, 2 C. L. R. 188, 18 Jur. 148, 23 L. J. C. P. 73.

45. Duty as to perishable freights.*

—Where a company receives potatoes in cold weather to be shipped to a point beyond its own road, it is bound to use great diligence in forwarding them with dispatch; and if they are frozen through negligence in not carrying them promptly it is liable for the damages. *Hewett v. Chicago, B. & Q. R. Co.*, 18 Am. & Eng. R. Cas. 568, 63 Iowa 611, 19 N. W. Rep. 790.

A railway company is not absolutely bound to forward property known by it to be perishable on the very day of its receipt, but the demands of its business, the time of starting its trains, its contracts and obligations already incurred, and other like considerations are to be regarded in determining the diligence or negligence of the company in such a case. *Dixon v. Chicago, R. I. & P. R. Co.*, 18 Am. & Eng. R. Cas. 525, 64 Iowa 531, 21 N. W. Rep. 17.

If a station agent of a railroad company makes an oral contract for the shipment of perishable property (potatoes) by a certain day, and he has express authority to make it, or is held out by the company as having such authority, and the shipper has the property at the station and offers it for shipment at the time named in the contract, but the company does not receive it, nor within a reasonable time thereafter furnish cars for its shipment, and injury occurs by freezing, in consequence of such failure, the company is liable for such injury. *Wood v. Chicago, M. & St. P. R. Co.*, 24 Am. & Eng. R. Cas. 91, 68 Iowa 491, 27 N. W. Rep. 473.

46. Selection of route and mode of shipment.—In the absence of an express contract a carrier must carry goods according to the usual route and deliver them within a reasonable time. *Hales v. London & N. W. R. Co.*, 4 B. & S. 66, 32 L. J. Q. B. 292, 11 W. R. 856, 8 L. T. 421.

* Failure of carrier to carry perishable goods in a reasonable time: materiality of evidence, see 35 AM. & ENG. R. CAS. 531, *abstr.*

Liability of carriers of perishable goods for loss caused by delay, see note, 31 AM. REP. 567.

Carrier's liability for loss or deterioration of goods by delay, see note, 11 AM. ST. REP. 360.

Where a contract gives the carrier an option between modes of transportation, the option must be exercised with a view to the owner's interest. *Blitz v. Union Steamboat Co.*, 51 Mich. 558, 17 N. W. Rep. 55.

Where the established route of a carrier was by rail to Philadelphia and by water to Boston, he was not bound to send goods by rail from Philadelphia when there was an obstruction in the water-communication. *Empire Transp. Co. v. Wallace*, 68 Pa. St. 302, 1 Am. Ry. Rep. 443.

Where an article is delivered to a common carrier for transportation, he must exercise his own judgment as to the mode of carrying it, and cannot escape liability by proving misrepresentations unless they relate to matters latent in their character. *New Jersey R. & T. Co. v. Pennsylvania R. Co.*, 27 N. J. L. 100.

Where goods are ordered and no specific instructions given as to the shipment, a delivery to the usual carrier is a constructive delivery to the purchaser, and the goods become his at once, subject only to the right of stoppage *in transitu*; but a mere direction on the part of the purchaser that he wants the goods sooner than they would reach him by river is not sufficient to justify a shipment by express, in the absence of anything to show that it was the usual carrier, or a carrier at all, except as its name might indicate. *Comstock v. Affalter*, 50 Mo. 411.

47. Measure of damages for failing to carry.*—The measure of damages in an action against a carrier for refusing to receive and carry goods is the difference between the value of the goods at the place of destination when they should have arrived and their value at the same time at the place of shipment, including necessary expenses for the detention of the goods, less reasonable charges for the transportation. *Galena & C. U. R. Co. v. Rae*, 18 Ill. 488. *People ex rel. v. New York, L. E. & W. Co.*, 22 Hun (N. Y.) 533.

When a company wrongfully refuses to take produce offered for shipment, it is the duty of the owner to take care of and protect his property while delayed, and for the expense thus incurred the company is liable. It is also liable for the loss occasioned by delay in getting the produce to its market place of destination, to be esti-

* See also *post*, 793.

mated by ascertaining its price there when it should have arrived had it been taken when offered, and its price at the time when it did arrive. *Houston & T. C. R. Co. v. Smith*, 22 *Am. & Eng. R. Cas.* 421, 63 *Tex.* 322. *St. Louis, A. & T. R. Co. v. Neel*, 56 *Ark.* 279, 19 *S. W. Rep.* 963.

The measure of damages for refusal to carry goods, where there is but one carrier, does not apply where the shipper has the choice between shipping by one of two or more routes. In such case, where one carrier fails to ship according to contract, the owner must ship by another line, and his damages will be the increased amount, or the difference between the price at which the first carrier contracted to carry and the price that the owner is compelled to pay the second carrier. *Grund v. Pendergast*, 58 *Barb. (N. Y.)* 216.—DISTINGUISHING *Bracket v. McNair*, 14 *Johns. (N. Y.)* 170; *O'Connor v. Foster*, 10 *Watts (Pa.)* 418.

48. Mandamus to compel road to carry—Strikes.*—Where a railroad company refuses to carry freights and passengers on the ground that its employes refused to work except for increased wages, a mandamus may issue, at the suit of the commonwealth, represented by the attorney-general, to compel it to do so, where there is no violence or force used by such employes to prevent the operation of trains; and it is no defense to such proceeding that the state has suffered no injury, and that private shippers or passengers have an adequate remedy at law in suits for damages. *People v. New York C. & H. R. R. Co.*, 9 *Am. & Eng. R. Cas.* 1, 28 *Hun (N. Y.)* 543, 3 *Civ. Pro.* 11, 2 *McCar.* 345; *reversing 2 Civ. Pro.* 82.—APPROVING *Railroad Com'rs v. Portland & O. C. R. Co.*, 63 *Me.* 269. *REVIEWING* *Union Pac. R. Co. v. Hall*, 91 *U. S.* 343; *State v. Hartford & N. H. R. Co.*, 29 *Conn.* 538; *People ex rel. v. Rochester & S. L. R. Co.*, 14 *Hun (N. Y.)* 373, 76 *N. Y.* 294; *People ex rel. v. Boston & A. R. Co.*, 70 *N. Y.* 569; *State v. Northeastern R. Co.*, 9 *Rich. (So. Car.)* 247; *In re New Brunswick & C. R. Co.*, 17 *New Brun.* 667; *Chicago & N. W. R. Co. v. People*, 56 *Ill.* 365; *Farmers' L. & T. Co. v. Henning*, 17 *Am. Law Reg. (N. S.)* 266; *People ex rel. v. Dutchess & C. R. Co.*, 58 *N. Y.* 152; *New*

York C. & H. R. R. Co. v. People, 12 *Hun* 195, 74 *N. Y.* 302; *Indianapolis & C. R. Co. v. State*, 37 *Ind.* 489; *State v. New Haven & N. R. Co.*, 37 *Conn.* 153; *Rex v. Severn & W. R. Co.*, 2 *B. & Ald.* 646; *People v. Albany & V. R. Co.*, 24 *N. Y.* 261.

Uncontroverted allegations, showing a quite general and largely injurious refusal and neglect of performance of the duties of carrier by a railroad company, establishes a case for the interference of the state; and railroad corporations cannot refuse or neglect to perform their public duties pending a controversy with their employes over the cost and expense of doing them, where it does not appear that the employes committed any unlawful act, or that there was an illegal combination compelling them to stop working. *People v. New York C. & H. R. R. Co.*, 9 *Am. & Eng. R. Cas.* 1, 28 *Hun (N. Y.)* 543, 3 *Civ. Pro.* 11, 2 *McCar.* 345; *reversing 2 Civ. Pro.* 82.

But the remedy of a individual injured by the failure of a company to receive and transport goods is not by mandamus, but an action at law for damages. *People ex rel. v. New York, L. E. & W. R. Co.*, 22 *Hun (N. Y.)* 533.—FOLLOWED IN *People v. New York, L. E. & W. R. Co.*, 63 *How. Pr.* 291.

49. Nature of action for failure to carry.—A cause of action against a railroad company for refusing to receive and transport grain, though based on its general duty to serve the public, is an action *ex delicto* and not *ex contractu*. *Pittsburgh, C. & St. L. R. Co. v. Morton*, 61 *Ind.* 539.

An action to recover from a common carrier for goods negligently lost is not an action upon contract within the meaning of New York Code of Procedure, as amended in 1866, § 227, providing that an attachment may issue "in an action arising on contract for the recovery of money only, or in an action for the wrongful conversion of personal property." *Atlantic Mut. Ins. Co. v. McLoon*, 48 *Barb. (N. Y.)* 27.

An action against common carriers for the loss of goods may be either for a breach of the contract to safely carry or for a breach of duty; in the one case the action being upon the contract and in the other an action for tort. If the action is in tort, negligence is presumed; but in either case the court may permit an amendment after verdict to conform the pleadings to the proofs. *Lamb v. Camden & A. R. & T. Co.*, 2 *Daly (N. Y.)* 454.—RECONCILING

* Can courts compel a railroad company to afford facilities to a shipper? See note, 29 *AM. & ENG. R. CAS.* 53. See also *ante*, 18; *post*, 143.

Muschamp v. Lancaster & P. J. R. Co., 8 M. & W. 421; *Collins v. Bristol & E. R. Co.*, 11 Ex. 790, 1 H. & N. 517; *Scotthorn v. South Staffordshire R. Co.*, 8 Ex. 341; *Wilby v. West Cornwall R. Co.*, 2 H. & N. 703; *Mytton v. Midland R. Co.*, 4 H. & N. 615; *Coxen v. Great Western R. Co.*, 5 H. & N. 247; *Bristol & E. R. Co. v. Collins*, 7 H. L. Cas. 194.

Where the gravamen of a complaint in an action against a railroad company for the loss of goods is solely for a breach of duty, and founded on a custom between connecting carriers as to forwarding goods, the action is in tort, or what at common law is called an action on the case, and is therefore not within the meaning of Taylor's Wis. St. ch. 133, § 59, limiting the amount of attorneys' fees "in actions at law on contract to \$25." *Wood v. Milwaukee & St. P. R. Co.*, 32 Wis. 398.—FOLLOWING Conkey *v. Milwaukee & St. P. R. Co.*, 31 Wis. 619.

2. Providing Cars and Furnishing Transportation Facilities.

50. Duty to furnish cars, generally.

—Notwithstanding the New York general railroad act of 1850, ch. 140, § 36, requiring railroad companies to furnish accommodations for all property offered for shipment, a company should refuse to receive perishable freight if it has not the means of immediate transportation; but if it receives it, it is liable for a failure to forward within the time ordinarily required for such transportation, unless it can show a legal excuse for such failure. *Tierney v. New York C. & H. R. R. Co.*, 76 N. Y. 305; *affirming* 10 Hun 569, 67 Barb. 538.—DISTINGUISHING *Wibert v. New York & E. R. Co.*, 12 N. Y. 245.

A shipper's order calling for a specific number of cars for a specified day will not, unaccepted by the carriers, constitute a contract binding on either. *Missouri Pac. R. Co. v. Texas & P. R. Co.*, 31 Fed. Rep. 864.

Tex. Rev. St. 1879, art. 279, providing a penalty against common carriers for refusing to transport goods, does not make them liable for a refusal to furnish cars on request. *San Antonio & N. P. R. Co. v. Bailey*, 4 Tex. App. (Civ. Cas.) 104, 15 S. W. Rep. 203.

Sayles' Tex. Civ. St. art. 4227, providing that by the refusal of a railroad corporation to transport any property or to deliver the same the carrier shall pay

all damages, and art. 4227 a, § 3, providing for a penalty of \$25 per day if cars are not furnished when applied for, repeals art. 279 of the Rev. St. of 1879, providing a penalty against common carriers for refusing to transport goods. *San Antonio & N. P. R. Co. v. Bailey*, 4 Tex. App. (Civ. Cas.) 104, 15 S. W. Rep. 203.

The Texas statute which imposes a penalty upon railroad companies for failing to furnish freight cars upon a written request therefor does not apply where an oral application is made for such cars; and a party may, independent of the statute, maintain an action for a breach of an oral contract to furnish cars. *Missouri Pac. R. Co. v. Harmonson*, 4 Tex. App. (Civ. Cas.) 133, 16 S. W. Rep. 539. *Missouri, K. & T. R. Co. v. Graves*, 4 Tex. App. (Civ. Cas.) 149, 16 S. W. Rep. 102.

51. Agreement to furnish cars at a specified time.—Where a railroad company has made an unconditional agreement to furnish freight cars on a certain day, it cannot excuse a delay by showing that an unavoidable accident prevented it from having the cars on the ground at the stipulated time. *Harrison v. Missouri Pac. R. Co.*, 7 Am. & Eng. R. Cas. 382, 74 Mo. 364, 41 Am. Rep. 318.

Where a railroad company is not required, by the order for cars, to furnish them at any particular hour, the delivery at any hour of the day is sufficient. *McGraw v. Missouri Pac. R. Co.*, 109 Mo. 582, 19 S. W. Rep. 53.

52. Duty to furnish suitable cars.*

—A company is bound to furnish suitable cars for the transportation of goods; and if it furnishes unsafe or unfit cars it will not be exonerated from liability by the fact that the shipper knew them to be defective, and accepted and used them, in the absence of a distinct agreement by him to assume the risk of shipping in such cars. *Pratt v. Ogdensburg & L. C. R. Co.*, 102 Mass. 557.

But the carrier is the judge of the sufficiency of his carriage in the first instance. *Sloan v. St. Louis, K. C. & N. R. Co.*, 58 Mo. 220.

A carrier is liable for loss of goods resulting from defects in a car used for transportation the existence of which imply negligence, although the car belonged to another and was procured by the carrier

* Duty of company to furnish proper cars, see note, 12 L. R. A. 746. See also *post*, 109.

for the particular shipment at the special request of the shipper, upon his paying the additional expense, and the shipment was made in its then condition—the car being of a kind acceptable to the carrier, and commonly used in making like shipments. *Louisville & N. R. Co. v. Dies*, 91 *Tenn.* 177, 18 *S. W. Rep.* 266.

Under a contract for the transportation of butter, a common carrier is bound to provide refrigerator cars, or other cars in which ice could and should be used, to protect the butter from the heat, and until such cars can be provided it is required to put the butter in cold-storage. *Beard v. St. Louis, A. & T. H. R. Co.*, 42 *Am. & Eng. R. Cas.* 509, 79 *Iowa* 527, 44 *N. W. Rep.* 803.—FOLLOWING *Beard v. Illinois C. R. Co.*, 79 *Iowa* 518.—*Beard v. Illinois C. R. Co.*, 42 *Am. & Eng. R. Cas.* 445, 79 *Iowa* 518, 7 *L. R. A.* 280, 44 *N. W. Rep.* 800.—FOLLOWED IN *Beard v. St. Louis, A. & T. H. R. Co.*, 79 *Iowa* 527.

A carrier is not bound, as a matter of law, to furnish any particular kind of car for the transportation of perishable goods, yet a failure to do so may be a fact for the jury to consider in determining the question of negligence. *Udell v. Illinois C. R. Co.*, 13 *Mo. App.* 254.

53. Duty to furnish means of through shipment.*—Where a railroad company undertakes to carry freights beyond its road to a point requiring reshipment by water, and gives a through bill of lading, it becomes its duty to provide the necessary boats for carrying to the place of destination. It has no right to trust to advantageous aid in the procurement of boats to enable it to carry out its contract; and if it does so and is disappointed, it is liable for the delay. *Bussey v. Memphis & L. R. R. Co.*, 4 *McCrary (U. S.)* 405, 13 *Fed. Rep.* 330.

Defendant road received freight, agreeing to carry it to a point beyond its own road, with provisions in the contract of shipment that it would not be liable for a loss by fire nor for a loss beyond its own line. The company ran steamers from the end of its road to the place of destination of the goods, but they were inadequate to carry all of its freights. At the time of shipment defendant and connecting roads, running to the place of destination, had failed to agree

on a division of freight rates, and the connecting roads would not receive its freights. The goods were delayed six days at the end of its line, where they were negligently destroyed by fire. *Held*, that it was liable, as it had expressly agreed to carry beyond its own line, and could not contract against its own negligence. *Condit v. Grand Trunk R. Co.*, 54 *N. Y.* 500, 6 *Am. Ry. Rep.* 410; *affirming 4 Lans.* 106.—FOLLOWING *Lamb v. Camden & A. R. & T. Co.*, 46 *N. Y.* 271; *Michaels v. New York C. R. Co.*, 30 *N. Y.* 564; *Read v. Spaulding*, 30 *N. Y.* 630; *Bostwick v. Baltimore & O. R. Co.*, 45 *N. Y.* 712.—NOT FOLLOWING *Morrison v. Davis*, 20 *Pa. St.* 171; *Denny v. New York C. R. Co.*, 13 *Gray (Mass.)* 481; *Memphis & C. R. Co. v. Reeves*, 10 *Wall. (U. S.)* 176.—APPLIED IN *McKay v. New York C. & H. R. R. Co.*, 50 *Hun (N. Y.)* 563, 20 *N. Y. St. R.* 816, 3 *N. Y. Supp.* 708; *Talcott v. Wabash R. Co.*, 50 *N. Y. St. R.* 423.

54. Duty to furnish warehouse facilities.*—Under *Minn. Gen. St.* 1878, ch. 124, §§ 7, 8, fixing the charge for receiving, elevating, and handling grain at elevators, and allowing other persons to erect elevators adjoining the track whenever the railroad company refuses to handle and store it, if a company furnishes suitable warehouse facilities at the rates fixed by law it may designate such warehouse or elevator as the exclusive place at such station for receiving and shipping grain, and may refuse to receive or ship it from other places. *Rhoder v. Northern Pac. R. Co.*, 21 *Am. & Eng. R. Cas.* 31, 34 *Minn.* 87, 24 *N. W. Rep.* 347.

55. Duty to carry fruit by special train.—An arrangement between the P., W. & B. R. Co. and a committee of a peach-growers' convention to run a special daily train during a peach season to Philadelphia, there to connect with the C. and A. R. Co., for the transportation of peaches to N. Y., and which before the commencement of the season was duly advertised by the company for that purpose, to leave the several stations on their road in the state at the respective hours stated each day (Saturdays and Sundays excepted) and reach Philadelphia at a certain hour in the evening, with the view to make such connection, and in time for the next morning's market in N. Y., will not constitute a special contract

* See also *post*, 563.

* See also ELEVATORS, 6-11.

between the company and a shipper of peaches from the state to N. Y. during the season, to transport his peaches by such train. *Truax v. Philadelphia, W. & B. R. Co.*, 3 *Houst. (Del.)* 233. *Reed v. Philadelphia, W. & B. R. Co.*, 3 *Houst. (Del.)* 176.

56. Not bound to furnish cars for unmined coal.—The statute which provides that "every railroad corporation in the state shall start and run cars for the transportation of such passengers and property as shall, within a reasonable time previous thereto, be ready or offered for transportation," cannot be so extended as to include coal in the earth, to be dug and raised from the mines after cars are furnished, so that the carrier, for any neglect in that regard, will be subject to the treble penalty provided in the statute. *People v. Illinois & St. L. R. & C. Co.*, 122 *Ill.* 506, 14 *N. E. Rep.* 261. *Illinois & St. L. R. & C. Co. v. People*, 19 *Ill. App.* 141.

57. Delay caused by press of business.*—It is the duty of a common carrier by rail to provide sufficient facilities and means of transportation for all freight which it should reasonably expect will be offered, but it is not bound to provide in advance for extraordinary occasions, nor for an unusual influx of business which is not reasonably to be expected. *Dawson v. Chicago & A. R. Co.*, 18 *Am. & Eng. R. Cas.* 521, 79 *Mo.* 296. *Truax v. Philadelphia, W. & B. R. Co.*, 3 *Houst. (Del.)* 233. *Galena & C. U. R. Co. v. Rae*, 18 *Ill.* 488.

Railroad companies are bound to have all reasonable and necessary facilities and appliances for conducting and carrying on in a prompt, skilful, and careful manner the business in which they are engaged, and for transporting without unreasonable delay the usual and ordinary quantity of freight offered them for transportation, or which might reasonably and ordinarily be expected; but they are not bound to be prepared for unusual and extraordinary contingencies, such as the great Chicago fire, which no ordinary prudence or foresight could reasonably foresee or anticipate. *Michigan C. R. Co. v. Burrows*, 33 *Mich.* 6.

Where the facilities of a company for carrying freight at the time of an unusual press of business are not sufficient it may lawfully decline to receive freight; but if it receives it it must forward it without delay,

and cannot excuse a failure to do so on account of the push of business. *Faulkner v. South. Pac. R. Co.*, 51 *Mo.* 311, 3 *Am. Ry. Rep.* 293.—FOLLOWING *Tucker v. Pacific R. Co.*, 50 *Mo.* 385.—*Houston & T. C. R. Co. v. Smith*, 22 *Am. & Eng. R. Cas.* 421, 63 *Tex.* 322.

The amount of business ordinarily done by a railroad is the only proper measure of its obligations to furnish transportation. If by reason of a sudden and unusual demand for stock or produce in the market, or from any other cause, there should be an unexpected influx of business, the company's obligation will be fully met by shipping such stock or produce in the order and priority of time in which it is offered. In doing so its means of transportation must be distributed at its various stations along the entire line of its road, so as to afford a reasonable amount of accommodation for all. *Ballentine v. North Mo. R. Co.*, 40 *Mo.*, 491.

A company is not liable for a delay in forwarding goods which is caused by an unusual press of freights, where all are forwarded in the order in which they are received, and where its road is well equipped and it is running as many trains as can safely be done; and this is so notwithstanding the general railroad act of 1850, ch. 140, § 36, requiring such companies to furnish sufficient accommodation for the transportation of all freights which shall be offered. *Wibert v. New York & E. R. Co.*, 12 *N. Y.* 245; affirming 19 *Barb.* 36, reaffirming 29 *Barb.* 633; see 2 *Sweeney* 677.—DISTINGUISHED IN *Tierney v. New York C. & H. R. R. Co.*, 76 *N. Y.* 305. QUOTED IN *Nashua Lock Co. v. Worcester & N. R. Co.*, 48 *N. H.* 339.

Where a railroad company is provided with a reasonable equipment for ordinary purposes, and forwards goods with as much expedition as practicable, it is not liable for the loss of expected profits on goods by a delay which occurs from an unusual press of business. But it is liable for any injury to the goods during the delay; and when it has contracted for through carriage it cannot excuse a delay by showing that the next connecting carrier would not receive the goods. *East Tenn. & G. R. Co. v. Nelson*, 1 *Coldw. (Tenn.)* 272.

A railroad company is bound to do all that is reasonable and to use all reasonable means, by increasing the number of its

* See also *post*, 140.

tracks and warehouses, to accommodate its increased business, and whether it has done this in a given case is a question for the jury; therefore an instruction that the company is not bound to provide additional tracks and warehouses to accommodate an unforeseen accumulation of freight, is error. *Cobb v. Illinois C. R. Co.*, 38 *Iowa* 601.

A railroad company is not relieved of liability to the penalty of \$25 per day, under N. C. act of 1875, ch. 240, for delay of shipment of goods beyond five days after receipt of same, by reason of its alleged inability to procure the necessary transportation on account of the large accumulation of freight. It is the duty of the company to provide a sufficient number of cars. *Keeler v. Wilmington & W. R. Co.*, 9 *Am. & Eng. R. Cas.* 165, 86 *N. Car.* 346.—FOLLOWING *Branch v. Wilmington & W. R. Co.*, 77 *N. Car.* 347.—REVIEWED IN *Whitehead v. Wilmington & W. R. Co.*, 9 *Am. & Eng. R. Cas.* 168, 87 *N. Car.* 255.

58. Discrimination between shippers.*—At common law it is the duty of a common carrier not to make or give any undue or unreasonable preference or advantage to or in favor of any person, and not to subject any person to undue or unreasonable prejudice or disadvantage in respect to terms, facilities, or accommodations; and the carrier will be liable for any damage arising from violation of this duty. *McDuffee v. Portland & R. R. Co.*, 52 *N. H.* 430, 2 *Am. Ry. Rep.* 261.—APPROVING *New England Exp. Co. v. Maine C. R. Co.*, 57 *Me.* 188; *Sandford v. Catawissa, W. & E. R. Co.*, 24 *Pa. St.* 378; *Chicago, B. & Q. R. Co. v. Parks*, 18 *Ill.* 460. REVIEWING *Garton v. Bristol & E. R. Co.*, 1 *B. & S.* 112.—DISAPPROVED IN *Johnson v. Pensacola & P. R. Co.*, 16 *Fla.* 623. QUOTED IN *DeMenacho v. Ward*, 23 *Blatchf. (U. S.)* 503.

If a company store freight received for transportation, on the ground that it has not facilities to forward it, and in the meantime receive and forward new and subsequent freight, it is liable to parties injured thereby. Nor is it any defence that the goods of plaintiff were shipped before other freights received sooner. *Great Western*

R. Co. v. Burns, 60 *Ill.* 284, 12 *Am. Ry. Rep.* 309.

A railroad company is liable for the frauds and negligence of its agents while acting in the course of their employment. It is liable where its agents, through bribery or from motives of partiality or oppression, gave out freight cars to be loaded with grain to persons not entitled to them, and thereby deprived plaintiff of the facilities of shipping his grain. *Galena & C. U. R. Co. v. Rae*, 18 *Ill.* 488.

59. Failure to furnish cars excuses offer to deliver.—While a carrier is not liable for failing to furnish cars or transport goods, unless offered at a usual or designated place for receiving freight, yet where the goods are placed at a station the refusal of the carrier upon demand to furnish cars relieves the owner from making any further delivery or offer of delivery. *Louisville, N. A. & C. R. Co. v. Flanagan*, 32 *Am. & Eng. R. Cas.* 532, 113 *Ind.* 488, 12 *West. Rep.* 190, 14 *N. E. Rep.* 370.—DISTINGUISHING *Chicago & G. W. R. Co. v. Dane*, 43 *N. Y.* 240. FOLLOWING *Louisville, N. A. & C. R. Co. v. Godman*, 104 *Ind.* 490.

When a railway company announces through its agent that it will not make a shipment at a time previously contracted for, a tender of the articles to be shipped at the time previously agreed on is thereby waived and rendered unnecessary to fix the liability of the company for resulting damages. *Texas Pac. R. Co. v. Nicholson*, 21 *Am. & Eng. R. Cas.* 133, 61 *Tex.* 491.

60. Procedure.—In an action against a company for a delay in furnishing cars, under *Wis. Rev. St. § 1798*, providing that "every railroad company shall, upon reasonable notice, when within its power to do so, furnish suitable cars for any person applying therefor," the complaint must allege that it was within the power of the company to furnish cars at the time demanded. *Richardson v. Chicago & N. W. R. Co.*, 18 *Am. & Eng. R. Cas.* 530, 61 *Wis.* 596, 21 *N. W. Rep.* 49.—QUOTED IN *Ayres v. Chicago & N. W. R. Co.*, 35 *Am. & Eng. R. Cas.* 679, 71 *Wis.* 372.

Where a carrier sued in an action on the case to enforce a common-law liability for not receiving grain for transportation is relieved from that liability, plaintiff cannot recover upon a contract to furnish cars and receive the grain. *Phelps v. Illinois C. R. Co.*, 94 *Ill.* 548.

* See also *post*, 142.

Failure of carrier to provide shipping facilities. One shipper crowding out another, see 32 *Am. & Eng. R. Cas.* 538, *abstr.*

III. DELIVERY TO COMPANY.

61. Receipt of carrier implies duty to carry.—As common carriers have no right to receive goods except for the purpose of carriage, a receipt for goods in the usual form implies an agreement to transport the goods to their destination if upon the carrier's line. *Landes v. Pacific R. Co.*, 50 Mo. 346, 3 Am. Ry. Rep. 288.

62. Actual delivery.*—There is no complete delivery of goods to a carrier unless they are placed under the control of the carrier with his knowledge and consent, and in a place where he may take charge of and care for them. *Grosvenor v. New York C. R. Co.*, 39 N. Y. 34, 5 Abb. Pr. N. S. 345.—DISTINGUISHED IN *Lake Shore & M. S. R. Co. v. Foster*, 104 Ind. 293, 54 Am. Rep. 319; *Rogers v. Long Island R. Co.*, 38 How. Pr. (N. Y.) 289.

There is no delivery and acceptance so as to create the relation of shipper and carrier so long as the owner retains the control of goods. Ordinarily it is necessary in delivering goods to a railroad that they be delivered at a station and to an authorized agent; but this rule may be changed by a custom or usage of the company, or by agreement between the parties, either as to the place or mode of delivery. *Truax v. Philadelphia, W. & B. R. Co.*, 3 *Houst. (Del.)* 233.

To subject a party to the responsibility of a carrier for goods lost it must appear that he received the goods and that they were delivered to and received by him as a carrier. *Southern Exp. Co. v. McVeigh*, 20 *Gratt. (Va.)* 264.

A delivery of goods to a carrier is a sufficient consideration for his undertaking to carry the goods safely. *McCauley v. Davidson*, 10 *Minn.* 418 (*Gil.* 335).

The assent of the carrier to the delivery of goods may be inferred from a course of dealing, without any express act or assent of the carrier or his agents in relation to the particular goods in question. *Moses v. Boston & M. R. Co.*, 24 *N. H.* 71.

The delivery of inanimate property on the platform of a railroad company, which is their usual place for receiving freight preparatory to shipment, and under an agreement previously made for transportation of

the same, is a sufficient delivery to charge the company with liability as a common carrier. *Bowie v. Baltimore & O. R. Co.*, 1 *MacArth. (D. C.)* 94.—REVIEWING *White v. Winnisimmet Co.*, 7 *Cush. (Mass.)* 155.

The placing of cotton on the wagon or car of a carrier, or near his boat or warehouse, is not a delivery unless some regulation of the carrier or custom existing between the carrier and the public makes it otherwise, or notice is given to the carrier or his agents or authorized servants. *Houston & T. C. R. Co. v. Hodde*, 42 *Tex.* 467.

63. Constructive delivery, generally.—In order to charge a common carrier for the loss of property it is necessary that it should be delivered to him or his agent for transportation. But such delivery may be either actual or constructive. *Merriam v. Hartford & N. H. R. Co.*, 20 *Conn.* 354.

Merely placing the goods in a position where he might easily have received them is not sufficient to charge him, if he did not know that it was intended that he should receive and ship the same. *O'Bannon v. Southern Exp. Co.*, 51 *Ala.* 481.

Delivery of goods to a common carrier for transportation, whether actual or constructive, being a bailment, involves exclusive possession in the carrier, and this involves a surrender of custody and control for the time being by the consignor. *Wilson v. Atlanta & C. R. Co.*, 40 *Am. & Eng. R. Cas.* 25, 82 *Ga.* 386, 9 *S. E. Rep.* 1076.

It is the duty of a company to receive freights of all persons according to its usage and custom, and where wheat is tendered for shipment, and the company is in the habit of receiving such freight by running its cars on side-tracks to private warehouses, a tender accordingly, or notice and readiness to deliver the wheat in that manner, is sufficient, and the company cannot require that the grain be delivered in a different manner or at a different place. *Galena & C. U. R. Co. v. Rae*, 18 *Ill.* 488.

Where goods were delivered in the usual manner for transportation by a common carrier, on his private dock and in his exclusive use for the purpose of receiving property to be transported by him—held, that such delivery was a good delivery to the carrier to render him liable for the loss of the goods, although neither he nor his agent was otherwise notified of such de-

* Delivery of goods to carrier, see note, 16 *AM. & ENG. R. CAS.* 101.

livery. *Merriam v. Hartford & N. H. R. Co.*, 20 Conn. 354.

An agreement to receive goods so delivered may be shown by proof of a constant practice and usage by the carrier to receive property left for transportation, at a particular place, without any express notice of such deposit. *Merriam v. Hartford & N. H. R. Co.*, 20 Conn. 354.

Where the defense to an action against a common carrier for the loss of goods was placed solely on the ground of a want of notice to him of delivery, and the court instructed the jury that the delivery, if in accordance with the usage claimed to be proved by the plaintiff, was sufficient, without submitting to them the question of fact whether such usage influenced the plaintiff in his conduct—*held*, that the charge was not exceptionable by reason of such omission. *Merriam v. Hartford & N. H. R. Co.*, 20 Conn. 354.

64. Depositing goods at roadside, or at other place.—If a common carrier agrees that property intended for transportation by him may be deposited at a particular place, without any express notice to him, such deposit merely would amount to constructive notice and a sufficient delivery. *Merriam v. Hartford & N. H. R. Co.*, 20 Conn. 354.—**DISTINGUISHING** *Buckman v. Levi*, 3 Campb. 414; *Packard v. Getman*, 6 Cow. (N. Y.) 757.

Proof of a constant and habitual practice and usage of a common carrier to receive goods for transportation when they are deposited for him in a particular place, without special notice of such deposit, is sufficient to show a public offer by the carrier to receive in that mode, and to constitute an agreement between the parties by which the goods, when so deposited, shall be considered as delivered to him, without any further notice. *Montgomery & E. R. Co. v. Kolb*, 18 Am. & Eng. R. Cas. 512, 73 Ala. 396, 49 Am. Rep. 54.

A deposit of cotton in a street along the side of a platform of a railroad depot, or in the railroad cotton-yard, for shipment, in pursuance of a custom or usage adopted or sanctioned by the depot agent, may amount to a delivery to the railroad company, although no receipt is given by the agent to the shipper and such usage or custom is contrary to the established regulations of the company known to the shipper, and no notice thereof is traced to the superinten-

dent or managing agent of the company. *Montgomery & E. R. Co. v. Kolb*, 18 Am. & Eng. R. Cas. 512, 73 Ala. 396, 49 Am. Rep. 54.

A place on a line of railroad where there is a switch, but neither agent, station, nor platform, and where shipments are made only by loading upon the cars, and where freight is delivered when parties are ready to receive the same, is not a depot, and a deposit of cotton near such switch does not constitute such a delivery to the company as to render it the latter liable as a common carrier. *Kansas City, M. & B. R. Co. v. Lilly (Miss)*, 45 Am. & Eng. R. Cas. 379, 8 So. Rep. 644.

An action cannot be maintained against a railroad company as a common carrier for the loss or destruction of goods deposited on the roadside at a place where there was no regular station and no agent, although a conductor of a freight train had promised to stop and take them. *Wells v. Wilmington & W. R. Co.*, 6 Jones (N. Car.) 47.

Roadside deposits, made to save the trouble of hauling to a regular depot, are at the risk of the owners until they are put on a freight car. *Wells v. Wilmington & W. R. Co.*, 6 Jones (N. Car.) 47.

In an action to recover damages for delay in transporting cord-wood which was piled along the line of the railroad company at various places, over a distance of two miles, the plaintiff cannot recover if the deposit along the line was made for the convenience of the owner in delivering it at some future time, and if the carrier did not assume possession and custody to the exclusion of the owner, there being otherwise no acceptance for shipment by the carrier. *Wilson v. Atlanta & C. R. Co.*, 40 Am. & Eng. R. Cas. 25, 82 Ga. 386, 9 S. E. Rep. 1076.

Placing fruit by the owner in a storehouse belonging to a railroad company at a station by permission of the company, for the shippers own convenience, is not a sufficient delivery to charge the company as a common carrier; neither is placing it on the ground near the station without its being taken in charge by the company's agent sufficient, unless it is placed there by his direction. *Truax v. Philadelphia, W. & B. R. Co.*, 3 Houst. (Del.) 233.

Proof that goods are left under a shed adjoining a freight depot and the freight agent informed that the owner would sub-

sequently call and give orders where the goods should be shipped to, is not in itself sufficient to show a delivery to the company, so as to charge it with a failure to ship. *Spade v. Hudson River R. Co.*, 16 *Barb. (N. Y.)* 383.

65. Sufficiency of evidence to show delivery—Burden of proof.*—Whether

freight has been delivered to a common carrier so as to fix his responsibility, is a mixed question of law and fact, and is usually shown by proving that the freight was sent to the place where it is the habit of the carrier to receive it, accompanied with notice to him that it is there for transportation. *Bowie v. Baltimore & O. R. Co.*, 1 *McArth. (D. C.)* 609.

It being in the power of a railroad company to ascertain whether or not it had received goods for shipment, it is presumed to have ascertained that fact; and its failure to deny—except by way of answer to the complaint—that the goods were so delivered is evidence of some weight that it had received them. *Union Pac. R. Co. v. Hepner*, 3 *Colo. App.* 313.

A lot of goods shipped together and embraced in the same way-bill, part of which were delivered to consignee and part not, raises the presumption that the entire lot was received by the company. *Union Pac. R. Co. v. Hepner*, 3 *Colo. App.* 313.

Evidence of a party that he delivered a parcel to a person he supposed to be a baggage-man, is not in itself sufficient to charge the carrier. He should show the delivery of the property to an officer of the company, or at least that it was delivered to a person acting as such, or that it was placed in the car or place of reception of such property. *Butler v. Hudson River R. Co.*, 3 *E. D. Smith (N. Y.)* 571.

In an action against a common carrier for the value of goods alleged to have been delivered to it for shipment, the burden of proving that the goods were received by the carrier for shipment is on the plaintiff, and, failing to establish such receipt, he cannot recover. *Louisville & N. R. Co. v. Echols*, 97 *Ala.* 556, 12 *So. Rep.* 304.

It is error to instruct the jury that the law presumes a delivery to the carrier at the place of shipment; and such error is not cured by an instruction given at the request

of the company, that the burden of proof is on the plaintiff. *Canfield v. Baltimore & O. R. Co.*, 14 *J. & S. (N. Y.)* 238.

An owner of goods having left them at a freight depot, without giving orders where they should be carried, and afterwards having taken away a portion of them, must show, before a referee or a jury can be called on to decide the value, what was retained. *Spade v. Hudson River R. Co.*, 16 *Barb. (N. Y.)* 383.

A company was sued to recover for a quantity of wool destroyed by fire while in its freight station awaiting transportation. The proof showed that the wool was delivered at the station to the company's agent, with each sack marked in the name of the consignees and their place of business in a city named, with the weights and numbers on the sacks. Previous shipments had been made by the same party, at the same place, during the same season, to the same consignees, and the agent who received the wool put it in a certain part of the station building, and pointed it out to another agent as being for the city to which it was marked. *Held*, sufficient evidence of a delivery and authority to ship to require its submission to the jury as to those questions. *Nichols v. Smith*, 115 *Mass.* 332.

66. Delivery to agents, generally.—

A delivery to a duly authorized agent of a common carrier, who is in the habit of receiving packages, is a sufficient delivery. *Waldron v. Chicago & N. W. R. Co.*, 1 *Dak.* 351, 1 *Dak. T.* 336, 46 *N. W. Rep.* 456.—*QUOTING Duff v. Budd*, 3 *B. & B.* 177.

Where goods are delivered in the cars for transportation, with the knowledge and consent of the carrier's local agent, the delivery and acceptance is complete, and renders the company liable as common carrier. *Truax v. Philadelphia, W. & B. R. Co.*, 3 *Houst. (Del.)* 233.

Delivery of goods to the agent of a carrier, knowing that he is the agent, is the same as delivery to the carrier; but if the shipper directs the agent not to ship the goods at once, the carrier will only be liable as warehouseman during the delay. *Rogers v. Wheeler*, 52 *N. Y.* 262, 4 *Am. Ry. Rep.* 411.—*DISTINGUISHING Barron v. Eldredge*, 100 *Mass.* 455.

Goods which are ready, at a place where the carrier may receive them, may be tendered for transportation to an agent authorized to receive or reject them, without

*Delivery of goods to carrier. Sufficiency of evidence, see 42 *AM. & ENG. R. CAS.* 424, *abstr.*

regard to the place where the tender is made. *Cobb v. Illinois C. R. Co.*, 38 Iowa 601.

Where the receiving-clerk of a railroad company is present, and sees other employes receive freight, and directs where it shall be put, there is a sufficient delivery to make the company liable as a common carrier, where the goods are destroyed by fire before being shipped, though the receiving-clerk has violated his duties in failing to tally and check the goods and return his account to a bookkeeper who was required to enter the goods upon a book before they could be receipted for and shipped. *Coyle v. Western R. Co.*, 47 Barb. (N. Y.) 152.—QUOTED IN *Wade v. Wheeler*, 3 Lans. (N. Y.) 201. REVIEWED IN *Ætna Ins. Co. v. Wheeler*, 49 N. Y. 616.

Plaintiff sued to recover the penalty prescribed by N. Car. Code, § 1967, for a failure to ship goods within five days, as required by the statute; and the defense was that the goods had never been delivered to the company. There was proof that the goods were delivered at the company's warehouse, and plaintiff, finding the regular agent and a third party, who seemed to be studying telegraphy, and assisting about the station, informed them he wished to ship the goods, whereupon such third party went with him, weighed the goods, and gave a bill of lading in the agent's presence, and signed it in his name. *Held*, that there was sufficient evidence to warrant the jury in finding that the goods had been delivered to the company. *Harrell v. Wilmington & W. R. Co.*, 42 Am. & Eng. R. Cas. 417, 106 N. Car. 258, 11 S. E. Rep. 286.

Plaintiff sent a box of goods to a railroad station, by an agent, to be shipped. The agent told a man who was working about the freight-sheds that he had a box to be sent to a certain place. The man said, "Bring it in and put it there," and the agent put the box where told, but took no receipt. Some days afterward plaintiff saw the man, who admitted receiving the box, but could not say what he did with it. The proofs did not show that the man was an agent of the railway. *Held*, that there was not sufficient proof of a delivery to the railway to support an action for the loss of the goods. *Young v. Canadian Pac. R. Co.*, 1 Man. 205.

67. Delivery must be to agents authorized to receive goods.—In order to

charge a common carrier as such, there must be a delivery of the article for transportation to the carrier, his servants, or agents; and if the delivery is made to a servant it must be to one who is intrusted to receive the goods, and not to a person engaged in other duties. *Blanchard v. Isaacs*, 3 Barb. (N. Y.) 388.—FOLLOWED IN *Grosvenor v. New York C. R. Co.*, 39 N. Y. 34, 5 Abb. Pr. N. S. 345.

The general authority of railroad freight agents is to receive goods for transportation upon the line of the road only; so where it is sought to charge a railroad with goods claimed to have been delivered to its agent some distance from the road, to be carried to the road and then shipped over it, plaintiff must show the authority of the agent to receive the goods at the place and in the manner claimed. *Missouri, C. & O. Co. v. Hannibal & St. J. R. Co.*, 35 Mo. 84.

Where the plaintiff delivered articles to a ticket master of a railroad company, to be carried by a passenger train, which he promised to label but did not, and it being neither his duty nor that of the company to do so—*held*, that as the articles had on them no owner's name, nor place of destination, and as his promise did not bind the company, they were not liable for the loss of the articles. *Elkins v. Boston & M. R. Co.*, 23 N. H. 275.—APPROVED IN *Porter v. Chicago, R. I. & P. R. Co.*, 41 Iowa 358. REVIEWED IN *Eaton v. Delaware, L. & W. R. Co.*, 57 N. Y. 382.

Where a person, not a passenger, delivered to the driver of a stage-coach a coat to be delivered in another place, and asked him to put it in the way-bill, but the driver refused, saying he had no authority to do so, but said he would deliver it to the next stage agent, and nothing was paid or offered the driver for carrying the coat, and there was no proof that the coat ever came to the possession of the proprietor of the stage or any of his agents—*held*, that there was no delivery of the coat to such proprietor, and that he was not responsible as a common carrier for the loss thereof. *Blanchard v. Isaacs*, 3 Barb. (N. Y.) 388.—REVIEWING *Middleton v. Fowler*, 1 Salk. 288.

68. Consigning goods to carrier's agent.*—There is nothing to prevent a person from consigning goods to one who

* See also *post*, 259.

is the agent of a railroad company, and after such agent receives the goods he holds them as the agent of the consignor, and not as the agent of the company. *Houston & T. C. R. Co. v. Hogg*, 2 Tex. Unrep. Cas. 544.

Where a package, delivered to common carriers for transportation, is addressed to the care of the agent and principal representative of the carrier at the point where the carriage is to terminate, it may be regarded as a direction to have the package stored at the place on the route where the carrier is in charge of the business, and does not import that upon receiving it the carrier's responsibility ceases and the agent becomes a consignee. *Russell v. Livingston*, 16 N. Y. 515; reversing 19 Barb. 346.—DISTINGUISHED IN *United States Exp. Co. v. Rush*, 24 Ind. 403.

69. Liability of carrier for acts or negligence of agents.—A carrier is liable for the negligence of his servants in taking goods on board his vessel in his absence, though he may have directed them not to receive goods—the plaintiff having no notice of such instructions. *Street v. Morrison*, 10 New Brun. 296.

It is the duty of a railroad company to keep itself informed of the manner in which its station agents conduct their agency, and their habit or usage in the matter of receiving and delivering freight, and it would be too detrimental to the public service to permit a company to escape responsibility for the consequences of a usage which its own agents had permitted to grow up and be acted upon, on the ground that it was not known to the superior officers of the company. *Montgomery & E. R. Co. v. Kolb*, 18 Am. & Eng. R. Cas. 512, 73 Ala. 396, 49 Am. Rep. 54.

70. Delivery as affecting rights of shipper and consignee.—Where parties sent an order for apples, to be shipped by rail immediately, and the company refused to receive them without a release, by the shipper, of liability for loss or damage during transit and their guaranty of freights, which they gave, and the apples never reached their destination—held, in a suit by the shippers against the purchasers, that the delivery to the carriers was a delivery to the purchasers, and that they were liable for the price. *Stafford v. Walter*, 67 Ill. 83.

Where one agrees to buy wheat, to be delivered on a car at a railroad station, to be paid for on delivery, and not to be removed

until paid for, and procures a car to be sent to the station, and, before any wheat is put into it represents to the railroad company that the car is loaded with wheat, and, on the strength of such representation obtains a bill of lading therefor; and afterwards the seller of the wheat, in pursuance of his contract, and without any knowledge of the fraudulent transaction of the buyer, puts the wheat into the car—he does not thereby deliver the wheat, but only puts it in a position to be delivered upon payment of the purchase-money, and, if not paid he has the right to remove it from the car, against the railroad company as well as against the purchaser. *Toledo, W. & W. R. Co. v. Gilman*, 81 Ill. 511.—DISTINGUISHING *Illinois C. R. Co. v. Smyser*, 38 Ill. 354.

71. Breach of contract to deliver to carrier.—Where defendant has contracted to deliver certain freights to a carrier, and has failed, the latter cannot go through empty, but must accept any other freights that are offered, whether at that or intermediate points; in which case, if he fails to get a full load, the measure of damages is the difference between what he might have made by carrying the stipulated freights and what he did make, or might have made on other freights. *Heilbronner v. Hancock*, 33 Tex. 714.

IV. LIABILITY FOR LOSS OR INJURY.

1. When Liability as Common Carrier Begins and When Terminates.

a. When Liability Begins.

72. Liability attaches upon delivery to carrier for carriage.—A common carrier is not liable for goods intended for transportation unless it appears that they were actually delivered to him or some one acting for him by authority; and his liability attaches only from the time the goods are accepted to be carried. *Grosvenor v. New York C. R. Co.*, 39 N. Y. 34, 5 Abb. Pr. N. S. 345.—FOLLOWING *Packard v. Getman*, 6 Cow. (N. Y.) 757; *Tower v. Utica & S. R. Co.*, 7 Hill (N. Y.) 47; *Blanchard v. Isaacs*, 3 Barb. (N. Y.) 388.—*St. Louis, A. & T. R. Co. v. Neel*, 56 Ark. 279, 19 S. W. Rep. 963. *Salinger v. Simmons*, 8 Abb. Pr. N. S. (N. Y.) 409.

The liability of the common carrier is fixed by accepting the property to be transported, and the acceptance is complete

whenever the property comes into his possession with his assent. The signing a bill of lading is only evidence of possession and may be shown by other testimony. *Illinois C. R. Co. v. Smyser*, 38 Ill. 354.

The relation of shipper and common carrier does not begin until the shipper surrenders control and the carrier assumes control over the goods. But such relation will be deemed to have commenced where the carrier accepts possession of the goods, though it be on a day when it had advertised that it would not receive goods of that kind. *Reed v. Philadelphia, W. & B. R. Co.*, 3 Houst. (Del.) 176.

A common carrier is not liable for a loss of goods unless they have been delivered to it for transportation and according to an established custom. The delivery must be to an employé of the company who was authorized to receive goods and not to one who was employed for other purposes. *Gleason v. Goodrich Transp. Co.*, 32 Wis. 85.—QUOTING *Tower v. Utica & S. R. Co.*, 7 Hill (N. Y.) 48.

73. Liability between time of receipt and of shipment.*—If a common carrier receives goods into his own warehouse for the accommodation of himself and his customers, so that the deposit there is a mere accessory to the carriage, and for the purpose of facilitating it, his liability as a common carrier begins with the receipt of the goods. *Clarke v. Needles*, 25 Pa. St. 338. *White v. Goodrich Transp. Co.*, 46 Wis. 493, 21 Am. Ry. Rep. 398.

The liability of railroad corporations as common carriers terminates when the goods transported are unladen from the cars and placed on the platform or in the depot in a position to be received and taken away by the owner; but a similar rule does not prevail before the goods are laden on the cars. In the reception of goods the company may be liable as a carrier between the time the goods are received for shipment and the time that they are laden on the cars. *Fitchburg & W. R. Co. v. Hanna*, 6 Gray (Mass.) 539.

74. When liability attaches from time of delivery to warehouseman.—A common carrier's liability for cotton begins upon its delivery to a warehouseman for compression for shipment, where by contract, express or implied, the carrier has

authorized the warehouseman to receive cotton for him at the warehouse and give receipts therefor to owners, and to insure it for the carrier's benefit, and to hold and compress it for shipment by the carrier, the latter giving out bills of lading to owners before taking actual custody of the cotton, upon presentation of the warehouseman's receipts. *Deming v. Merchants' C.-P. & S. Co.*, 90 Tenn. 306, 17 S. W. Rep. 89.

75. Delivery must be for immediate shipment.—If a common carrier receives goods into his own warehouse for the accommodation of himself and his customers, so that the deposit is a mere accessory to the carriage, and for the purpose of facilitating it, his liability as a carrier will commence with the receipt of the goods; but if the goods are not ready for immediate transportation until something further is done, or further directions are given by the owner, the carrier will be responsible only as a warehouseman. *Judson v. Western R. Co.*, 4 Allen (Mass.) 520. *Barron v. Eldredge*, 100 Mass. 455.—DISTINGUISHED IN *Rogers v. Wheeler*, 52 N. Y. 262.—*Basnight v. Atlantic & N. C. R. Co.*, 111 N. C. 592, 16 S. E. Rep. 323. *Pittsburgh, C. & St. L. R. Co. v. Barrett*, 3 Am. & Eng. R. Cas. 256, 36 Ohio St. 448.

If goods are delivered to a company for transportation without more, the liability of the carrier attaches, and this means an insurance, a responsibility for every loss, save only such as result from the acts of God or the public enemy; but if the delivery is for storage for a certain or indefinite time, the carrier becomes a mere depositary or bailee until the appointed time has expired. *Gregory v. Wabash R. Co.*, 46 Mo. App. 574.—REVIEWED IN *Goodbar v. Wabash R. Co.*, 53 Mo. App. 434.

Where goods are delivered to a carrier to be kept in his warehouse until further orders, the liability of carrier will not attach until further orders are given to ship; but when this is done, the responsibility of the carrier attaches at once. The test of whether he is acting as a warehouseman or as a common carrier is whether the goods have been delivered for the purpose of immediate transportation without further orders or not. *Wade v. Wheeler*, 3 Lans. (N. Y.) 201.—QUOTING *Coyl v. Western R. Corp.*, 47 Barb. (N. Y.) 152.

76. Liability may attach before or without a bill of lading.—Where a

* See also *post*, 95.

shipper of goods undertakes to hold a carrier to its common-law liability, it is not necessary to prove that goods were shipped under a written contract. In the absence of the latter the law implies an obligation upon the part of the carrier to safely carry and deliver the goods in good condition. *Rubens v. Ludgate Hill Steamship Co.*, 20 N. Y. Supp. 481.—QUOTING *Cragin v. New York C. R. Co.*, 51 N. Y. 63.—*Aiken v. Chicago, B. & Q. R. Co.*, 25 Am. & Eng. R. Cas. 377, 68 Iowa 363, 27 N. W. Rep. 281.

No bill of lading is necessary to create the liability of common carrier. The mere reception of goods for the purpose of transporting them is sufficient. So where goods are delivered to a carrier marked with the name and address of the consignee thereon, the common-law liability of the carrier attaches, though the shippers go away without any special contract for the transportation. *Shelton v. Merchants' Despatch Transp. Co.*, 4 J. & S. (N. Y.) 527.

A carrier is liable for damage to goods from the time they are received for shipment, and not from the date of the bill of lading only; and, if the evidence is conflicting, it is for the jury to determine whether or not the goods were actually received before the bill of lading issued. *St. Louis, A. & T. R. Co. v. Neel*, 55 Am. & Eng. R. Cas. 428, 56 Ark. 279, 19 S. W. Rep. 963.

Where a railroad company furnishes a car for the purpose of being loaded, and assents to the placing of goods therein, the goods are as much in the possession of the company as if they had been delivered in its warehouse for shipment, and the company is liable where they are thereafter destroyed by fire, though it occurs before a bill of lading has been signed. The liability of the carrier attaches from the time of accepting the goods for transportation. *Illinois C. R. Co. v. Smyser*, 38 Ill. 354.—DISTINGUISHED IN *Toledo, W. & W. R. Co. v. Gilvin*, 81 Ill. 511.

While the statute makes it the duty of common carriers to give receipts for merchandise delivered to them for transportation, their failure to do so cannot vary their liability if delivery is satisfactorily shown. *Montgomery & E. R. Co. v. Kolb*, 18 Am. & Eng. R. Cas. 512, 73 Ala. 396, 49 Am. Rep. 54.

77. Liability as to bill of lading under Texas statute.—Tex. Rev. St., art 277, provides that the duties and liabilities

of carriers shall be the same as at common law, except where otherwise provided. A clause in article 283 provides that the trip or voyage shall commence from the time of signing the bill of lading, and the liability of the carrier shall attach as at common law from and after such signing. Held, under these provisions, that the liability of a railroad company as a common carrier had not attached at all where cotton was delivered on its platform to be shipped but which was destroyed by fire before any bill of lading had been signed. If the company was liable at all it was as warehousemen. *Missouri Pac. R. Co. v. Douglas*, 16 Am. & Eng. R. Cas. 98, 2 Tex. App. (Civ. Cas.) 32.

If the company has a depot or warehouse for storing goods, it is responsible for all goods in its care, as warehouseman, until the commencement of the trip or voyage; and the trip or voyage is not to be considered as having commenced until the signing of the bill of lading. *Missouri Pac. R. Co. v. Douglas*, 16 Am. & Eng. R. Cas. 98, 2 Tex. App. (Civ. Cas.) 32.

A custom cannot change or modify the plain provisions of a statute. So it is not competent to prove a custom by which a carrier received goods on its platform, and became liable for the same without signing a bill of lading. *Missouri Pac. R. Co. v. Douglas*, 16 Am. & Eng. R. Cas. 98, 2 Tex. App. (Civ. Cas.) 32.

Liability as a common carrier does not attach until a bill of lading is given, or until the goods have been delivered to and received by the carrier. *Texas & P. R. Co. v. Wheat*, 2 Tex. App. (Civ. Cas.) 146.

Tex. Rev. St. art. 283, providing that the trip or voyage shall be commenced from the time of signing a bill of lading, and the liability of the common carrier shall attach, as at common law, from and after such signing, does not prevent such liability from attaching before a bill of lading is signed, as a bill of lading is not necessary to create the relation of carrier and shipper. *East Line & R. R. Co. v. Hall*, 64 Tex. 615.—REVIEWED IN *Gulf, C. & S. F. R. Co. v. Trawick*, 80 Tex. 270.

78. Liability where shipper loads or assists.—The liability of a common carrier of goods and merchandise attaches when the property passes, with his assent, into his possession, and is not affected by the kind of carriage in which it is trans-

ported, nor by the fact that the carriage is loaded by the owner. The common carrier is an insurer of the property carried, and the duty rests upon him to see that the packing and conveyance are such as to secure its safety. *Hannibal & St. J. R. Co. v. Swift*, 12 Wall. (U. S.) 262, 1 Am. Ry. Rep. 434.—*APPROVING Mallory v. Tioga R. Co.*, 39 Barb. (N. Y.) 488.

The duty of loading freight delivered to and accepted by a railroad company for transportation over its road rests primarily upon the company. *London & L. F. Ins. Co. v. Rome, W. & O. R. Co.*, 52 N. Y. S. R. 581, 68 Hun 598, 23 N. Y. Supp. 231.

Though the owner of property be charged with loading and unloading on the cars, if he does it negligently, still the carrier is not relieved from liability for an injury that results from the manner of moving the cars, if the injury be one which was likely to result. *Doan v. St. Louis, K. & N. W. R. Co.*, 38 Mo. App. 408.

Where a truckman is employed to deliver heavy freight at a railroad station, his liability ends and that of the company begins whenever the company's agents assume the care and custody of it, which is to be determined by the jury; and the fact that the truckman assists in loading it on a car will not continue the shipper's liability where the mode of loading is provided by the company and the loading is being superintended by the company's agent. *Merritt v. Old Colony & N. R. Co.*, 11 Allen (Mass.) 80.

The carrier's relation to heavy freight is not changed by a rule requiring shippers to load it upon the cars. So where lumber had been delivered for shipment, but was destroyed while waiting for cars, and where the owner had a hand ready to load it when the cars should be furnished, but where it was destroyed by fire, the question of whether the property had come to the possession of the company as a common carrier was properly submitted to the jury. *London & L. F. Ins. Co. v. Rome, W. & O. R. Co.*, 52 N. Y. S. R. 581, 68 Hun 598, 23 N. Y. Supp. 231.

Where it is a custom for shippers of peaches to furnish hands for the purpose of loading them for shipment, and the custom has been acquiesced in, a shipper cannot recover from the company the cost of hiring such hands. *Reed v. Philadelphia, W. & B. R. Co.*, 3 Houst. (Del.) 176.

Plaintiff's assignors, hay dealers, in accordance with a rule of defendant railroad company, were accustomed to unload their hay into defendant's freight-house and then to load it on the cars for transportation. Though frequently requested, defendant failed to furnish cars sufficient to transport the hay as fast as it was delivered, and it accumulated until the freight-house was full. The agent of plaintiff's assignors thereupon notified persons supplying them with hay not to deliver any more, as there was no room for it; but defendant's agent told them he would find room for it, and had the hay subsequently delivered placed in an open shed. Defendant had general orders to ship the hay as fast as it could be loaded on the cars. *Held*, that nothing further being required to prepare the hay for transportation, and no further orders being necessary to enable defendant to forward it, defendant's liability therefor, as soon as delivered at the freight-house, was that of a common carrier, and not that of a warehouseman. *London & L. F. Ins. Co. v. Rome, W. & O. R. Co.*, 23 N. Y. Supp. 231, 68 Hun. 598, 52 N. Y. S. R. 581.

b. When Liability Terminates.*

79. Generally.†—A common carrier who has performed his contract for the carriage of goods will still remain liable for their care and custody until he has delivered or offered to deliver them to the owner, or done what the law esteems equivalent to a delivery. *Smith v. Nashua & L. R. Co.*, 27 N. H. 86.—*DISTINGUISHED IN Francis v. Dubuque & S. C. R. Co.*, 25 Iowa 60. *REVIEWED IN Brown v. Grand Trunk R. Co.*, 54 N. H. 535.

The liability of a railroad company as a common carrier does not extend over the whole time of the existence of their lien for freight. *Spears v. Spartanburg, U. & C. R. Co.*, 11 So. Car. 158.

Evidence of the usage of business in the vicinity may be received to show when the liability of common carriers ceases, as well as when it commenced. *Farmers' & M. Bank v. Champlain Transp. Co.*, 16 Vt. 52.—*REVIEWING Gibson v. Culver*, 17 Wend. (N. Y.) 305.

* See also *post*, 333-361.

† When railroad's liability as common carrier ceases, see note, 21 AM. & ENG. R. CAS. 147; 16 *Id.* 272; 7 AM. REP. 591; 10 L. R. A. 417; 17 *Id.* 691.

When the duty of a common carrier as to the delivery of freight has ended, no custom or practice of his servants in assisting consignees in moving or loading their goods can affect the principal. *Jewell v. Grand Trunk R. Co.*, 55 N. H. 84, 11 Am. Ky. Rep. 496.

80. When carried to place of destination.—The responsibility of a carrier commences with the delivery of goods to it and continues until their delivery at their destination. *Southern Exp. Co. v. Newby*, 36 Ga. 635. *Central R. & B. Co. v. Anderson*, 58 Ga. 393, 16 Am. Ky. Rep. 85. *Southern Exp. Co. v. Everett*, 37 Ga. 688.

81. When carried to place of destination and unloaded.—The question when the transit is terminated, so that the duty and responsibility of the carrier as such is ended, is ordinarily one of fact, resting altogether in proof, to be determined by the jury, with reference to the mode of transportation, the terms of the contract, the ordinary and reasonable course of business at the place of destination, and other attending circumstances. In the absence of a special contract varying his liability, a common carrier stands in the situation of an insurer of the property entrusted to him, and is answerable for every loss or damage happening to it while in his custody as such carrier, by whatever cause occasioned, unless it be by the act of God or of the public enemy. And the duty assumed by him on a line of railway is to carry the goods safely to the place of destination and there discharge them on the platform or other suitable place, so as to put them in readiness for convenient delivery to the consignee or party entitled to them. *Blumenthal v. Brainerd*, 38 Vt. 402.—NOT FOLLOWED IN *Leavenworth, L. & G. R. Co. v. Maris*, 16 Kan. 333.

It is the duty of a carrier immediately upon the arrival of goods at their place of destination to deliver them to the owners or deposit them in a freight or warehouse, and such deposit constitutes a constructive delivery, and the carrier's responsibility as such is terminated and its liability as warehouseman immediately commences. *Sessions v. Western R. Corp.*, 16 Gray (Mass.) 132. *Gregg v. Illinois C. R. Co.*, 147 Ill. 550, 35 N. E. Rep. 343.

The liability of a common carrier by railway, as such, is not terminated until the goods are unloaded from the car and placed

in store. It does not terminate upon the arrival of the car containing the goods at the place of destination and the placing of such car inside the carrier's freight depot, and if the goods are destroyed by fire while so placed in the freight depot the carrier is liable. *Chicago & N. W. R. Co. v. Bensley*, 69 Ill. 630.—FOLLOWING *Porter v. Chicago & R. I. R. Co.*, 20 Ill. 407.

Defendants received 2000 bundles of hoop iron to be carried to London and delivered at their station there to the plaintiff. On its arrival, the plaintiffs having no agent in London and living in Montreal, defendants sent to them their advice notes of the arrival and unloaded the iron in their yard, where it remained for nearly three weeks and was injured by rust and exposure. *Held*, that the defendants were not liable. *Hall v. Grand Trunk R. Co.*, 34 U. C. Q. B. 517.—QUOTING *Inman v. Buffalo & L. H. R. Co.*, 7 U. C. C. P. 325.

Eighteen bundles were missing, and defendant's officers, not having checked the number taken out of the cars, could only say that if the 2000 bundles arrived there it was all placed in the yard and must have been stolen from there. *Held*, that the defendants were liable for the eighteen bundles. *Hall v. Grand Trunk R. Co.*, 34 U. C. Q. B. 517.

Defendants as common carriers undertook to carry goods of plaintiff. Upon arrival at their destination, the custom duties not having been paid and no one being in readiness to receive them, they were placed in a bonded warehouse and whilst there were destroyed by fire. *Held*, that defendants were not liable for their loss, and that their duty as common carriers was ended on the deposit of the goods in the bonded warehouse. *Inman v. Buffalo & L. H. R. Co.*, 7 U. C. C. P. 325.—FOLLOWING *O'Neill v. Great Western R. Co.*, 7 U. C. C. P. 203.

82. When notice to consignee of arrival is required.—The liability of a common carrier continues until notice is given to the consignee of the arrival of the goods, and for a reasonable time thereafter for removing them. *Solomon v. Philadelphia & N. Y. E. S. Co.*, 2 Daly (N. Y.) 104. *Dunham v. Boston & A. R. Co.*, 46 Hun (N. Y.) 245, 11 N. Y. S. R. 472.—APPROVING *Wood v. Milwaukee & St. P. R. Co.*, 27 Wis. 541; *Louisville, L. & G. R. Co. v. Maris*, 16

* See also *post*, 221-235.

Kan. 333. FOLLOWING *Faulkner v. Hart*, 82 N. Y. 413. NOT FOLLOWING *Norway Plains Co. v. Boston & M. R. Co.*, 1 Gray (Mass.) 263; *Rice v. Hart*, 118 Mass. 201; *Reed v. Richardson*, 98 Mass. 216.

It is not necessary that a carrier by railway should either give notice to the consignee of the arrival of the goods or make actual delivery of them, in order that the liability of the carrier shall cease after a reasonable time for the owner to attend and remove the goods. *Jeffersonville R. Co. v. Cleveland*, 2 Bush (Ky.) 468. *Spears v. Spartanburg, U. & C. R. Co.*, 11 So. Car. 158.

A common carrier remains liable until the actual delivery of the goods to the consignee, or, if the course of business is such that the delivery is not made to the consignee, his liability continues until notice of the arrival of the goods be given. It is competent, however, for the carrier to prove a uniform usage and course of business to leave the goods at the usual stopping-places in the towns to which the goods are directed without notice to the consignee; and if such usage be shown, of so long continuance, uniformity, and notoriety as to justify a jury in finding that it was known to the plaintiff, the carrier will be discharged. *Gibson v. Culver*, 17 Wend. (N. Y.) 305.—FOLLOWED IN *Schroeder v. Hudson River R. Co.*, 5 Duer (N. Y.) 55. REVIEWED IN *Rawson v. Holland*, 59 N. Y. 611; *Farmers' & M. Bank v. Champlain Transp. Co.*, 16 Vt. 52.

Under Texas Rev. St. art. 281, 282, providing that the liability of a common carrier shall continue until a delivery of the goods, unless he has used due diligence to notify the consignee, who does not take them away, a carrier by rail remains liable as a common carrier for goods left in its cars, even though a third person has agreed to unload them for the consignee, in the absence of any agreement to receive the goods on the cars. *Missouri Pac. R. Co. v. Haynes*, 37 Am. & Eng. R. Cas. 645, 72 Tex. 175, 10 S. W. Rep. 398.

Plaintiff delivered to defendants, as common carriers, goods to be conveyed from the Suspension Bridge to Toronto. Plaintiff on July 24, 1856, received a notice that "the undermentioned goods consigned to you have arrived here this day. We will thank you to send for them as soon as possible, as they remain here at your risk and expense." The goods were spring goods, which had arrived on April 5 and on March

11, and being unsalable at the time of receipt of notice, plaintiff refused to take them. *Held*, that the goods, being bonded goods, subject to duty, and defendants having conveyed them within a reasonable time to their places of destination, they were not bound to give notice of their arrival there and their duty as common carriers had ceased. *O'Neill v. Great Western R. Co.*, 7 U. C. C. P. 203.—APPROVING *Bowie v. Buffalo & B. & G. R. Co.*, 7 U. C. C. P. 191.—FOLLOWED IN *Inman v. Buffalo & L. H. R. Co.*, 7 U. C. C. P. 325.

83. When consignee entitled to reasonable time after arrival for removal.*—The extraordinary liability of a railroad company as carrier of goods extends, not merely to the termination of the actual transit of the goods to the place of destination, but also until the consignee has a reasonable time thereafter to inspect the goods and remove them in the usual hours of business and in the ordinary course of business. *Leavenworth, L. & G. R. Co. v. Maris*, 16 Kan. 333.—FOLLOWING *Moses v. Boston & M. R. Co.*, 32 N. H. 523. NOT FOLLOWING *Norway Plains Co. v. Boston & M. R. Co.*, 1 Gray (Mass.) 263; *McCarty v. New York & E. R. Co.*, 30 Pa. St. 253; *Francis v. Dubuque & S. C. R. Co.*, 25 Iowa 60; *Bansem v. Toledo, W. & W. R. Co.*, 25 Ind. 434; *Cincinnati & C. A. L. R. Co. v. McCool*, 26 Ind. 140; *Chicago & A. R. Co. v. Scott*, 42 Ill. 133; *Fenner v. Buffalo & S. L. R. Co.*, 44 N. Y. 505; *Zinn v. New Jersey Steamboat Co.*, 49 N. Y. 442; *Wood v. Crocker*, 18 Wis. 345; *Derosia v. Winona & St. P. R. Co.*, 18 Minn. 133; *Morris & E. R. Co. v. Ayers*, 29 N. J. L. 393; *Blumenthal v. Brainerd*, 38 Vt. 413; *McMillan v. Michigan S. & N. I. R. Co.*, 16 Mich. 79; *Jeffersonville R. Co. v. Cleveland*, 2 Bush (Ky.) 468; *Illiard v. Wilmington & W. R. Co.*, 6 Jones (N. Car.) 343.—APPROVED IN *Dunham v. Boston & A. R. Co.*, 46 Hun (N. Y.) 245, 11 N. Y. S. R. 472.

Where goods are carried to their place of destination within a reasonable time, in the absence of proof to the contrary, the presumption is that they are ready for delivery at any time after they are received at the depot; and where they are held a reasonable time the liability of the company as a common carrier ceases, and if they be burned in its warehouse it is not liable except as ware-

* See also *post*, 206.

housemen. *Lemke v. Chicago, M. & St. P. R. Co.*, 39 *Wis.* 449, 13 *Am. Ry. Rep.* 406.

Where freight is carried by rail and placed on a wharf where the owners are unable to get it for several days by reason of the freight being so placed that it is impossible to reach it, and where it is damaged by rain, the company is liable either as a common carrier or as warehouseman. If the jury believe that a reasonable time had not elapsed after notice to the consignees of its arrival, then the company is liable as a common carrier; and even if such reasonable time had elapsed, if negligence be proven, it is liable as warehouseman. *Goodwin v. Baltimore & O. R. Co.*, 58 *Barb. (N. Y.)* 195; *reversed in* 50 *N. Y.* 154.

84. Rules for determining what is a reasonable time.—When for the jury.—The question of whether a consignee has had a reasonable time in which to remove goods after their arrival at the place of destination is a question for the jury if there be a conflict of evidence as to the material facts, or when the facts are doubtful; but if the evidence is undisputed, or the facts few and simple, the question of what is a reasonable time may be decided by the court. *Lemke v. Chicago, M. & St. P. R. Co.*, 39 *Wis.* 449, 13 *Am. Ry. Rep.* 406.

What is a reasonable length of time is a question for the jury, to be determined from the facts of each case. This rule is in no way affected by a provision in the bill of lading that the goods are to be delivered at the company's depot. *Lamb v. Camden & A. R. & T. Co.*, 2 *Daly N. Y.* 454.—**QUALIFYING** *Roth v. Buffalo & S. L. R. Co.*, 34 *N. Y.* 553.

In determining what is a reasonable time, the fact that the goods did not arrive on time, and when the consignee expected them, must be considered, especially where it appears that he called frequently for the goods about the time they should have arrived, but received no information as to when they were expected. *Jeffersonville R. Co. v. Cleveland, 2 Bush (Ky.)* 468.

This reasonable time is not a time varying with the distance, convenience, or necessities of the consignee, but is such time as would enable a person living in the vicinity of the place of delivery, in the usual course of business and within the ordinary hours of business, to inspect the goods and take them away. *Leavenworth, L. & G. R. Co. v. Maris*, 16 *Kan.* 333. *Wood v. Crocker*, 18

Wis. 345.—**DISAPPROVING** *Norway Plains Co. v. Boston & M. R. Co.*, 1 *Gray (Mass.)* 263. **FOLLOWING** *Moses v. Boston & M. R. Co.*, 32 *N. H.* 523.—*Moses v. Boston & M. R. Co.*, 32 *N. H.* 523.—**NOT FOLLOWING** *Norway Plains Co. v. Boston & M. R. Co.*, 1 *Gray (Mass.)* 263.—**DISTINGUISHED IN** *Arthur v. St. Paul & D. R. Co.*, 32 *Am. & Eng. R. Cas.* 449, 38 *Minn.* 95, 35 *N. W. Rep.* 718. **EXPLAINED IN** *Chicago & N. W. R. Co. v. Sawyer*, 69 *Ill.* 285. **FOLLOWED IN** *Columbus & W. R. Co. v. Ludden*, 89 *Ala.* 612; *Leavenworth, L. & G. R. Co. v. Maris*, 16 *Kan.* 333; *Jeffersonville R. Co. v. Cleveland*, 2 *Bush (Ky.)* 468; *Wood v. Crocker*, 18 *Wis.* 345. **REVIEWED IN** *Hartmann v. Louisville & N. R. Co.*, 39 *Mo. App.* 88.

85. When for the court.—The common-law liability of carriers remains until the consignee has had a reasonable time in which to remove goods after their arrival at the place of destination. What is a reasonable time is a question of law where there is no dispute as to the facts; and if the case be submitted to the jury where there is no dispute as to the facts, and they find contrary to the law, it is ground for reversal. *Hedges v. Hudson River R. Co.*, 49 *N. Y.* 223, 3 *Am. Ry. Rep.* 346; *reversing* 6 *Robt. (N. Y.)* 119.—**FOLLOWING** *Fenner v. Buffalo & S. L. R. Co.*, 44 *N. Y.* 505; *Roth v. Buffalo & S. L. R. Co.*, 34 *N. Y.* 548.

86. What is a reasonable time.*—Where goods arrive at the place of destination on Saturday evening and are not destroyed by fire until about noon of the following Tuesday, the owner had a reasonable time in which to remove them, and the liability of the common carrier as such had ceased; and the fact that the owner had been absent from town during the time between their arrival and destruction, attending to other business, could not extend the time in which the company would be liable as common carrier. *Lemke v. Chicago, M. & St. P. R. Co.*, 39 *Wis.* 449, 13 *Am. Ry. Rep.* 406.

Goods arrived at their place of destination about dark on Saturday evening, and at the request of the consignee the car containing them was run onto a side-track until Monday morning, at which time the consignee opened the car and found some of his goods had been stolen. *Held*, that the carrier was liable. *Eagle v. White*, 6 *Whart. (Pa.)* 505.

*See also *post*, 207, 241.

Box of goods was started from New York for St. Albans on the 13th of September, and the plaintiff claimed that on the evening of the 17th the consignee called at the depot at St. Albans and found the box ready for him, but left it with the view of calling for it the next morning, but during the night the box was stolen. *Held*, that the defendant's duty as common carriers in respect to the box was fully performed, and the contract of carriage is to be treated as ended, unless it was reasonable under all the circumstances of the case that the party entitled to receive the box should not be called upon to accept a delivery of it until next morning. If the box remained in the depot in readiness for delivery for seven days after

arrival there, as the defendants' evidence to prove, and was stolen on the night of the 24th of September and not on the night of the 17th, as the plaintiffs claimed — *held*, that a reasonable time had been offered to the party entitled to receive the box to call for it and accept a delivery of it, and that the defendants' responsibility for the goods as common carrier ceased before the box was stolen. *Blumenfeld v. Brainerd*, 38 *Vt.* 402.

87. As between connecting carriers.—The rule of law that the carrier's liability is terminated and his liability as a warehouseman commences when goods have been carried to their destination and stored in a warehouse, does not apply where the goods are destined to a point beyond the initial carrier's line. *Hooper v. Chicago & N. W. R. Co.* 27 *Wis.* 81, 5 *Am. Ry. Rep.* 302.—APPLYING *Converse v. Norwich & N. Y. Transp. Co.*, 33 *Conn.* 166.—APPROVED IN *Bennitt v. Missouri Pac. R. Co.*, 46 *Mo. App.* 656.

Where a company receives goods for a point beyond its line, its common-law liability continues until the goods have been delivered to the next connecting carrier; and its liability is not that of a warehouseman while the goods are in its depot at the end of its route awaiting such delivery. *Michigan C. R. Co. v. Mineral Springs Mfg. Co.*, 16 *Wall. (U. S.)* 318.—APPROVED IN *Bennitt v. Missouri Pac. R. Co.*, 46 *Mo. App.* 656. DISTINGUISHED IN *Deming v. Norfolk & W. R. Co.*, 16 *Am. & Eng. R. Cas.* 632, 21 *Fed. Rep.* 25, 17 *Phila. (Pa.)* 540; *Michigan C. R. Co. v. Lantz*, 32 *Mich.*

502. FOLLOWED IN *Peterson v. Case*, 18 *Am. & Eng. R. Cas.* 578, 21 *Fed. Rep.* 885. QUOTED IN *Montgomery & E. R. Co. v. Culver*, 22 *Am. & Eng. R. Cas.* 411, 75 *Ala.* 587; *Savannah, F. & W. R. Co. v. Harris*, 26 *Fla.* 148; *Illinois C. R. Co. v. Mitchell*, 68 *Ill.* 471; *Ogdensburg & L. C. R. Co. v. Pratt*, 49 *How. Pr. (N. Y.)* 84.

88. When delivery to elevator company sufficient.—Where it is the custom of railroads in carrying grain to deliver it on behalf of the consignees to public warehouses or elevators, but where the elevator company does not give the consignee a receipt until the railroad company's freight bills have been paid, a delivery of grain to such elevator company is sufficient to terminate the liability of the railroad company as a common carrier, though the grain be destroyed in the elevator before any such receipt has been given. *Arthur v. St. Paul & D. R. Co.*, 32 *Am. & Eng. R. Cas.* 449, 38 *Minn.* 95, 35 *N. W. Rep.* 718.

89. Delivery of such freights as are usually unloaded from cars.—Where the carrier is not required or expected in the usual course of business to remove the freight from the car, as in the case of grain in bulk, coal, lumber, and the like, its liability as such will terminate by delivering the car in a safe and convenient position for unloading at the elevator, warehouse, or other place designated by the contract or required in the usual course of business; or, if no place of delivery is thus designated or required, on its side-track in the usual and customary place for unloading by consignees. *Gregg v. Illinois C. R. Co.*, 147 *Ill.* 550, 35 *N. E. Rep.* 343. *Pittsburgh, C. & St. L. R. Co. v. Nash*, 43 *Ind.* 423.

In the event of a failure of the consignee to designate a place of delivery, the contract of carriage will determine when the cars, in proper and safe condition, are placed at the usual and ordinary place of keeping or storing cars containing like freight upon the railroad company's tracks, and where they may be safely and conveniently unloaded. *Gregg v. Illinois C. R. Co.*, 147 *Ill.* 550, 35 *N. E. Rep.* 343.

Where several car-loads of corn are shipped to a point named, consigned to the shipper, and no warehouse or place of delivery is designated, and it is not shown that in the usual course of business the carrier is bound

* See also *post*, 208, 615-623.

2 *D. R. D.*—4.

* See also *post*, 255.

to deliver at any particular place, it will be presumed that the consignee is to receive the grain on the track. *Gregg v. Illinois C. R. Co.*, 147 Ill. 550, 35 N. E. Rep. 343.

Where the evidence shows that it has been the custom of a railroad company to deliver cars loaded with lumber for plaintiff at or near his place of business, it will be presumed that a contract of shipment was made with reference to such custom, and the company is bound to deliver the cars at the usual place; and where the local agent recognizes the company's obligation and agrees to run the cars to the usual place, but before he does so the lumber is destroyed by fire, the company is liable. *Pittsburgh, C. & St. L. R. Co. v. Nash*, 43 Ind. 423.—QUOTING *Farmers' & M. Bank v. Champlain Transp. Co.*, 23 Vt. 186. REVIEWING *Bansemmer v. Toledo & W. R. Co.*, 25 Ind. 434; *Cincinnati & C. A. L. R. Co. v. McCool*, 26 Ind. 140; *Adams Exp. Co. v. Darnell*, 31 Ind. 20.

90. Delivery at consignee's house or place of business.*—As a general rule common carriers by wagons are required to deliver the goods to the consignee at his house or place of business, and their liability as such continues until such delivery; but this rule does not apply to common carriers by vessels on the seas, lakes, or navigable rivers, or by railroads. *Bansemmer v. Toledo & W. R. Co.*, 25 Ind. 434.—REVIEWED IN *Pittsburgh, C. & St. L. R. Co. v. Nash*, 43 Ind. 423.

Usually the liability of the common carrier continues until the delivery of the goods, but a usage that is known to the parties, or so established and settled, or so uniformly acted on, or so notorious as to be presumed to be known to the parties, may be given in evidence, even where there is an express written contract to carry, showing that it was usual to deliver packages to the proprietor of a building to which the goods were addressed whenever the consignee himself is not found in at the time. *Stimson v. Jackson*, 58 N. H. 138.

91. Effect of failure to deliver on demand.†—Where a demand is made upon a railroad company acting as a common carrier for goods which have arrived at their destination, and there is a failure to deliver them without sufficient excuse, the

company continues to hold them at its own peril and not at that of the consignee. *Louisville & N. R. Co. v. McGuire*, 79 Ala. 395.

Where goods are shipped over a railroad, and are permitted by the owner to remain at the depot of their destination until the railroad company becomes liable therefor only as warehouseman, and afterwards such goods are demanded by the owner, and he is informed by the agent in charge of such depot that the goods have not yet arrived, and afterwards said depot, together with the goods, is burned up, the failure to deliver the goods on demand of the owner is such negligence as will render the company liable for the value of the goods. *Union Pac. R. Co. v. Moyer*, 35 Am. & Eng. R. Cas. 615, 40 Kan. 184, 19 Pac. Rep. 639. *Meyer v. Chicago & N. W. R. Co.*, 24 Wis. 566.

Especially if the jury believe that the loss was the direct result of such wrong information. *Jeffersonville R. Co. v. Cotton*, 29 Ind. 498.

Plaintiff delivered to defendants, as common carriers, foreign goods in bond at Buffalo, to be carried to Brantford, valued at £69 3s. A receipt was given April 26, 1854, for, amongst other things, a box at Buffalo for way-station. The contract, as alleged in the declaration, was to carry the goods from Buffalo to Brantford, and there to deposit and keep them for plaintiff for reward, etc. Frequently, before defendant's freight station was burnt at Brantford May 8 or 9, 1854, and afterwards, plaintiff applied for the goods, when the answer was, "not arrived." On May 9 the answer was "burnt up." It was admitted the goods arrived on May 5 or 6, and were stored in a bonded warehouse in defendant's control, and were burnt up on the 8th or 9th, and that no notice of arrival was sent to the consignee. Held, that defendant's liability as common carriers had ceased and that of warehousemen commenced, and that they were not liable under the contract, as alleged in the declaration, and were not bound to give notice. *Bowie v. Buffalo, B. & G. R. Co.*, 7 U. C. C. P. 191.—APPROVED IN *O'Neill v. Great Western R. Co.*, 7 U. C. C. P. 203. DISTINGUISHED IN *McCrosson v. Grand Trunk R. Co.*, 23 U. C. C. P. 107.

92. When demand is not necessary.*—A demand is excused when it is

* See also post, 215, 256.

† See also post, 350.

* See also post, 243, 307, 701.

shown that it could not have been complied with and the obligation to make it has ceased, and when the act is proved to be impossible. So where a railroad company undertakes to carry goods to a point beyond its line it cannot excuse a failure to do so on the ground that the owner never demanded the goods at the place of destination, where it clearly appears that the goods never were carried to their destination and the company had no office or agent there from whom a demand could have been made. *Schroeder v. Hudson River R. Co.*, 5 *Duer* (N. Y.) 55.

93. Carriers by water—Delivery on wharf.*—By the contract of affreightment of goods from port to port the carrier stipulates not only for their safe transportation to the place of destination, but also for their delivery on arrival to the consignee. It is not enough if he carry the goods in safety, but he must, in due time and without demand upon him, deliver them, or do that which in contemplation of law is tantamount thereto, before he is discharged from his responsibility as carrier. *Morgan v. Dibble*, 29 *Tex.* 107.

When a common carrier by steamboat or other vessel, in the due and common course of his business, delivers his goods or parcels into the custody of the wharfinger upon the wharf, the transit is ended and his responsibility as carrier ceases, unless he have, either expressly or by fair implication, undertaken to do something more; and the question as to the time and place when the duty of the carrier ends is one of contract, to be determined by the jury from a consideration of all that was said by either party at the time of the delivery and acceptance of the parcels by the carrier, the course of the business, the practice of the carrier, and all other attending circumstances, the same as any other contract, in order to determine the intention of the parties. *Farmers' & M. Bank v. Champlain Transp. Co.*, 23 *Vt.* 186.—*APPROVING* *Garside v. Trent & M. Nav. Co.*, 4 *T. R.* 581. *REVIEWING* *Weed v. Saratoga & S. R. Co.*, 19 *Wend.* (N. Y.) 534.—*DISTINGUISHING* IN *Johnson v. Concord R. Corp.*, 46 *N. H.* 213. *EXPLAINED* IN *Packard v. Taylor*, 35 *Ark.* 402, 37 *Am. Rep.* 37. *QUOTED* IN *Pittsburgh, C. & St. L. R. Co. v. Nash*, 43 *Ind.* 423; *Nashua Lock Co. v. Worcester & N. R. Co.*, 48 *N. H.* 339; *Gray*

v. Jackson, 51 *N. H.* 9; *Ouimit v. Henshaw*, 35 *Vt.* 605. *REFERRED TO* IN *Darling v. Boston & W. R. Co.*, 11 *Allen* (Mass.) 295.

It is competent for the shipper and carrier to contract for a delivery at a certain place other than the consignee's place of business. So a contract entered into between a shipper and a vessel to deliver on a dock is good. *Davis v. Chautauque Lake S. S. Assembly*, 2 *N. Y. S. R.* 365, 41 *Hun* 638.

A carrier by water, while goods are on a wharf, is still in charge of them as carrier and responsible in this capacity for their safety, and if there is either negligence or want of due foresight and prudence in placing them there, under the circumstances, he is responsible for their loss, although it was subsequently occasioned by the immediate "act of God;" unless it clearly appears that they would have been destroyed by the same peril if there had been no failure of duty by the carrier. The question of diligence is for the jury. *Morgan v. Dibble*, 29 *Tex.* 107.—*QUOTING* *Kohn v. Packard*, 3 *La.* 227.

A mere deposit of goods by a steamship on its own wharf, without acceptance by the consignee, not separated and set apart from the residue of the cargo, and without a reasonable opportunity and time for their removal, does not discharge the carriers, and the goods remain at their risk. *Warner v. Steamship Illinois*, 17 *Phila. (Pa.)* 549.—*QUOTING* *Redmond v. Liverpool, N. Y. & P. Steamship Co.*, 46 *N. Y.* 584.

94. Return of cars belonging to connecting carrier.—Where railroad cars containing freight are shipped over a connecting line of railroad to a certain point, to be delivered to the consignee of the goods to be unloaded, after which the carrier is again to take the cars to its yards for storage and keep them there until called for, the liability of the carrier as insurer of the cars will be suspended during the time of such stoppage, during which it has no control over the cars, and will not again attach until after the cars have been unloaded and made ready for removal to the place of storage. *Peoria & P. U. R. Co. v. United States Rolling Stock Co.*, 136 *Ill.* 643, 27 *N. E. Rep.* 59; *reversing* 28 *Ill. App.* 79.—*DISTINGUISHING* *Peoria & P. U. R. Co. v. Chicago, R. I. & P. R. Co.*, 109 *Ill.* 135.—*East St. Louis Con. R. Co. v. Wabash, St. L. & P. R. Co.*, 32 *Am. & Eng. R. Cas.* 522, 123

* See also *post*, 217, 253.

Ill. 594, 15 *N. E. Rep.* 45, 12 *West. Rep.* 834; reversing 24 *Ill. App.* 279.—EXPLAINING *Peoria & P. U. R. Co. v. Chicago, R. I. & P. R. Co.*, 109 *Ill.* 135.—COMMENTED ON IN *Peoria & P. U. R. Co. v. United States Rolling Stock Co.*, 136 *Ill.* 643.

Where cars loaded with goods are carried to the place of destination and are there, by direction of the shipper, placed upon the side-track of the consignee for the purpose of being unloaded, and the cars after being unloaded are to be taken by the carrier to the storage-yard, and they are burned on such side-track before they are removed; and it is not shown whether they were unloaded before their destruction or that the carrier had again taken them in charge for removal and storage, the carrier will not be liable, as such, for their loss. *Peoria & P. U. R. Co. v. United States Rolling Stock Co.*, 136 *Ill.* 643, 27 *N. E. Rep.* 59; reversing 28 *Ill. App.* 79.

2. Loss or Injury Prior to Transit.

95. When liability attaches.*—

Where goods are delivered to a common carrier for transportation and are placed in the depot or warehouse, with nothing further to be done by the shipper, and they are burned before being shipped, the company will be liable as a common carrier and not as a warehouseman. *Grand Tower M. & T. Co. v. Ullman*, 89 *Ill.* 244.

The liability of a railway company for goods destroyed while in its possession depends on whether or not it has accepted them, and not on whether all has been done that ought to precede acceptance. If a carrier takes control of goods and puts its agents to preparing them for shipment, it has accepted them. *East Line & R. R. R. Co. v. Hall*, 64 *Tex.* 615.

A railroad company is not liable as common carriers for property deposited in its warehouse to await orders from the owner for its transportation; and the fact that the company is prohibited by its charter from charging as warehouseman will not create such liability, but will only make it liable as gratuitous bailee. *Michigan S. & N. I. R. Co. v. Shurtz*, 7 *Mich.* 515.—DISTINGUISHED IN *Cleveland & T. R. Co. v. Perkins*, 17 *Mich.* 296.

In an action against a railroad company for failure to deliver cotton received by it

for transportation, etc., it is not liable for cotton stolen or lost after a deposit on a platform at a station-house, unless it be shown that the railroad company or its agents had notice of the deposit and received the cotton for transportation as a common carrier. *Southwestern R. Co. v. Webb*, 48 *Ala.* 585.

In such an action it is a question of fact to be determined (under appropriate instructions from the court) by the jury from all the evidence, whether or not there was a delivery to the carrier for transportation. *Southwestern R. Co. v. Webb*, 48 *Ala.* 585.

Permitting the cotton to remain where it was burned, after bills of lading were issued therefor, would not render the company liable where it had not actually assumed possession or control of the same. *Martin v. St. Louis, I. M. & S. R. Co.*, 56 *Am. & Eng. R. Cas.* 112, 55 *Ark.* 510, 19 *S. W. Rep.* 314.

A part of a lot of goods had been delivered to the carrier and were burned before shipment. The owner gave evidence tending to show that he had "authorized and directed" the shipment of goods as delivered, while the company claimed that they were held for the convenience of the owner to await delivery of the whole lot before shipping, and therefore it was only liable as warehouseman. *Held*, that it was error to instruct the jury that the company was liable as common carriers, if it had either authority or direction to ship the goods as delivered, as under plaintiff's contention both authority and direction to ship as delivered was necessary to charge the company as common carriers. *Watts v. Boston & L. R. Corp.*, 106 *Mass.* 466, 8 *Am. Ry. Rep.* 50.—QUOTED IN *Goodbar v. Wabash R. Co.*, 53 *Mo. App.* 434.

96. When loss is due to negligence.*—A complaint which shows that plaintiff delivered cotton to defendant company which was left in its custody by virtue of a contract of shipment, and that while in its custody it was destroyed by fire, through the negligence of the company in allowing boys to play on the platform where the goods lay, with lighted pipes, states a good cause of action; and no bill of lading is necessary to render the company liable for such negligent loss. *Martin v. Ft. Worth & D. C. R. Co.*, 3 *Tex. Civ. App.* 556, 22 *S. W. Rep.* 1007.

* Liability of carrier for loss of goods, see note, 10 *L. R. A.* 417.

* See also *ante*, 73.

Where felony is set up as an answer to a defense by a carrier in an action for the loss of goods, the question of negligence becomes immaterial. *Great Northern R. Co. v. Rimell*, 18 C. B. 575.

Where a railroad agent received goods into the company's warehouse at a country station, which was an ordinary wooden house which he kept fastened in the nighttime with iron locks, bolts, and bars, and also in the day-time in the same manner, it appearing that the agent resided two hundred yards from the warehouse—*held*, to be ordinary care, and that the company was not liable for the loss of the goods by theft. *Neal v. Wilmington & W. R. Co.*, 8 Jones (V. Car.) 482.

Where a person applied to a railroad company for the transportation of cotton and was informed that it should be transported within three days, and his offer to hire hands to assist in the delivery of the cotton was refused—*held*, that it was gross negligence in the company to suffer the cotton to remain undelivered for several months until the larger portion had rotted by exposure to the weather, and that they were liable. *Glenn v. Charlotte & S. C. R. Co.*, 63 N. Car. 510.

A railroad company was sued for a loss of flour and grain which was burned in its sheds and grain elevator after delivery to the company and before shipment. The evidence showed that the shed was of wood and not slated, and only a few feet from the track, and that it caught fire from sparks from a wood-burning shifting engine; that the elevator where the grain was destroyed was on a wharf some 250 feet from the sheds, most of the intervening space being water; and that the fire occurred in July, when it was very dry. *Held*, sufficient evidence to show negligence in the burning of the flour in the shed, but not as to the grain in the elevator. *Barron v. Eldredge*, 100 Mass. 455.

97. Proximate cause.—A railroad company which agrees with a compress company to transport to the compress all cotton received at a certain place is not liable to the owners or insurers of such cotton for the destruction by fire of a lot of cotton which had accumulated during the delay of the railroad company to furnish transportation, such delay not being the direct and proximate cause of the loss by fire. *St. Louis, I. M. & S. R. Co. v. Commercial U.*

Ins. Co., 49 Am. & Eng. R. Cas. 137, 139 U. S. 223, 11 Sup. Ct. Rep. 554.

Where the proximate cause of damage to goods was exposure to the elements and not the violation of a contract, an action cannot be maintained against a railroad company for delay in forwarding the freight, where such delay was alleged to be the cause of the actionable injury. *St. Louis, A. & T. R. Co. v. Neel*, 55 Am. & Eng. R. Cas. 428, 56 Ark. 279, 19 S. W. Rep. 963.

Defendant railroad company contracted with a compress company to furnish cars and carry cotton from a place of storage to the compress. Owing to a press of business cars were not furnished in sufficient numbers to move the cotton, and by reason of the delay a considerable quantity accumulated about the sheds and grounds of the compress company, which was consumed by fire. The fire extended to and consumed also plaintiff's warehouse. *Held*, that the failure of the railroad to furnish sufficient transportation for the cotton was not the direct and proximate cause of the fire, and did not render the company liable. *Martin v. St. Louis, I. M. & S. R. Co.*, 56 Am. & Eng. R. Cas. 112, 55 Ark. 510, 19 S. W. Rep. 314.

In an action for the destruction by fire of cotton placed alongside a railway track awaiting shipment, the court instructed the jury that, if the shipper contracted with defendant to furnish a car for the shipment of such cotton, and the company failed to comply with such contract, and by reason of such failure the cotton was damaged by fire, the verdict should be for the plaintiff. *Held* error, there being no evidence connecting the supposed breach of contract to supply the car with the fire from which the damage resulted. *Kansas City, M. & B. R. Co. v. Lilly*, (Miss.) 45 Am. & Eng. R. Cas. 379, 8 So. Rep. 644.

Goods were left with a steamboat company for shipment, but no particular vessel was designated. While on the wharf they were burned, but without negligence on the part of the carrier. *Held*, that a delay in shipping was not the proximate cause of the loss, and would not make the company liable, even though there may have been negligence as to the delay. *Scott v. Baltimore, C. & R. Steamboat Co.*, 19 Fed. Rep. 56.

98. Liability where goods are lost from car while being loaded.—Where a purchaser of goods orders them by the

car-load, and certain of the goods are lost from a car while being loaded and before the car is full, the title to the goods lost is in the seller and not in the purchaser, and the former may maintain an action for the loss. *Gilbert v. New York C. & H. R. R. Co.*, 6 T. & C. (N. Y.) 662, 4 Hun 378.

Where goods are ordered to be shipped by the car-load, and some of them are lost from the car while they are being loaded, a demand upon the carrier is not necessary before commencing an action by the seller to recover their value. *Gilbert v. New York C. & H. R. R. Co.*, 4 Hun (N. Y.) 378.

99. Where shipment is delayed to suit carrier's convenience.—Where a company receives goods and holds them for its own convenience until enough are made up for a load, it is liable for a loss that occurs by fire while being so held, where they might have been forwarded by another route, although nothing was said as to the route by which they were to be sent. *Lawrence v. Winona & St. P. R. Co.*, 15 Minn. 390 (Gil. 313).—FOLLOWING *Garside v. Trent & M. Nav. Co.*, 4 T. R. 581.—QUOTED IN *Irish v. Milwaukee & St. P. R. Co.*, 19 Minn. 376 (Gil. 323). REVIEWED IN *Wood v. Milwaukee & St. P. R. Co.*, 27 Wis. 541.

100. Where shipment is delayed to allow creditors to attach.*—Where a railroad receives goods consigned to one who has made advances thereon, it is liable to the consignee where, through connivance with the shipper, it holds the goods until they can be attached by the shipper's creditors. *Robinson v. Memphis & C. R. Co.*, 16 Fed. Rep. 57.—APPLYING *Bliven v. Hudson River R. Co.*, 36 N. Y. 403. DISTINGUISHING *Furman v. Chicago, R. I. & P. R. Co.*, 57 Iowa 42; *McAllister v. Chicago R. I. & P. R. Co.*, 74 Mo. 531; *Burton v. Wilkinson*, 18 Vt. 188; *Van Winckle v. United States M. Steamship Co.*, 37 Barb. (N. Y.) 122.—FOLLOWED IN *The M. M. Chase*, 37 Fed. Rep. 708.

101. Where freights are injured in loading.—Plaintiff delivered a planing-machine to defendants, a railroad, to be carried between two stations. In placing it on board a car for that purpose defendant's servants injured the machine by negligence or want of proper appliances. Held, that defendants were liable, notwithstanding a spe-

cial contract that the machinery was to be carried at the owner's risk. *Whitman v. Western Counties R. Co.*, 17 Nov. Sc. 405.—APPROVING *Grand Trunk R. Co. v. Fitzgerald*, 5 Can. Sup. Ct. 204.

The limitations of the Nova Scotia Railway Act of 1880, § 26, of "suits for indemnity for any damage or injury sustained by reason of the railway," have no application to a suit to recover damages for a neglect to provide proper appliances, or to use proper care, in placing heavy freights on the cars. *Whitman v. Western Counties R. Co.*, 17 Nov. Sc. 405.

102. Where cotton is lost while awaiting shipment.—The owner of certain cotton placed the same on a platform built by and belonging to a municipality, which platform was alongside of a side-track of a railroad company. The cotton was to be shipped over the company's line, but they had not received or receipted for the same nor taken it under their control. While unguarded by any one said cotton took fire either from the sparks of engines on the company's side-track, from the stumps of cigars thrown near it by loiterers, or from some other cause unknown. The cotton being destroyed and suit being brought against the railroad company to recover its value—held, that the defendant was not liable as a common carrier therefor. *Brown v. Atlanta & C. A. L. R. Co.*, 13 Am. & Eng. R. Cas. 479, 19 So. Car. 39.

The court charged that the defendant could not be made liable on a mere probability that the fire was caused by its engines, but only on a preponderance of proof that it was so caused, and then only upon proof of negligence on the part of the defendant or its servants, and that the probability must amount to proof. Held, that this part of the charge, taken in connection with the rest of it, was not open to the objection that it led the jury to infer that positive, as distinguished from circumstantial, evidence that the fire was caused by the sparks from defendant's engines was necessary to render defendant liable in any event. *Brown v. Atlanta & C. A. L. R. Co.*, 13 Am. & Eng. R. Cas. 479, 19 So. Car. 39.

The court charged that if the town council erected and controlled the platform and allowed persons to place cotton thereon, knowing its liability to destruction by fire, and did not take the necessary precautions to prevent it, this constituted the interven-

* See also *post*, 161, 295, 302.

tion of an independent responsible agent, and the defendant was not liable except for the negligent destruction of the cotton. *Held*, that this was not error. *Brown v. Atlanta & C. A. L. R. Co.*, 13 *Am. & Eng. R. Cas.* 479, 19 *So. Car.* 39.

The injury being proved, the onus was upon the company to disprove negligence, which they might do by showing that they used the most approved mechanical contrivances to prevent the escape of fire, and that on the day in question their engines were managed with due care and skill. *Brown v. Atlanta & C. A. L. R. Co.*, 13 *Am. & Eng. R. Cas.* 479, 19 *So. Car.* 39.

The company was not responsible for the consequences resulting from such incidental use of their locomotives on the branch road as might produce inevitable accident, provided it appeared that such consequences had resulted notwithstanding the exercise of proper care and diligence. *Brown v. Atlanta & C. A. L. R. Co.*, 13 *Am. & Eng. R. Cas.* 479, 19 *So. Car.* 39.

103. Liability for failure to move cotton from compress warehouse.—

A railroad company made a contract with a compressing company by which it agreed to remove cotton from the warehouse of the compressing company, where it was received, to the mill. It was its custom to accept the warehouse receipts of the compressing company and issue bills of lading thereon, reserving the right to have the cotton compressed. The railroad company neglected to remove the cotton from the warehouse, in consequence of which it was stored in a public street. *Held*, in an action for the destruction of the cotton, that it was liable in damages for the nuisance resulting from the accumulation of the cotton in the street because it assisted in the creation or continuance thereof, and also because, as a common carrier, it permitted the accumulation of dangerous material which it was bound to transport without delay. *Marine Ins. Co. v. St. Louis, I. M. & S. R. Co.*, 43 *Am. & Eng. R. Cas.* 79, 41 *Fed. Rep.* 643.

Persons delivering the cotton at the warehouse after it had been filled were not guilty of contributory negligence defeating a recovery against the railroad company. *Marine Ins. Co. v. St. Louis, I. M. & S. R. Co.*, 43 *Am. & Eng. R. Cas.* 79, 41 *Fed. Rep.* 643.

Delay in transportation, resulting in the

destruction of freight by fire in consequence of its accumulation and storage in such a manner as to create a nuisance, cannot be justified by a railroad company which has issued bills of lading for the goods, on the ground of an unexpected press of business. *Marine Ins. Co. v. St. Louis, I. M. & S. R. Co.*, 43 *Am. & Eng. R. Cas.* 79, 41 *Fed. Rep.* 643.

A railroad company is not estopped from denying that it had assumed possession of cotton for which it had issued bills of lading, by reason of the Ark. act of March 15, 1887, prohibiting warehousemen and carriers from issuing receipts or bills of lading except for goods actually received into their possession. The object of the act does not extend beyond the protection of holders of such receipts or bills of lading. *Martin v. St. Louis, I. M. & S. R. Co.*, 56 *Am. & Eng. R. Cas.* 112, 55 *Ark.* 510, 19 *S. W. Rep.* 314.

3. Loss or Injury During Transit.

a. Loss or Injury, Generally.

104. Carrier is insurer except as to the act of God or the public enemy.*—The undertaking of the carrier to transport the goods to a particular place necessarily includes the duty of delivering them there in safety. *De Mott v. Laraway*, 14 *Wend. (N. Y.)* 225. *Burritt v. Rench*, 4 *McLean (U. S.)* 325. *Pendall v. Rench*, 4 *McLean (U. S.)* 259.

Where a carrier accepts goods without any contract limiting its liability it is liable for any injury or loss that occurs, whether it be from its own negligence or not, except such as result from the act of God or the public enemy. *South & N. Ala. R. Co. v. Wood*, 9 *Am. & Eng. R. Cas.* 419, 66 *Ala.* 167, 41 *Am. Rep.* 749. *Day v. Ridley*, 16 *Vi.* 48. *Coll v. M'Mehen*, 6 *Johns. (N. Y.)* 160.

A common carrier is not liable for injuries to goods while in his possession when caused by an act of God which could not be anticipated and prevented by the exercise of reasonable diligence; as where the injury is caused by an unprecedented flood in the river, raising it three feet higher than ever known before, and so suddenly, during the night that the railroad track crossing it was submerged by morning, and the water entered the freight car

* See also *ante*, 12; *post*, 289.

in which the goods were before they could be reached and rescued. *Smith v. Western R. Co.*, 49 *Am. & Eng. R. Cas.* 108, 91 *Ala.* 455, 8 *So. Rep.* 754.

A railroad company is not liable for damages occasioned by injury to freight in transportation which is caused solely and entirely by an earthquake, and without fault or negligence on the part of the company. *Slater v. South Carolina R. Co.*, 35 *Am. & Eng. R. Cas.* 625, 29 *So. Car.* 96, 6 *S. E. Rep.* 936.—APPLYING *Wallingford v. Columbia & G. R. Co.*, 26 *So. Car.* 258.

Where a carrier agrees to transport and deliver goods within a specified time he is liable for a failure to do so, unless it appears that he was prevented by the act of God or the public enemy, or unless the delay was from some cause which was excepted from the carrier's liability in the bill of lading. *Broadwell v. Butler*, 6 *McLean (U. S.)* 296.

Inevitable accident will not excuse a carrier from a failure to transport perishable goods within the time that it has entered into a special contract to do so. *Reed v. Philadelphia, W. & B. R. Co.*, 3 *Houst. (Del.)* 176.

105. Liability where carrier's negligence contributes to the loss.*—A common carrier is relieved from absolute liability for an injury to goods by showing that it was occasioned by the act of God or public enemies; but to avail himself of such exemption from liability he must show that he himself was free from fault; and when the injury is occasioned by such causes, if his own fault contributes thereto, he is not relieved from liability. *Heyl v. Inman Steamship Co.*, 14 *Hun (N. Y.)* 564. *Michaels v. New York C. R. Co.*, 30 *N. Y.* 564.—APPROVED IN *Pruitt v. Hannibal & St. J. R. Co.*, 62 *Mo.* 527.

Where a carrier receives goods for transportation and negligently delays shipping until they are injured by an unusual flood, to avoid liability on the ground that the injury was caused by the act of God the carrier must show that he was himself free from fault or negligence. *Read v. Spaulding*, 30 *N. Y.* 630; *affirming* 5 *Bosw.* 395.—REVIEWING *Denny v. New York C. R. Co.*, 13 *Gray (Mass.)* 481.—APPROVED IN *Pruitt v. Hannibal & St. J. R. Co.*, 62 *Mo.* 527. FOLLOWED IN *Condit v. Grand Trunk R. Co.*, 54 *N. Y.* 500. REVIEWED IN

Lamont v. Nashville & C. R. Co., 9 *Heisk. (Tenn.)* 58.

In case of injury to goods, the act of God cannot be set up as a defense by the carrier if guilty of previous misconduct or neglect by which the exposure resulting in the loss was occasioned. *Armentrout v. St. Louis, K. C. & N. R. Co.*, 1 *Mo. App.* 158.

106. Necessary evidence to prima-facie charge the carrier.*—Ordinarily the shipper of goods makes out a *prima-facie* case by showing that he delivered the goods to the carrier in good order and that they were in bad condition or damaged when delivered to the consignee; and the carrier may then show that the injury was caused by the act of God or the public enemy, the burden of proving which is on it. *Winne v. Illinois C. R. Co.*, 31 *Iowa* 583, 1 *Am. Ry. Rep.* 460.

One who sues a common carrier for injury to goods must show affirmatively that defendant received them in good order. *Marquette, H. & O. R. Co. v. Kirkwood*, 9 *Am. & Eng. R. Cas.* 85, 45 *Mich.* 51, 7 *N. W. Rep.* 209, 40 *Am. Rep.* 453.—DISAPPROVING *Laughlin v. Chicago & N. W. R. Co.*, 28 *Wis.* 204. FOLLOWING *Marquette, H. & O. R. Co. v. Langton*, 32 *Mich.* 251. REVIEWING *Midland R. Co. v. Bromley*, 17 *C. B.* 372.—NOT FOLLOWED IN *Lake Erie & W. R. Co. v. Oakes*, 11 *Ill. App.* 489.

Merely showing a delivery by the carrier in an injured condition is not enough. It must be shown in what condition the carrier received the goods in order to prove an injury in his hands, which may be shown by direct affirmative evidence, or by proof of such facts and circumstances as to raise the presumption that they were in proper condition when received by the carrier. *Smith v. New York C. R. Co.*, 43 *Barb (N. Y.)* 225; *affirmed* in 41 *N. Y.* 620.

A railroad receipting for goods "in apparent good order" does not relieve the consignor from proof of their condition at the time of delivery. *Chicago & N. W. R. Co. v. Benjamin*, 63 *Ill.* 28; 7 *Am. Ry. Rep.* 392.

A carrier will be presumed to have received goods in good order for shipment; that is, that they were in such a condition that they could be moved without loss; and if not in such condition he is not bound to receive them. *Breed v. Mitchell*, 48 *Ga.* 533.

* See also *ante*, 21.

* See also *post*, 702-704.

There is no presumption that goods were in good order when shipped, nor that they remained in the same condition in which they were at the time they were delivered to the carrier, where they have been carried and delivered to the consignee for the purpose of inspection. *Brooks v. Dinsmore*, 3 N. Y. S. R. 587.

Where it is conceded that a loss occurred from leakage and breakage, from which the carrier is released by his contract unless his negligence or misconduct co-operated in the loss, the burden of proof is upon the shippers to show such negligence or misconduct. *The Jefferson*, 31 Fed. Rep. 489.—FOLLOWING National B. of E. & M. Co. v. The New Orleans, 26 Fed. Rep. 44.

107. Presumption of loss while in carrier's hands.—Where A. ships goods securely boxed, to be delivered to B., and a part only are delivered, the presumption is that the loss occurred while the goods were in the carrier's possession. *Rice v. Indianapolis & St. L. R. Co.*, 3 Mo. App. 27.

When a carrier who receipts for cotton states in the receipt that it was not in bad order, and it is delivered to the consignee in a damaged condition, it must be presumed that the cotton suffered the injury while under the control of the carrier. In such case there is no requirement that the owner should prove by evidence *aliunde* that the cotton was not damaged when the consignee received it. *International & G. N. R. Co. v. Blanton*, 22 Am. & Eng. R. Cas. 428, 63 Tex. 109.

108. When burden of proof is shifted to the carrier.*—When a common carrier delivers goods in a damaged or injured condition, and it does not appear that he received them in such condition, the law casts on him the burden of proving that they were in that condition when he received them, or that the injury occurred by the act of God or the public enemy, and without fault on his part. *Montgomery & W. P. R. Co. v. Moore*, 51 Ala. 394.

The burden of proof is, first, on the plaintiff to show delivery and acceptance of the goods, and next, the loss and value thereof. This shown, the burden is upon defendant to relieve itself of liability by showing legal contract exemption, or that the loss was occasioned by a public enemy or by the act of God, or that the goods had in themselves

elements of destruction which occasioned the loss. *Savannah, F. & W. R. Co. v. Harris*, 42 Am. & Eng. R. Cas. 457, 26 Fla. 148, 7 So. Rep. 544. *Buddy v. Wabash, St. L. & P. R. Co.*, 20 Mo. App. 206. *Hall v. Cheney*, 36 N. H. 26. *Brooks v. Dinsmore*, 3 N. Y. S. R. 587. *Green v. Indianapolis & St. L. R. Co.*, 56 Mo. 556.

Where a shipper has shown a delivery of goods to a carrier in good condition, and a loss or injury while in the carrier's hands, the general rule is that the burden of proof is on the carrier to show that his liability terminated before the loss or damage occurred. *South & N. Ala. R. Co. v. Wood*, 9 Am. & Eng. R. Cas. 419, 66 Ala. 167, 41 Am. Rep. 749.—APPROVING *Wardlaw v. South Carolina R. Co.*, 11 Rich. (So. Car.) 337.

If the goods are lost under circumstances which render the carrier liable by the general rule of law, he must respond unless he can show that there was a special acceptance, equivalent to a contract, which exempts him from the ordinary liability of common carriers in the particular case. *Park v. Preston*, 108 N. Y. 434, 15 N. E. Rep. 705, 13 N. Y. S. R. 809; *affirming 37 Hun 645, mem.*

Where on the face of the transaction the time consumed in transportation appears to be unreasonable, the burden is upon the carrier to account for the delay. *St. Clair v. Chicago, B. & Q. R. Co.*, 42 Am. & Eng. R. Cas. 414, 80 Iowa 304, 45 N. W. Rep. 570.

The burden of proof is on the plaintiffs to show that the property did not safely reach its destination; but, where the plaintiffs proved that the defendant's boat in which the property was stowed was capsized and the property damaged, and a portion of the property carried by the defendants to a place out of their course—*held* sufficient to throw the burden of proof on the defendants to account for the property. *Day v. Ridley*, 16 Vt. 48.

Plaintiff shipped cotton in cars containing also cotton belonging to another party. While in transportation the cars were destroyed by fire and two bales of cotton only were saved, but which were not delivered to either plaintiff or the other parties. *Held*, that the burden of proof was on the carrier to show that the two bales saved from the fire did not belong to plaintiff, and in the absence of such evidence the jury would be

* See also *post*, 703.

authorized, in any event, to find for plaintiff the value of the two bales. *Woodward v. Illinois C. R. Co.*, 1 Biss. (U. S.) 403.

109. Liability for damages resulting from defective cars.*—The fact that a way-bill specifies rates of charges for the transportation of butter in common cars does not excuse the carrier from liability for injury resulting therefrom, the rate specified in the way-bill not having the effect of preventing the carrier from claiming compensation for charges incurred on account of outlays made in order to safely transport the goods. *Beard v. Illinois C. R. Co.*, 42 Am. & Eng. R. Cas. 445, 79 Iowa 518, 7 L. R. A. 280, 44 N.W. Rep. 800.

Where butter was injured by the heat, and the defendant claims that it did not have refrigerator cars in which it could transport it, evidence is admissible to show that a custom prevails among carriers by railroad to put butter into cold-storage when refrigerator cars are not ready to receive it. *Beard v. Illinois C. R. Co.*, 42 Am. & Eng. R. Cas. 445, 79 Iowa 518, 7 L. R. A. 280, 44 N.W. Rep. 800.

Although a railroad company did not have refrigerator cars which were available for the transportation of a shipment of butter, that fact does not relieve it from liability for injury by heat when it is shown that the butter could have been carried safely by the use of ice in box-cars. *Beard v. Illinois C. R. Co.*, 42 Am. & Eng. R. Cas. 445, 79 Iowa 518, 7 L. R. A. 280, 44 N.W. Rep. 800.

110. Not liable for loss through inherent defects in goods carried.†—But while carriers are insurers for the delivery of goods, they are not insurers that they shall reach their destination in the same condition in which they were shipped. They are not liable for losses from ordinary wear and tear of goods in the course of transportation, or from their ordinary loss or deterioration in quantity or quality in the course of the voyage, or from inherent natural infirmity and tendency to damage, or which arise from the personal neglect, or wrong, or misconduct of the owner or shipper of the goods. But a common carrier is bound to use due diligence for the preservation of the goods from damage and deterioration. *Illinois C. R. Co. v. McClellan*, 54

Ill. 58. *McGraw v. Baltimore & O. R. Co.*, 9 Am. & Eng. R. Cas. 188, 41 Am. Rep. 696, 18 W. Va. 361.

A carrier does not insure against loss arising from the act of God or defects in the thing carried; if either of these or both taken together are the sole cause of the loss he is not liable. *Nugent v. Smith*, L. R. 1 C. P. D. 423, 45 L. J. C. P. D. 697, 34 L. T. 827, 25 W. R. 117; reversing L. R. 1 C. P. D. 19, 45 L. J. C. P. D. 19, 33 L. T. 731, 24 W. R. 237.

A carrier of fruit-trees is not liable for a loss or damage thereto by freezing, unless they be carelessly exposed to the cold or frozen through an unnecessary delay in shipping, the burden of showing which is on the owner; and it is not liable where they are frozen in its cars at the place of destination or at the end of its route, where they are not as liable to freeze in the cars as in the warehouse. *Vail v. Pacific R. Co.*, 63 Mo. 230, 20 Am. Ry. Rep. 420.

111. Evidence to show loss.—In a suit against a carrier to recover the value of cotton lost, to authorize a recovery it must be proved: 1. That defendant was a common carrier. 2. That the cotton was received as freight by defendant in such manner as to constitute defendant a common carrier of the cotton. 3. Failure to transport the cotton to the place of destination. *Missouri Pac. R. Co. v. Douglass*, 16 Am. & Eng. R. Cas. 98, 2 Tex. App. (Civ. Cas.) 32.

In an action against a carrier for loss or non-delivery of goods, plaintiff must give evidence in support of the allegation, notwithstanding its negative character; but slight evidence will be sufficient. *Chicago & N.W. R. Co. v. Dickinson*, 74 Ill. 249.

The fact that a consignee of goods called at the railroad station, at their place of destination, and made inquiries for them is admissible in evidence, as tending to show a loss of the property. *Ingledeu v. Northern R. Co.*, 7 Gray (Mass.) 86.

In an action against a common carrier, to recover damages for injuries to goods shipped by sea (or where the same matter is relied on as a defense against an action by him to recover freight), the fact that similar goods shipped by sea to the port of delivery usually arrived safe and uninjured, would be admissible evidence against him, as a circumstance tending to show that any damage or breakage was the result of negligence on his part; and, *e converso*, the fact

* See also *ante*, 52.

† See also *ante*, 26.

that such goods usually arrived in a damaged and broken condition is admissible evidence for him, as tending to show that the breakage was not the result of negligence on his part. *Steele v. Townsend*, 37 Ala. 247.—**LIMITING** *O'Grady v. Julian*, 34 Ala. 88.

Where two disinterested persons, on the oral request of both the owner and the railroad company, made a survey of damaged freight and reported on the same, but the effort thus made did not result in adjusting the dispute, and a suit was afterwards brought to recover the damages, the report or finding of such disinterested persons was not admissible in evidence at the instance of either party over the objection of the other, even though made in writing, and even though it had long been the custom of the railroad company, and its custom at that place, to adjust such disputes in that manner. *Central R. Co. v. Rogers*, 66 Ga. 251.

In an action to recover for several barrels of whiskey and pork destroyed while in transit, one of the plaintiffs swore the whiskey was worth \$2.25, and the pork \$20, per barrel. *Held*, that the price must be held to mean that the whiskey was worth \$2.25 per gallon, and not per barrel, and that the price fixed must be taken to mean at the place of destination. *Toledo, P. & W. R. Co. v. Kickler*, 51 Ill. 157.

112. Evidence to establish contract to carry.—Where a carrier is sued in assumpsit upon its common-law liability as a carrier of goods, whether the plaintiff counts upon a special contract or upon one which the law implies, he must prove the contract to entitle him to recover; and whether the declaration charges a special contract or an implied contract which the law raises, there is no difference except in the mode of proof. If an express contract be set out, then the proof need only be sufficient to show what the contract was; if an implied contract be declared upon, then such facts and circumstances must be proven as to create the relation of shipper and carrier from which the law infers a contract. *Michigan S. & N. I. R. Co. v. McDonough*, 21 Mich. 165.—**DISTINGUISHING** *Great Western R. Co. v. Hawkins*, 18 Mich. 427.—**EXPLAINED AND DISTINGUISHED** IN *Kansas Pac. R. Co. v. Nichols*, 9 Kan. 235. **FOLLOWED** IN *Lake Shore & M. S. R. Co. v. Perkins*, 25 Mich. 329.

QUOTED IN *Kansas Pac. R. Co. v. Reynolds*, 8 Kan. 623.

113. Rights of consignee where there is a partial loss.*—Where common carriers have been guilty of negligence, whereby the owner of goods has sustained injury, the subsequent acceptance of the goods by the owner is no bar to an action; but it may be given in evidence in mitigation of damages. Nothing short of a release or the acceptance of something in satisfaction is a bar. *Bowman v. Teall*, 23 Wend. (N. Y.) 306. *Howe v. Oswego & S. R. Co.*, 56 Barb. (N. Y.) 121.

Where goods are shipped in barrels and tierces a receipt by the owners given to the carrier, acknowledging a delivery of the number of barrels and tierces shipped, will not prevent them from recovering for a partial loss of the contents of the barrels or tierces, unless they were received and receipted for as for a full compliance with the contract, which is a question for the jury. *Alden v. Pearson*, 3 Gray (Mass.) 342.

114. Negligence that will render company liable.†—Whatever the conditions of the contract may be between consignor and carrier, the latter cannot escape liability for loss which may result through his own negligence or the malfeasance of his employes to the goods entrusted to his care for transportation. *Milton v. Denver & R. G. R. Co.*, 1 Colo. App. 307, 29 Pac. Rep. 22.

If a carrier receives goods well-packed, it is liable for a loss or damage which results from its negligent or careless handling; but not if the loss or injury results from imperfect packing. *Culbreth v. Philadelphia, W. & B. R. Co.*, 3 Houst. (Del.) 392.

A railroad which has received goods under a contract by which the owner agrees to send a man along to protect them, will be liable for the loss of the goods through its own negligence, though the owner fails to perform his share of the contract. *Purcell v. Southern Exp. Co.*, 34 Ga. 315.

A box containing a glass bottle filled with oil of cloves, delivered to a common carrier marked "Glass—with care—this side up," is a sufficient notice of the value and nature of the contents to charge him for the loss of the oil occasioned by his disregarding

* See also *post*, 227.

† Injury to freight resulting from negligence or delay. see note, 3 AM. & ENG. R. CAS. 326. See also *post*, 180, 756.

such direction. *Hastings v. Pepper*, 11 Pick. (Mass.) 41.

Where a railway company in a bill of lading for the shipment of cotton reserves the right to have it compressed, and subsequently places it in the hands of a compress company for that purpose, such company becomes the agent of the railway company, and the latter is liable for its destruction or damage through the negligence of the compress company. *Otis Co. v. Missouri Pac. R. Co.*, 112 Mo. 622, 20 S. W. Rep. 676.

A common carrier of bonded goods, who receives goods in bond for carriage the bill of lading of which recites that they are to be transported in bond, is liable for a loss arising from a shipment of the goods on an unbonded vessel. *Mellier v. St. Louis & N. O. Transp. Co.*, 14 Mo. App. 281.

Where a carrier places potatoes on a vessel on the upper deck, where they are frozen, it is liable, where there is nothing to prevent their being placed below deck, where they would not have frozen, and where the only excuse offered for not putting them there is that they were put where potatoes are usually carried, and that it would have taken longer to put them below. *Wing v. New York & E. R. Co.*, 1 Hill. (N. Y.) 235.—QUOTED IN *Merchants' D. & T. Co. v. Cornforth*, 3 Colo. 280.

A railroad received cotton-seed meal consigned to a point about six miles from its road on a bayou, giving a through bill of lading, it being its custom to transfer freights from where its road crossed the water to the place of destination on flat boats. The meal in question was delivered by the road on Saturday night and was left in the rain uncovered on its platform until the following Monday, the boat not going on Sunday. Held, that the railroad company was liable for injuries to the meal and the sacks containing it caused by getting wet. *Williams v. Morgan*, 32 La. Ann. 168.

115. When shipper assumes risk of transportation.—Where the shipper of machinery agrees that it may be loaded and transferred upon open cars, the railroad company is not liable for damages caused thereby, in the absence of its own negligence or of unreasonable delay in transportation or delivery. *Western & A. R. Co. v. Exposition Cotton Mills* 35 Am. & Eng. R. Cas. 602, 81 Ga. 522, 7 S. E. Rep. 916, 2 L. R. A. 102.

Where the owner of cotton ships it by

water on an open craft, the character of which is well known to him, and which is the only method employed in shipping cotton on that river, he assumes the risk of loss of the cotton by getting wet, and cannot recover for an injury thereto from such loss. *Chevaillier v. Patton*, 10 Tex. 344.—APPROVING *Whitesides v. Turkhill*, 20 Miss. 599. FOLLOWING *Chevaillier v. Straham*, 2 Tex. 124.—DISTINGUISHED IN *Philleo v. Sanford*, 17 Tex. 227.

116. Proving a special value in property.—Plaintiff shipped a car-load of ear corn over the road of defendant. The petition alleged that it was carefully selected for its peculiar value as seed corn, and that while in transportation the defendant, without the knowledge or consent of plaintiff, caused it to be run through an elevator and shelled, thus materially diminishing its value. Held, that it was not error to permit plaintiff to introduce testimony that he notified defendant before shipment that the corn was selected for seed purposes, and this notwithstanding there was no allegation in the petition of such notice. *Missouri Pac. R. Co. v. Nevin*, 16 Am. & Eng. R. Cas. 252, 31 Kan. 385, 2 Pac. Rep. 795.

117. Violation of Sunday laws.—The mere fact that freight cars were run and unloaded on Sunday in violation of a statute will not render a company liable for a loss of goods. *Wilke v. Merchants' Despatch Transp. Co.*, 47 Iowa 272.

The cars containing the goods were unloaded on Sunday. In the absence of proof that by the law of the state where the loss happened such an act was unlawful, it was not evidence of fault or negligence on defendant's part. *Shelton v. Merchants' Despatch Transp. Co.*, 59 N. Y. 258, 48 How. Pr. 257; reversing 4 J. & S. 527.

118. Liability for goods lost from chartered car.—A company is not relieved from all liability for goods shipped in a chartered car to be loaded and unloaded by the owner, where it is shown that the company's agent retained the key of the car, thereby controlling access to its interior. *Central R. & B. Co. v. Anderson*, 58 Ga. 393, 16 Am. Ry. Rep. 85.

119. Liability for loss through failure to obey shipper's directions.—Where a shipper gives directions as to how to ship, which are assented to by the carrier, the latter will be liable for damage that results from a failure to obey such

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directions. *Sager v. Portsmouth, S. & P. & E. R. Co.*, 31 Me., 228.

A carrier is bound by instructions given by the shipper as to the manner in which goods are to be carried, and is liable for a breach of duty if he does not obey them. *Johnson v. New York C. R. Co.*, 39 How Pr. (N. Y.) 127; following 33 N. Y. 610.

120. Payment of charges as affecting right to sue for damages.*—Where a common carrier performs his contract to transport and deliver goods, a payment of the freight, or a submission to judgment therefor, does not preclude the owner of the goods from recovering damages for injuries received by the goods during their transit; he may pay the freight and sue for the damages, or set up his damages by way of counter-claim in an action to recover the freight, or he may bring a cross-action. *Schwinger v. Raymond*, 83 N. Y. 192, 38 Am. Rep. 415.

Where goods are delivered to a common carrier to be transported a promise to pay freights will be implied, and it is not necessary to prove payment or tender of the charges in order to hold him liable in his capacity of common carrier. The law will not presume, without proof, that the bailment was gratuitous. *Winne v. Illinois C. R. Co.*, 31 Iowa 583.

Where a common carrier receives property for transportation and declines to fix a price or charge therefor, he cannot defeat a recovery for a loss by saying that he had a secret intention not to charge anything for the transportation, but which was not communicated to the shipper nor agreed to by him. *Gray v. Missouri River Packet Co.*, 64 Mo. 47.

121. Necessary averments in action for damages.†—In an action against a carrier for loss of goods, it is sufficient to allege that the loss was occasioned by the negligence of the carrier, without averring the specific facts constituting the negligence. *McCauley v. Davidson*, 10 Minn. 418 (Gil. 335).

122. Who may maintain suit for damages.‡—A party who is buying grain, and who has agreed to furnish the means of transportation from the place of purchase to him, may maintain an action against a railroad company for failing to transport

grain according to contract, though he is not in fact the owner of the grain. *Cobb v. Illinois C. R. Co.*, 38 Iowa 601.

Where an incorporated bank ships flour, the carrier cannot defend an action against it for negligently injuring the flour on the ground that the bank, under its charter, could not acquire title to the flour. *Farmers' & M. Bank v. Detroit & M. R. Co.*, 17 Wis. 372.

Goods were shipped by a married woman and a receipt therefor given to her, she not being the owner. Held, that, as she was the bailor and consignor, she had a right to maintain the action, and that defendant, having recognized her as the owner in receiving the goods, was estopped from disputing her ownership when sued for the loss. *Chicago & A. R. Co. v. Shea*, 66 Ill. 471.

123. Measure of damages.*—Where goods are lost in the hands of a carrier, the measure of damages is the value of the goods at the place of destination at the time that they should have arrived, less freight charges. *Cincinnati, H. & D. R. Co. v. Spratt*, 2 Duw. (Ky.) 4.

Profits that the shipper might have made by ulterior speculation, or by shipping them to other places and better markets, are too remote to be considered. *Harrison v. Stewart*, 1 Taney (U. S.) 485.

Where the verdict was for the full amount of the value of the goods at the place of destination, without any allowance for freight charges, a new trial must be granted. It cannot be assumed that the jury allowed interest to the same amount as these charges, when no interest was demanded in the complaint and no instructions as to interest given in the judge's charge. *Miami Powder Co. v. Port Royal & W. C. R. Co.*, 55 Am. & Eng. R. Cas. 688, 38 So. Car. 78, 16 S. E. Rep. 339.

Where a carrier delivers goods in a damaged condition, the measure of damages is the actual depreciation therein, together with any expense that the owner was put to in making the goods saleable so far as their condition would permit. *Robertson v. National Steamship Co.*, 17 N. Y. Supp. 459; reversing 14 N. Y. Supp. 313.

The ordinary rule is that where goods are shipped and never delivered, the measure of damages is the value of the goods at the place of destination; but where the con-

* See also *post*, 715.

† See also *post*, 723.

‡ See also *post*, 705-722.

* See also *post*, 757-776.

signees have a lien on the goods for advances made, where a part of the goods are delivered, or delivered in a damaged condition, the measure of damages is found by deducting the net market value of the goods at the place of destination from the amount of the advances. *Burrill v. Rench*, 4 *McLean* (U. S.) 325.

Though goods saved by a common carrier from the perils of a freshet were damaged by passing through the freshet, yet if some not saved are unaccounted for, and it is not shown that the freshet caused their loss, or what their condition was when they disappeared, a recovery for their value may be had against the carrier without deducting anything for conjectural damage which they may have sustained by reason of the freshet before the loss occurred. *Charlotte, C. & A. R. Co. v. Wooten*, 87 *Ga.* 203, 13 *S. E. Rep.* 509.

No damages can be recovered for the breach of a contract to convey money from Mexico to Texas during the late war, to enable the bailee to carry on a contraband trade. *Cantu v. Bennett*, 39 *Tex.* 303.

Where a railroad company has sued a wrongdoer for the destruction of goods while in its hands as carrier, and has recovered, it is liable to the owner of the goods for the whole amount thus recovered, and cannot deduct therefrom the amount that it had to pay out in the litigation. *Hardman v. Brett*, 37 *Fed. Rep.* 803.

On the 19th of December, 1881, eighteen bales marked "Rags" were delivered by the plaintiffs in London to the defendants for conveyance to W. station in Kent, where in the ordinary course they should have been delivered within twenty-four hours. By mistake they were forwarded to another place and did not reach the W. station until the 4th of January, 1882, when, finding them to have become heated (through being packed in a damp state) and therefore unfit for the manufacture of paper, the consignees rejected them; and ultimately the rags were found useless for any purpose, and were destroyed. There being an admitted breach of duty on part of the defendants, and it being conceded that the rags would have sustained no injury if they had been packed dry, the county court judge gave a verdict for the plaintiffs, but for nominal damages only, on the ground that the loss was attributable to the plaintiffs' own act in packing the rags in a damp state, without in-

forming the defendants that special care was necessary. Upon a motion to enter a verdict for the plaintiffs for the admitted value of the goods—*held*, that the ruling of the judge was correct. *Baldwin v. London, C. & D. R. Co.*, 9 *Am. & Eng. R. Cas.* 175, *L. R.* 9 *Q. B. D.* 582.—**DISTINGUISHING** *Hooper v. London & N. W. R. Co.*, 50 *L. J. Q. B.* 103.

124. Rule where debt due in another country is sued for in United States.—The general rule is that debts due in one country and sued for in another are to be computed where the action is brought, in the currency of the country where the debt is payable, but without adding or subtracting on account of any depreciation there may be in the currency of either country. So where a railroad has contracted to transport goods from the United States to Canada, and is sued in the United States for a loss, the recovery should follow the same rule; and it is error to award damages for the value of the property at the place of destination in Canada according to the value of American currency there, which is at a discount. *Rice v. Ontario Steamboat Co.*, 56 *Barb. (N. Y.)* 384.

b. Loss or Injury Caused by Delay.*

125. Extent of liability.—In the absence of a special contract to deliver goods at a specified time, the common-law liability of carriers, as insurers, for the safe delivery of goods does not make them insurers as to the time of delivery. *Truax v. Philadelphia, W. & B. R. Co.*, 3 *Houst. (Del.)* 233. *Boner v. Merchants' Steamboat Co.*, 1 *Jones (N. Car.)* 211.—**CRITICISING** *Harrell v. Owens*, 1 *Dev. & B. (N. Car.)* 273.

While nothing but the act of God or the public enemy will excuse a carrier from the ultimate delivery of property intrusted to his care, he is not to the same extent liable for every delay in reaching the point of destination. *Wabash, St. L. & P. R. Co. v. McCasland*, 11 *Ill. App.* 491.

Unreasonable delay in transporting freight is an active breach of the carrier's contract. *Berje v. Texas & P. R. Co.*, 37 *La. Ann.* 468.

A railroad company is liable in damages sustained by reason of a delay in the ship-

* Delay in transporting goods, see note, 35 *AM. & ENG. R. CAS.* 571, 575. See also *post*, 777-793.

ment of freight. *Branch v. Wilmington & W. R. Co.*, 88 N. Car. 570.

A carrier is liable for delays occasioned by obstructions of which it had notice and of which the shipper had not notice. *Schwab v. Union Line*, 13 Mo. App. 159.—NOT FOLLOWING *Wibert v. New York & E. R. Co.*, 12 N. Y. 245. QUOTING *Read v. St. Louis, K. C. & N. R. Co.*, 60 Mo. 208.

A carrier is not justified in delaying the delivery of goods which he has undertaken to carry by adopting a particular mode of carrying them, merely because that is the usual mode. *Hales v. London & N. W. R. Co.*, 4 B. & S. 66, 32 L. J. Q. B. 292, 11 W. R. 856, 8 L. T. 421.

120. Duty to protect goods during delay and continue transit when obstruction is removed.—In case of an interruption on the stipulated line of transportation, a carrier is bound to use all reasonable means such as a prudent owner, being present, would take to protect the property from unnecessary loss or damage. *Regan v. Grand Trunk R. Co.*, 61 N. H. 579.

It is the duty of common carriers to provide sufficient and suitable means for the carriage of the goods they receive, and make delivery of them with all convenient dispatch; and while accidents and obstructions will excuse delay, they do not put an end to the contract, which must be completed as soon as the impediment to the transportation of the property is removed, or can reasonably be overcome. *Baltimore & O. R. Co. v. O'Donnell*, 49 Ohio St. 489, 32 N. E. Rep. 478.

When goods in the care of a carrier become injured, it is his duty to make ordinary and reasonable exertion to repair the injury or lessen its effect. Therefore where packages of furs become wet, it is the duty of the carrier to have them opened and dried. *Chouteaux v. Leech*, 18 Pa. St. 224.

127. When a delay is excusable.*—A common carrier who has not been guilty of negligence is not liable for delay in the transportation of goods occasioned by an accident not inevitable, if the goods are finally safely delivered. *Nashville & C. R. Co. v. Jackson*, 6 Heisk. (Tenn.) 271, 12 Am. Ry. Rep. 54. *Truax v. Philadelphia, W. & B. R. Co.*, 3 Houst. (Del.) 233.

* Excuse for delay in transportation, see note, 9 L. R. A. 836.

Temporary interruptions or obstructions which could not, with ordinary prudence, be provided against, excuse delay, but do not absolve from the duty to carry and deliver as soon as it becomes practicable. *Vicksburg & M. R. Co. v. Ragsdale*, 46 Miss. 458, 1 Am. Ry. Rep. 407.

Where it appears that the goods were carried and reached their destination within the usual time occupied, according to the usual course of business in effectuating the transportation between the point of shipment and the point of delivery, and there is no evidence of any special undertaking for completing the transportation within a definite or fixed time, there can be no recovery for delay. *Lowe v. East. Tenn., V. & G. R. Co.*, 90 Ga. 85, 15 S. E. Rep. 692.

Where by statute a carrier is not liable for the total loss of goods, in a certain case, in an action for delay in the delivery of such goods, a plea excusing such delay upon the ground of a temporary loss of the goods while they were in charge of the company is a good answer to the action. *Wallace v. Dublin & B. J. R. Co.*, 8 Ir. C. L. 341.

A company is not liable for delay resulting from the breaking down of a freight car when the car is broken on the track of another company. *Livingstone v. New York C. & H. R. R. Co.*, 5 Hun (N. Y.) 562.

128. Low water not an excuse for delay in carrying by boat.—Low water in a navigable river, preventing a boat from passing, is not strictly within any of the reasons which excuse a carrier for a failure to deliver goods within a reasonable time. *Broadwell v. Butler*, 6 McLean (U. S.) 296.

129. Liability where the delay causes a loss.—It is the carrier's duty to forward freight without delay and as speedily as practicable, and if it be unnecessarily and negligently detained by him he is liable for the loss resulting. *Lamont v. Nashville & C. R. Co.*, 9 Heisk. (Tenn.) 58, 19 Am. Ry. Rep. 284.

A common carrier is not an insurer as to time, but is bound to transfer freight to its destination within a reasonable time. If delay is occasioned by an inevitable accident the loss ensuing is not chargeable to the carrier. *American Exp. Co. v. Smith*, 33 Ohio St. 511.

A common carrier is bound to reasonable expedition in the carrying of freight, but not to great haste, and in no case is he liable for hypothetical or chimerical damages

caused by a delay, nor for any supposed loss which might have resulted to an immoral or illegal traffic. So where the owner of cotton was attempting to hurry the carrier forward, during the civil war, in order that he might have an opportunity to smuggle the same across the international line into Mexico, in violation of the revenue laws of the United States, the carrier is not liable for a delay and the seizure of the cotton by the United States authorities. *Gerhard v. Neese*, 36 Tex. 635.

A delay on the part of a carrier to forward goods does not make it liable for a loss occurring by fire where the goods are received under a contract exempting the carrier from such loss, where the fire occurs without its fault, though the goods would not have been exposed to the fire had they been promptly shipped. *Hoadley v. Northern Transp. Co.*, 115 Mass. 304.—APPROVED IN *McVeagh v. Atchison, T. & S. F. R. Co.*, 3 N. Mex. 205. DISTINGUISHED IN *Fox v. Boston & M. R. Co.*, 37 Am. & Eng. R. Cas. 632, 148 Mass. 220, 19 N. E. Rep. 222, 1 L. R. A. 702.

Where fruit and ornamental trees shipped were destroyed by frost before reaching their destination, and this was caused by delay of transportation to Chicago where they were to pass into the hands of another line, the fact that the company's buildings in Chicago were destroyed by fire will not furnish a sufficient excuse for the delay, where it appears that other shipments, made afterwards, went through in time and were delivered to the other line. *Michigan C. R. Co. v. Curtis*, 80 Ill. 324.

Cars containing plaintiff's goods were laid off at an intermediate station and other cars were taken on in their place. It appeared that all of the cars could not be taken, but why some were laid off and others taken on did not appear. The train went through to its place of destination in safety, but the cars containing plaintiff's goods, which were attached to a train on the following day, were destroyed by the public enemy. *Held*, that the company was not liable. *Clark v. Pacific R. Co.*, 39 Mo. 184.—FOLLOWED IN *Gilkerson v. Pacific R. Co.*, 39 Mo. 354. RECONCILED IN *Pruitt v. Hannibal & St. J. R. Co.*, 62 Mo. 527.

Where goods were directed to be carried from Richmond, Va., to Augusta, Ga., but instead of being carried directly they were sent to Atlanta, Ga., thence to Charlotte, N.

C., and thence to Augusta, and where they should have been received in Augusta on the 1st of September but were not received until the 8th, and on the 10th they were destroyed by a flood, and where from the 1st to the 10th the consignees sent daily to the depot of the carrier, exhibited the bill of lading, and asked for and described the goods, but were informed that they had not arrived, though in fact they were then in the possession of the carrier, the agent of which afterwards admitted that they had arrived two days before the flood, and that by carelessness at headquarters the way-bill was not sent with them and was not received until after they were destroyed, the carrier was liable for their value. *Richmond & D. R. Co. v. Benson*, 86 Ga. 203, 12 S. E. Rep. 357.

130. Goods must be carried in a reasonable time.*—A common carrier is bound by the common law to convey goods committed to it for that purpose within a reasonable time, and it is liable for a failure to do so. And where a railroad has a monopoly of the business and invites public custom it is bound to provide sufficient power and vehicles to carry all goods which the invitation naturally brings to it. *Branch v. Wilmington & W. R. Co.*, 77 N. Car. 347.—APPLYING *Williams v. Vanderbilt*, 28 N. Y. 217.—QUOTED IN *Purcell v. Richmond & D. R. Co.*, 108 N. Car. 414. REVIEWED IN *Whitehead v. Wilmington & W. R. Co.*, 9 Am. & Eng. R. Cas. 168, 87 N. Car. 255.—*Schwab v. Union Line*, 13 Mo. App. 159. *Rome R. Co. v. Sullivan*, 32 Ga. 400. *Nudd v. Wells*, 11 Wis. 407. *Nettles v. South Carolina R. Co.*, 7 Rich. (So. Car.) 190. *Louisville & N. R. Co. v. Touart*, 97 Ala. 514, 11 So. Rep. 756.

Nothing relieves from this obligation to deliver except the act of God, the public enemy, the act or conduct of the owner, or a special agreement limiting the common-law duty. *Vicksburg & M. R. Co. v. Ragsdale*, 46 Miss. 458.

A carrier is only bound to deliver goods within a reasonable time under the circumstances, and is not liable for delay arising from causes beyond its control. *Taylor v. Great Northern R. Co.*, L. R. 1 C. P. 385, 35 L. J. C. P. 210, 12 Jur. N. S. 372, 14 L. T. 363, 14 W. R. 639.

* Failure to deliver goods within a reasonable time, see 26, AM. & ENG. R. CAS. 292, *abstr.* See also *post*, 204.

A carrier is justified in incurring delay and delivering the goods after the usual time, when delay is necessary to secure their safe carriage. *Great Northern R. Co. v. Taylor*, 1 H. & R. 471, L. R. 1 C. P. 385, 12 Jur. N. S. 372, 35 L. J. C. P. 210, 14 W. R. 639, 14 L. T. 363.

131. Rules for determining what is a reasonable time.*—Where the carrier has not agreed to deliver freights at any fixed time, it becomes its duty to do so within a reasonable time, which is determined, not by the necessities of the shipper, but by the circumstances of the case. *Cobb v. Illinois C. R. Co.*, 38 Iowa 601.

The law does not attempt to fix by rule what is a reasonable time. Each case must be referred to its own peculiar circumstances, account being taken of the mode of conveyance, the nature of the goods, the season of the year, character of the weather, and the ordinary facilities for transportation under the control of the carrier. *Vicksburg & M. R. Co. v. Ragsdale*, 46 Miss. 458.

What is an unreasonable delay in the transportation and delivery of goods will depend upon its character, extent, and circumstances. The fact that it is unusual cannot of itself be conclusive, and may not be even slight evidence that it is unreasonable. It must be so unusual as to be more reasonably attributable to negligence of the carrier than to any of the causes of delay to which the transportation, by reason of the mode, time, route, or subject of the carriage, or other circumstances implying negligence, is known to be exposed. *Chicago & A. R. Co. v. Simms*, 18 Ill. App. 68.

Proof of the usual course of delivery is ordinarily *prima facie* evidence of reasonable time. *Schwab v. Union Line*, 13 Mo. App. 159.

132. What is a reasonable time—
(1) *General rules.*—A railroad company is bound to deliver freight at its destination with reasonable expedition. A delay of seventy days, unexplained, is unreasonable. *St. Louis, I. M. & S. R. Co. v. Heath*, 18 Am. & Eng. R. Cas. 557, 41 Ark. 476.

A delay of twenty-four hours at a station on the way is unnecessary unless excused by something which the law recognizes as sufficient. That the company needed its rolling stock for the purpose of conveying passengers is not a sufficient excuse. *Ormsby*

v. Union Pac. R. Co., 2 McCrary (U. S.) 48, 4 Fed. Rep. 706.

One year is an unreasonable time in which to carry goods from a point in Massachusetts to a point in Wisconsin, and after the lapse of such a time there can be no doubt of the right of the owner to maintain an action against the carrier for a failure to transport the goods and deliver them within a reasonable time. *Nudd v. Wells*, 11 Wis. 407.

(2) *Illustrations.*—Potatoes were delivered to a railroad on the 13th day of February, 1866, to be shipped on the 14th, about 100 miles. There was a daily train between the points; the weather was mild and so continued on the 14th; the potatoes did not reach their destination until the 16th, and arrived so frozen as to be worthless, the weather on the 15th and 16th having become cold. *Held*, that under the circumstances the company was liable in damages. *McGraw v. Baltimore & O. R. Co.*, 9 Am. & Eng. R. Cas. 188, 18 W. Va. 361, 41 Am. Rep. 696.

A car of onions was delivered to the defendant at noon on Tuesday, for transportation a distance of sixty-four miles. It did not reach its destination until the next Saturday evening, when the onions were spoiled. *Held*, that the jury was justified in finding, from the time consumed, that defendant was negligent, in the absence of evidence showing reasonable cause for the delay. *St. Clair v. Chicago, B. & Q. R. Co.*, 42 Am. & Eng. R. Cas. 414, 80 Iowa 304, 45 N. W. Rep. 570.

A car-load of onions was unnecessarily delayed in transportation and reached the consignee on Saturday evening so heated and damaged as to be worthless. The owner failed to unload them until Monday following. The court instructed the jury that the goods being perishable, it was the duty of the owner to unload on Sunday, if that would save the loss; and that if the loss occurred by reason of his failure to so unload, he could not recover. *Held*, that the company could not complain of the instruction, as it was more favorable than it was entitled to. *St. Clair v. Chicago, B. & Q. R. Co.*, 42 Am. & Eng. R. Cas. 414, 80 Iowa 304, 45 N. W. Rep. 570.

In such case plaintiff's witnesses testified that onions shipped in bulk in a closed car in the month of October would spoil in four days, and defendant's witnesses testified that they would not; but the onions in this case

* See also *ante*, 37.

were shown to be sound when shipped and spoiled when they reached their destination. *Held*, that the jury was justified in believing plaintiffs witnesses as to the perishable nature of the property. *St. Clair v. Chicago, B. & Q. R. Co.*, 42 *Am. & Eng. R. Cas.* 414, 80 *Iowa* 304, 45 *N. W. Rep.* 570.

Where corn was received by a railroad to be transported to a point the usual time for reaching which was two and one half to three days, and the shipment did not reach its destination, a part of it until eleven days and a part forty-five days after it was shipped—*held*, that this was such delay as would render the company liable for damage resulting to the corn by reason thereof. *Illinois C. R. Co. v. McClellan*, 54 *Ill.* 58.

Where the ordinary time required for freight cars to run from the point where grain was shipped to its destination was two or three days, and of 125 cars of grain shipped only ninety-five ever reached the place to which they were shipped, and their average time was over thirty days, the delay was held unreasonable, and the company could not excuse such delay on account of blockades on its side-tracks and other difficulties known to itself at the time of accepting the grain. *Illinois C. R. Co. v. Cobb*, 64 *Ill.* 128.

Goods were shipped over a route that usually took three days for transportation. The goods in question were five days in transportation and were not delivered to the consignee until the lapse of 12 days more. *Held*, that the delay was unreasonable, making the carrier liable in damages. *Michigan S. & N. I. R. Co. v. Day*, 20 *Ill.* 375.

133. Where there is a contract to deliver in a specified time.*—Where there is a special contract to carry within a prescribed time the carrier is held to a rigid performance of it, and is not excused, even by inevitable necessity, unless he has provided against it by positive stipulation. *Place v. Union Exp. Co.*, 2 *Hill. (N. Y.)* 19. *Chicago & A. R. Co. v. Thrapp*, 5 *Ill. App.* 502.—*APPLIED IN* *Pittsburgh, C., C. & St. L. R. Co. v. Racer*, 5 *Ind. App.* 209.

Where a carrier agrees to accept nursery stock for transportation, knowing that the owner will need them at the place of desti-

nation for delivery to his customers on a certain day, it assumes the duty of delivering them in time, or in case of failure to show that it has used every reasonable effort to make the delivery. *Chicago & A. R. Co. v. Thrapp*, 5 *Ill. App.* 502.

134. Delay caused by sending freights past destination.—Proof that a railroad company received a car-load of freight from a connecting railroad, in which was a boiler shipped and way-billed to a point upon its line, the rest of the car-load being through freight; that it had due notice of the shipping and the destination of the boiler, and of the transfer of the contents of the car of the connecting line in which it was first loaded onto a car of its own line; and that it sent such car beyond its line to the destination of the through freight which it contained, without opening it or looking for the boiler, is sufficient to sustain a verdict against the railroad company for damages caused by its negligent delay in delivering the boiler. *Waite v. New York C. & H. R. R. Co.*, 35 *Am. & Eng. R. Cas.* 576, 110 *N. Y.* 635, *mem.*, 17 *N. E. Rep.* 730, 17 *N. Y. S. R.* 162, 2 *Silv. App.* 85; *affirming* 39 *Hun* 655, *mem.*

135. Delays caused by unusual floods.—Where the transportation of goods is delayed by an unprecedented flood the carrier is not rendered liable for the delay because a flood had occurred in each of the two preceding years which had delayed freights, but not so high as the one in question, and where the carrier had not changed the construction of its road or provided other means of crossing the river. *Norris v. Savannah, F. & W. R. Co.*, 28 *Am. & Eng. R. Cas.* 66, 23 *Fla.* 182, 11 *Am. St. Rep.* 355, 1 *So. Rep.* 475.

Where the transportation of freight, perishable in its nature, is interrupted and delayed by a flood in a river which the track of the railroad crosses, and the freight decays, and there is no negligence on the part of the common carrier in taking care of the freight or otherwise, the loss is attributable to the flood as an act of God, and the carrier is not liable. *Norris v. Savannah, F. & W. R. Co.*, 28 *Am. & Eng. R. Cas.* 66, 23 *Fla.* 182, 11 *Am. St. Rep.* 355, 1 *So. Rep.* 475.

A carrier who undertakes to carry goods over his own route is not responsible for an unavoidable delay resulting from the destruction of a bridge by an unusual flood;

* Effect of inevitable accident on contract of carrier to deliver goods within specified time, see note, 14 *L. R. A.* 216.

and to avoid a delay he is not bound to divert the goods from his own to another route over which he has no control, unless in the exercise of a sound discretion it appears that the change of route would have prevented a loss resulting from the delay. *American Exp. Co. v. Smith*, 33 *Ohio St.* 511.

Where a railroad company is delayed in the carrying of a heavy boiler by the destruction of its bridge by high water, it is not bound to incur extraordinary expense to procure a means of carrying the boiler across the river, as upon a pontoon bridge or a steamboat, when it had the facilities of doing so in ordinary high water. *Vicksburg & M. R. Co. v. Ragsdale*, 46 *Miss.* 458, 1 *Am. Ry. Rep.* 407.—FOLLOWED IN *Frank v. Memphis & C. R. Co.*, 52 *Miss.* 570.

A railroad company is liable for loss or damage to goods where it has been negligent in not forwarding them promptly, where loss or damage occurs at an intermediate station by the goods getting wet in a depot by an extraordinary flood. *Read v. Spaulding*, 30 *N. Y.* 630.

136. Carrier only bound to exercise due care.*—A common carrier, in respect to the time of delivery of goods, is responsible only for the exertion of due diligence, and may excuse delay in the delivery by accident or misfortune, although not inevitable; it is enough if he exerts due care and diligence to guard against delay. *Parsons v. Hardy*, 14 *Wend. (N. Y.)* 215. *Geisner v. Lake Shore & M. S. R. Co.*, 26 *Am. & Eng. R. Cas.* 287, 102 *N. Y.* 563, 7 *N. E. Rep.* 828, 2 *N. Y. S. R.* 514; *reversing* 34 *Hun* 50.—FOLLOWING *Wibert v. New York & E. R. Co.*, 12 *N. Y.* 245; *Blackstock v. New York & E. R. Co.*, 20 *N. Y.* 48.—*Johnson v. East Tenn., V. & G. R. Co.*, 90 *Ga.* 810, 17 *S. E. Rep.* 121.

A carrier is only bound to deliver goods within a reasonable time, under ordinary circumstances, and is not bound to use extraordinary efforts or to incur extra expense in order to overcome a fall of snow. *Bridgdon v. Great Northern R. Co.*, 28 *L. J. Ex.* 51, 32 *L. T.* 94.

The carrier is bound to use due diligence in carrying freights to their place of destination, and if it fails in this it is liable for the damages; and if unreasonable delay is shown the company must show a reasonable excuse,

arising from accident or other cause not the result of its own negligence, in order to relieve itself from liability. *Galena & C. U. R. Co. v. Rae*, 18 *Ill.* 488.—DISTINGUISHED IN *Illinois C. R. Co. v. Cobb*, 64 *Ill.* 128.

What will amount to due diligence in this respect must necessarily depend upon the peculiar or special circumstances of each particular case, and the diligence of the carrier may be increased by the agreement of the parties or by the nature of the freight transported, as where, for instance, it is of a perishable nature; for anything of this kind may very properly be considered as affecting, more or less, the question of due and reasonable diligence. *Truax v. Philadelphia, W. & B. R. Co.*, 3 *Houst. (Del.)* 233.

137. Duty of carrier to give notice of delay.—It is the duty of a carrier to notify its shippers of obstructions which will necessarily cause delay. *Schwab v. Union Line*, 13 *Mo. App.* 159.

Neglect to notify the consignee of a change of route does not render the carrier liable for loss or damage happening from delay in the delivery of goods, if such notice would not have avoided the injury. *Regan v. Grand Trunk R. Co.*, 61 *N. H.* 579.

The mere failure on the part of a carrier to notify the consignor or consignee that goods are detained by a flood will not render the carrier liable where the goods are promptly shipped and delivered as soon as the waters subside enough to render it possible, and where there is no evidence that the damage sustained would have been diminished if such notice had been given. *Norris v. Savannah, F. & W. R. Co.*, 28 *Am. & Eng. R. Cas.* 66, 23 *Fla.* 182, 11 *Am. St. Rep.* 355, 1 *So. Rep.* 475.

138. Liability as between connecting lines.—A railroad company that contracts to carry goods over its own and connecting roads, and deliver the same within a certain time at a destination beyond the terminus of its own line, is liable to the shipper for damages caused by delay in transportation over such connecting roads. Whether the contract of shipment provided for a carriage beyond such terminus is a question for the jury. Upon the determination of this question the provisions of the receipt delivered by the carrier to the shipper are not conclusive upon the latter. *Pereira v. Central Pac. R. Co.*, 18 *Am. & Eng. R. Cas.* 565, 66 *Cal.* 92, 4 *Pac. Rep.* 988.

* See also *post*, 184.

139. When delay is a question for the jury.—With respect to the liability of a common carrier for damages resulting from delay in the transportation and delivery of goods, the rule is that he is liable if he failed to transport and deliver within a reasonable time; but what is a reasonable time must be determined by the facts of the particular case, and is always a question of fact and not of law. *International & G. N. R. Co. v. Server*, 3 *Tex. App. (Civ. Cas.)* 534.

Where the mark upon the goods differs from the way-bill the carrier is justified in exercising caution; and it is a question for the jury whether in exercising such caution he acted in good faith, and whether the delay in the delivery of the goods was reasonable and caused solely by the difficulty in identifying the goods. *Baltimore & O. R. Co. v. Humphrey*, 9 *Am. & Eng. R. Cas.* 331, 59 *Md.* 390.

Where fish are consigned for transport by special train and boat from London to Boulogne, but the company makes no absolute guarantee that they will go by any particular train and boat, in case of delay it is for the jury to say whether, under the circumstances, the company has been guilty of negligence or has fulfilled its contract. *Hayes v. South-Eastern R. Co.*, 54 *L. J. Q. B. D.* 174, 52 *L. T.* 514.

140. Delays caused by unusual press of business.*—A railroad company is not liable for a delay in carrying goods which occurs without its fault by an unusual press of freights, where it has not contracted to deliver within any specified time, and where plaintiff's property was transported and delivered as soon as other property. *Wibert v. New York & E. R. Co.*, 12 *N. Y.* 245; *affirming* 19 *Barb.* 36; *reaffirmed* in 29 *Barb.* 633; *see* 3 *Sweeney* 677.—FOLLOWED IN *Geisner v. Lake Shore & M. S. R. Co.*, 26 *Am. & Eng. R. Cas.* 287, 102 *N. Y.* 563, 7 *N. E. Rep.* 828, 2 *N. Y. S. R.* 514; *Conger v. Hudson River R. Co.*, 6 *Duer (N. Y.)* 375. NOT FOLLOWED IN *Schwab v. Union Line*, 13 *Mo. App.* 159. QUOTED IN *Re New York C. & H. R. R. Co.*, 67 *Barb. (N. Y.)* 426. REVIEWED IN *Gray v. Jackson*, 51 *N. H.* 9.

A railroad company is not liable for dam-

ages, with reference to expected profits, where there is no special contract and a delay happens in transportation in consequence of an unusual press of business, the company having a reasonable equipment for all ordinary purposes and having forwarded the goods with as much expedition as practicable. But it is liable for any damage to the goods during the delay. *East Tenn. & G. R. Co. v. Nelson*, 1 *Coldw. (Tenn.)* 272.—QUOTED IN *Louisville & N. R. Co. v. Weaver*, 16 *Am. & Eng. R. Cas.* 218, 9 *Lea (Tenn.)* 38; *East Tenn. & V. R. Co. v. Rodgers*, 6 *Heisk. (Tenn.)* 143; *Louisville & N. R. Co. v. Campbell*, 7 *Heisk. (Tenn.)* 253.

Where a company refused to furnish cars for the transportation of grain to Cairo during the war, on account of the large accumulation of cars on its track at that point waiting to be unloaded, and finally furnished cars upon the promise of the shipper to unload the same, which was not done either by him or the consignee, but refused—held, in a suit to recover damages for delay, that the jury were justified in finding for defendant. *Cobb v. Illinois C. R. Co.*, 88 *Ill.* 394, 21 *Am. Ky. Rep.* 317.

Where a railroad company has accepted freight for shipment it cannot excuse a delay in transportation upon the ground that there was an unusual rush of business on its road. The excess of business might have excused a refusal to accept the freight, but could not excuse a non-performance of its contract to carry. *International & G. N. R. Co. v. Anderson*, 3 *Tex. Civ. App.* 8, 21 *S. W. Rep.* 691.

Nor would the fact that an accumulation of cars and freight at the place of delivery was such that the company could not reach that point within a reasonable time exonerate the carrier, it being within the power of the company to have removed the obstruction. The carrier should provide in his contract for such a contingency, if he would limit his liability. *Illinois C. R. Co. v. McClellan*, 54 *Ill.* 58.

An unusual press of business will not excuse a carrier from a delay where it appears that the press of business had existed for a long time, and was well known to the carrier at the time it received the goods. In such case the carrier should notify the shipper of the facts and contract accordingly. *Pect v. Chicago & N. W. R. Co.*, 20 *Wis.* 594.

* See also *ante*, 57.

Liability of railroad for delay in transportation of goods caused by an unusual press of freight, see note, 22 *AM. & ENG. R. CAS.* 427.

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141. Sufficiency of carrying facilities.*—If the company has a reasonable equipment for all ordinary purposes of business, and the delay is occasioned by an unusual press of business, but the carrying is done with reasonable expedition under the circumstances, the carrier is not responsible for the delay; nor will the carrier be responsible if the goods are delayed by an accident not amounting to an inevitable casualty, if due care and diligence have been exercised. *Vicksburg & M. R. Co. v. Ragsdale*, 46 Miss. 458, 1 Am. Ry. Rep. 407.

Where the rolling stock of a railroad company is sufficient for its ordinary business during 9 months of the year, the fact that for the other three months of each year its rolling stock is not sufficient to promptly carry all freights of a particular kind requiring cars of a peculiar structure, will not render the carrier liable to a shipper, who had made a general contract to ship the special kind of goods, but without specifying any quantity or limiting any time for the shipment, for cost of insurance and storage from the time his goods might be ready for shipment until the company could furnish cars. *Thayer v. Burchard*, 99 Mass. 508.

A railroad company which has the rolling stock and equipments to carry without delay the freights usually offered, is not bound to receive goods which it is not at the time able to carry by reason of some accidental or extraordinary increase in the public demand for transportation, which occurs without the fault of the company. In such case the company may rightfully decline to receive freights offered which it cannot carry without delay; but if it does receive them it can only relieve itself from responsibility for delay resulting from a previous accumulation of freights by acquainting the shipper with the facts when he offers his goods and affording him the option of acquiescing in the delay or seeking some other line of transportation. *Bussey v. Memphis & L. R. R. Co.*, 4 McCrary (U. S.) 405, 13 Fed. Rep. 330.

Where the principal cause of delay in transporting grain by a railroad was a great accumulation of loaded cars at all its stations for a great distance on its road and

the fact that the company had undertaken to carry more freights than it could manage successfully—*held*, that even if plaintiff were in some degree of fault in not receiving grain more promptly, it would not excuse the company for delay in transporting other grain shipped to plaintiffs. *Illinois C. R. Co. v. Cobb*, 64 Ill. 128.—**DISTINGUISHING** *Galena & C. U. R. Co. v. Rae*, 18 Ill. 488.

A railroad company received flour at an inland point to be carried to a seaport and thence by steamer to London; but a delay occurred before vessels could be procured to transport it. *Held*, that if the company was well supplied with the necessary equipments and means of transportation for all the freight that might ordinarily be accepted, and the delay occurred by a sudden and extraordinary influx of ocean freight, which was beyond the company's control and which it could not foresee and anticipate, or by the exercise of any diligence provide for, then it was not liable for the delay. *Helliwell v. Grand Trunk R. Co.*, 10 Biss. (U. S.) 170, 7 Fed. Rep. 68.

But if, in such case, the company knew at the time of making the contract that the accumulated business was such as might reasonably be expected to prevent it from reshipping within a reasonable time, or if it might by proper effort have known it, in that event it would be liable for the delay. *Helliwell v. Grand Trunk R. Co.*, 10 Biss. (U. S.) 170, 7 Fed. Rep. 68.

142. Discrimination between shippers.*—A common carrier is not responsible for delay caused by an unusual press of business, or influx or accumulation of freight exceeding its ability to carry, where it makes no undue discriminations among owners, and carries the freight offered as soon as it can, consistently with its accommodations and with its duty to forward freight previously offered. But when it has once accepted goods delivered for transportation it is bound safely to keep, safely to carry, and safely to deliver them. *Truax v. Philadelphia, W. & B. R. Co.*, 3 Houst. (Del.) 233.

In an action for damages to property shipped by negligent delay in transportation, defendant proved that its road was in good order and well equipped; that the car in which the property was loaded was connected with a train on the eighth Novem-

*Reception of freight when road is obstructed or cars insufficient; liability for delay, see note, 18 AM. & ENG. R. CAS. 525.

* See also *ante*, 58.

ber, and run onto a side track, and there remained until the fifteenth, when it was sent forward. It also gave evidence tending to show that the delay was occasioned by an accumulation of freight beyond the capacity of the road to carry, and that the train was sent forward in its regular order. Plaintiff in reply showed by defendant's books several instances where goods, which were billed after the eighth, arrived in an average time of less than two days after the dates of the bills, and also that the date of the way-bill indicated the date the car was loaded and placed with the train. *Held*, that this evidence tended to prove that the car containing the property in question was not sent forward in its regular order, and made the question one of fact for the jury, whose determination could not be reviewed on appeal. *Acheson v. New York C. & H. R. Co.*, 61 N. Y. 652.

143. Delays caused by strikes.*—

Where a railroad company has received freight for shipment, and its employes refuse to work, it is still bound to forward the freight within a reasonable time, unless the strike is of such violence as to render it unsafe to do so; but it is not liable where the strike is of such magnitude as to be beyond the control of the company and the civil authorities. *Haas v. Kansas City, Ft. S. & G. R. Co.*, 35 Am. & Eng. R. Cas. 572, 81 Ga. 792, 7 S. E. Rep. 629.—REVIEWED IN *Gulf, C. & S. F. R. Co. v. Levi*, 42 Am. & Eng. R. Cas. 439, 76 Tex. 337, 13 S. W. Rep. 191, 8 L. R. A. 323.

Where a company uses all reasonable means and efforts to move its trains, and a delay is caused by the action of its employes who were on a strike, it is not liable. While the employes are on a strike and working against the company they cannot be said to be its employes. *Little v. Fargo*, 43 Hun (N. Y.) 233, 5 N. Y. S. R. 462.—FOLLOWING *Geismer v. Lake Shore & M. S. R. Co.*, 102 N. Y. 563.

Goods were shipped with a provision in the bill of lading to the effect that the carrier should not be liable for loss or damage caused by fire or other casualty while in transit, or while in depots or places of transshipment. At an intermediate station, where the goods were awaiting transportation from

one line to another, the goods were delayed by a mob of strikers, and were finally burned. *Held*, that the company was not liable. *Hall v. Pennsylvania R. Co.*, 14 Phila. (Pa.) 414.

144. Waiver of right of action for delay.—A party who has a right of action against a carrier of goods for a failure to carry and deliver them within a reasonable time, may waive it by afterward demanding the goods and insisting on a delivery. *Nudd v. Wells*, 11 Wis. 407.

A delay by the carrier having been shown, from which injury might have resulted, he may show that before the commencement of the voyage the plaintiff consented that such delay should occur; the maxim applies, *volenti non fit injuria*. *Johnson v. Lightsey*, 34 Ala. 169.

Where a party waives a right of action for the value of goods that he had against a carrier for an unreasonable delay in carrying and delivering goods, by afterward demanding them and insisting on a delivery, he may still recover damages fixed by the contract of shipment for such delay, and also any other direct and immediate damages caused thereby. *Nudd v. Wells*, 11 Wis. 407.

Mere acceptance of a portion of the goods shipped by railroad, on arrival at their destination, is not a waiver of all claim for loss resulting from delay. *Georgia R. Co. v. Cole*, 68 Ga. 623.

145. Special defenses.—Plaintiffs shipped veal from Vermont by rail into the state of Massachusetts, where a law existed prohibiting the sale of veal killed when less than four weeks old, but of which law the shippers were ignorant. *Held*, that the fact that some of the veal was killed within the prohibited time would not avail the carrier as a defense to an action for a want of proper care in transporting it; but so far as the statute affected the value of the veal it might be a valid defense. *Mann v. Birchard*, 40 Vt. 326.

The term *via* is never used to designate a terminal point, and the fact that the consignor directed that goods delivered to a carrier for transportation to "R" be shipped "*via* D," which was a point on the route selected but not the nearest or most available to "R," affords no ground of defense to an action for the damages sustained by reason of their detention at "D." *Denver & R. G. R. Co. v. De Witt*, 1 Colo. App. 419, 29 Pac. Rep. 524.

* See also *ante*, 18, 46, and title STRIKES. Delay caused by strikes and mobs; liability of carrier for, see note, 45 AM. & ENG. R. CAS. 339.

140. Measure of damages, generally.*—A consignee of goods may recover damages of a common carrier for not delivering them in a reasonable time, but he cannot treat the goods as lost and sue for their value without showing that the goods have depreciated in value or cannot be used after their arrival. *Tanner v. Oil Creek R. Co.*, 53 Pa. St. 411.—**DISTINGUISHING** *Raphael v. Pickford*, 6 Scott N.R. 478, 5 M. & G. 551, 44 E. C. L. 292.

Where dressed poultry is shipped to market and is negligently delayed in the carrier's hands, whereby it is injured, in ascertaining the damages it is proper to prove its condition upon arrival at the place of destination, and also the market price when it should have been delivered, as well as when it was delivered. *Holden v. New York C. R. Co.*, 54 N. Y. 662.

In an action against a carrier to recover for damage to grain resulting from unreasonable delay in its transportation, if the grain was to be delivered under a contract of sale by the shipper the contract price should be taken as the basis for estimating the damages; otherwise the market price at the place of delivery at the time the grain should have reached there should govern. *Illinois C. R. Co. v. McClellan*, 54 Ill. 58.

In a suit against a railroad for delay in transportation of grain it is not sufficient for plaintiff to prove that when the grain arrived after the time it should have arrived he realized a specific sum for the grain, and then stop; but he should prove what disposition was made of it, how long, if at all, it was stored, and at what expense, and if sold, the price it brought and the expense of sale. *Illinois C. R. Co. v. Cobb*, 72 Ill. 148.

Where a railroad company receives a still-worm, used in the manufacture of turpentine, which it agreed to transport to a point on a connecting road, it is liable for a delay in the transportation by the connecting road whereby crude turpentine accumulates and overflows the boxes for holding it, and is thereby lost; and the measure of the damages is the value of the turpentine thus lost. *Savannah, F. & W. R. Co. v. Pritchard*, 28 Am. & Eng. R. Cas. 57, 77 Ga. 412, 4 Am. St. Rep. 92, 1 S. E. Rep. 261.

147. Damages for loss of market.†—If a railroad fails to transport grain to its

destination within a reasonable time, and the price of grain declines at the point to which it is consigned, the owner is entitled to recover the difference between the market price at that point when it should have arrived and the market price at the time it actually does arrive. *Illinois C. R. Co. v. Cobb*, 72 Ill. 148. *Fox v. Boston & M. R. Co.*, 37 Am. & Eng. R. Cas. 632, 148 Mass. 220, 19 N. E. Rep. 222, 1 L. R. A. 702.

If in consequence of delay on the part of a railroad in the transportation of grain there ceases to be a market at the point to which it is consigned, the owner may without unreasonable delay ship the grain to some point where it can be sold for the most advantageous price, dispose of it to the best advantage, and hold the company for the loss. *Illinois C. R. Co. v. Cobb*, 72 Ill. 148.

Where the carrier is informed of the special circumstances making it advantageous to the plaintiff to get his produce to a certain market on a certain day, and agrees to furnish cars to be loaded in time to be forwarded to such market by that day, which contract he fails to perform, the plaintiff is entitled to recover such special damages as actually result from the failure to get the produce to market on that day. *Hamilton v. Western N. C. R. Co.*, 30 Am. & Eng. R. Cas. 1, 96 N. Car. 398, 3 S. E. Rep. 164.—**FOLLOWING** *Lindley v. Richmond & D. R. Co.*, 88 N. Car. 547.

A railroad company accepted cotton for a point beyond its road, agreeing to carry to the end of its line and there reship by boat. The company agreed with a packet company to ship by a certain boat, but when she arrived she refused to take the cotton on account of heavy freights and low water. Before the arrival of this boat, however, another boat had offered to take the cotton but had been refused. The cotton was forwarded on the next boat that could be procured, but during the time of the delay there was a decline in the price of cotton. The railroad company was at liberty to contract with any boat that it might choose, and there was nothing before the departure of the boat which offered to carry the cotton and was refused, to induce the belief that the other boat would not take it. *Held*, that the company was not liable. *Frank v. Memphis & C. R. Co.*, 52 Miss. 570.—**FOLLOWING** *Vicksburg & M. R. Co. v. Ragsdale*, 46 Miss. 476.

* See also *post*, 757-809.

† See also *post*, 778.

148. When interest allowable.*—In the absence of a statute authorizing it, interest cannot be recovered in a suit against a railroad for delay in transporting grain. *Illinois C. R. Co. v. Cobb*, 72 Ill. 148.—DIS-
TINGUISHING *Bradley v. Geiselman*, 22 Ill. 494; *Chicago & N. W. R. Co. v. Ames*, 40 Ill. 249; *Northern Transp. Co. v. Sellick*, 52 Ill. 249; *Chicago & N. W. R. Co. v. Schultz* 55 Ill. 421.

c. Loss or Injury by Fire.

149. Generally.—A common carrier is liable for a loss of goods in his possession in that capacity by accidental fire, unless he was exempted from that risk by special contract. *Parker v. Flagg*, 26 Me. 181. *Porter v. Chicago & R. I. R. Co.*, 20 Ill. 407.

The destruction of goods by an accidental fire is not such an act of God as to relieve the carrier from liability, though the proximate cause of the burning is a sudden wind which diverts the course of a distant fire and drives it upon the goods. *Miller v. Steam Nav. Co.*, 10 N. Y. 431; *affirming* 13 Barb. 361.

Where the circumstances are unusual, or an accident occurs which could not reasonably have been anticipated, common carriers are not bound to make extraordinary provision therefor, and are not responsible for a loss thereby occasioned. So a railroad is not liable for goods burned while in transit by fire from burning woods. *Pennsylvania R. Co. v. Fries*, 87 Pa. St. 234.

Although the common-law liability of carriers be controlled by the custom of excepting fire as a risk in the bill of lading, the carrier should be held to strict proof of diligence and care in avoiding loss to the owner by so dangerous an element. *Singleton v. Hilliard*, 1 Strobb. (So. Car.) 203.

A carrier, having agreed to deliver goods in Pittsburgh, is liable for a loss by fire which occurred after their arrival at his warehouse in Albany, to which he had removed some months before and occupied, as was the custom of the trade, until the aqueduct across the river to Pittsburgh was completed. *Graff v. Bloomer*, 9 Pa. St. 114.

A railroad company that ships goods over part of its route on a vessel which it does not own or charter is not relieved from liability by U. S. St. of 1851, ch. 43, exempting the owners or charterers of vessels

from liability for loss by accidental fires, where the goods are destroyed by an accidental fire on the vessel. *Hill Mfg. Co. v. Boston & L. R. Co.*, 104 Mass. 122.

150. Exception of loss by fire in bill of lading not binding if loss occurs through negligence.—A common carrier, protected by a valid stipulation in his bill of lading against liability for loss of goods by fire, is not responsible for any loss resulting from that cause, unless his negligence was the proximate cause of the fire. *Lancaster Mills v. Merchants' Cotton-Press Co.*, 45 Am. & Eng. R. Cas. 423, 89 Tenn. 1, 14 S. W. Rep. 317. *St. Louis, I. M. & S. R. Co. v. Bone*, 52 Ark. 26, 11 S. W. Rep. 958.

A bill states no cause of action which merely avers loss by fire of goods intrusted to a carrier for shipment under a bill of lading containing a valid clause exempting him from liability for loss by fire. Complainant must, in such case, aver the additional fact, which he must establish by proof, that the carrier's negligence was the proximate cause of the fire causing the loss. *Lancaster Mills v. Merchants' Cotton-Press Co.*, 45 Am. & Eng. R. Cas. 423, 89 Tenn. 1, 14 S. W. Rep. 317.

Upon such defective bill no relief can be awarded, even where there is prayer for general relief and the carrier suffers a decree *pro confesso*. *Lancaster Mills v. Merchants' Cotton-Press Co.*, 45 Am. & Eng. R. Cas. 423, 89 Tenn. 1, 14 S. W. Rep. 317.

151. When proof of delivery and of loss raises a presumption of negligence.*—Proof that goods were delivered to a railroad company and were destroyed while on its cars raises a presumption of negligence on the part of the company. *Gulf, C. & S. F. R. Co. v. Zimmerman*, 81 Tex. 605, 17 S. W. Rep. 239.

The occurrence of a fire does not alone justify an inference of negligence, and in the absence of an explanation as to its origin, or evidence that it was in defendant's power to explain, or that by the exercise of reasonable care the fire would not have occurred, no presumption is raised to justify a submission to the jury whether the fire was caused by defendant's negligence or not. *Whitworth v. Erie R. Co.*, 6 Am. & Eng. R. Cas. 349, 87 N. Y. 413; *affirming* 13 J. & S. 602.

* See also *post*, 702.

* See also *post*, 173.

Where, in an action by a shipper of cotton against a railroad to recover damages for the loss of the cotton from fire, the evidence shows that the carrier, after receiving the property, placed it in the hands of a compress company to have it compressed, and also shows careless conduct on the part of the compress company in the use of fire about the cotton, and that, too, on the very day of the conflagration—*held*, that the conclusion of the compress company's negligence is a natural and reasonable one. *Otis Co. v. Missouri Pac. R. Co.*, 112 Mo. 622, 20 S. W. Rep. 676.

152. When burden to prove negligence is on plaintiff.*—In an action to recover for the loss of goods delivered to a company for transportation, where it is admitted that the goods were destroyed while in the company's warehouse, but it is charged that the fire destroying them was the result of the company's negligence, the burden of proof to establish such negligence is on the plaintiff. *Denton v. Chicago, R. I. & P. R. Co.*, 52 Iowa 161, 2 N. W. Rep. 1093.

A provision in a contract for the transportation of goods, to the effect that a carrier should not be liable for a loss by fire, does not relieve the carrier for a loss if a fire occurs through its own negligence; but the burden of proving negligence is on the plaintiff, and it is error to charge that the burden of disproving negligence is on the company. *Lamb v. Camden & A. R. & T. Co.*, 46 N. Y. 271, 7 Am. Rep. 327; *reversing 2 Daly* 454.—APPLIED IN *Babcock v. Lake Shore & M. S. R. Co.*, 49 N. Y. 491; *Magnin v. Dinsmore*, 56 N. Y. 168; *Platt v. Richmond, Y. R. & C. R. Co.*, 32 Am. & Eng. R. Cas. 517, 108 N. Y. 358, 11 Cent. Rep. 101, 15 N. E. Rep. 393, 13 N. Y. S. R. 660; *Kelsey v. Jewett*, 28 Hun (N. Y.) 51; *McKay v. New York C. & H. R. R. Co.*, 50 Hun 563, 20 N. Y. S. R. 816, 3 N. Y. Supp. 708. DISTINGUISHED IN *Adams Exp. Co. v. Harris*, 40 Am. & Eng. R. Cas. 151, 120 Ind. 73, 21 N. E. Rep. 340; *Russell Mfg. Co. v. New Haven Steamboat Co.*, 50 N. Y. 121; *Rawson v. Holland*, 59 N. Y. 611. FOLLOWED IN *Witting v. St. Louis & S. F. R. Co.*, 101 Mo. 638; *Cochran v. Dinsmore*, 49 N. Y. 249; *Condict v. Grand Trunk R. Co.*, 54 N. Y. 500; *Magnin v. Dinsmore*, 3 J. & S. (N. Y.) 182; *Sutro v. Fargo*, 9 J. & S. (N. Y.) 231. QUOTED IN *Chicago, St. L. & N.*

O. R. Co. v. Moss, 21 Am. & Eng. R. Cas. 98, 60 Miss. 1003.—*Sutro v. Fargo*, 9 J. & S. (N. Y.) 231.—FOLLOWING *Lamb v. Camden & A. R. & T. Co.*, 46 N. Y. 271; *Cochran v. Dinsmore*, 49 N. Y. 249.—*Little Rock, M. R. & T. R. Co. v. Harper*, 21 Am. & Eng. R. Cas. 97, 44 Ark., 208.—QUOTED IN *Little Rock, M. R. & T. R. Co. v. Talbot*, 47 Ark. 97.—*Otis Co. v. Missouri Pac. R. Co.*, 112 Mo. 622, 20 S. W. Rep. 676.

Proof of the mere fact of the loss of goods by fire, without more, raises no presumption of negligence against a carrier. *Louisville & N. R. Co. v. Manchester Mills*, 88 Tenn. 653, 14 S. W. Rep. 314.—DISTINGUISHING *Inman v. South Carolina R. Co.*, 129 U. S. 128; *Turney v. Wilson*, 7 Yerg. (Tenn.) 340. QUOTING *Merchants' Dispatch Transp. Co. v. Bloch*, 86 Tenn. 393; *East Tenn., V. & G. R. Co. v. Mitchell*, 11 Heisk. 404; *Louisville & N. R. Co. v. Wynn*, 88 Tenn. 320.

153. When burden to disprove negligence is on the carrier.*—Where a railroad company is sued upon its contract to safely carry goods, and sets up the defense that it did safely carry them to the place of destination, where the goods were stored in its warehouse and there destroyed by fire, without its negligence or fault, the burden is on the company to establish such defense and to show that the fire was without fault or negligence. *Wilson v. California C. R. Co.*, 94 Cal. 166, 29 Pac. Rep. 861.

A defect in a brake, such as to prevent a burning car from being detached, raises a legal presumption of negligence on the part of the company, shifting the *onus* to it to show the contrary, or that the defect or fire was the result of unavoidable accident. *Empire Transp. Co. v. Wamsutta O. & M. Co.*, 63 Pa. St. 14.

154. When question of negligence is for jury.†—Where goods are shipped under a contract providing that the company should not be liable for a loss by fire, the fact of a loss by fire while in the carrier's hands does not raise a presumption of negligence; and where the evidence merely shows a loss by fire without evidence of fault or negligence on the part of the carrier, it is error for the court to direct a verdict for the plaintiff. The case should be sub-

* See also *post*, 704.

* See also *post*, 702, 703.

† See also *post*, 186.

mitted to the jury. *Sutro v. Fargo*, 9 J. & S. (N. Y.) 231.

While plaintiff's goods with others were on the carrier's wharf at night a fire occurred and destroyed them. It appeared that the carrier had provided a watchman, but there was no evidence that he was at his post; and no means of extinguishing the fire had been provided. *Held*, that it was proper to leave the question of the carrier's negligence to the jury. *Russell Mfg. Co. v. New Haven Steamboat Co.*, 50 N. K. 121.—DISTINGUISHING *Lamb v. Camden & A. R. Co.*, 46 N. Y. 271, 7 Am. Rep. 327.—EXPLAINED IN *Russell Mfg. Co. v. New Haven Steamboat Co.*, 52 N. Y. 657.

155. When carrier's negligence is proximate cause of loss.—A common carrier, though protected by a valid fire-clause exemption, is not excused from liability for loss of goods by fire while in his custody, even when the fire occurred without his negligence, if by his fault or negligence the goods were placed in reach of or contact with the fire. The carrier's negligence, not the fire, is, in this case, the proximate cause of the loss. *Deming v. Merchants' C.-P. & S. Co.*, 90 Tenn. 306, 17 S. W. Rep. 89.

Cotton was burned on board a car for shipment. The fire occurred without fault of the carrier. He was protected by a valid fire-clause exemption. But for unusual delay in removing the car and breaking of machinery in the effort to remove it, the cotton would not have been within reach of the fire. The delay and breaking of machinery was not explained. *Held*, that the carrier was negligent, and that negligence, not the fire, was the proximate cause of the loss; that the burden of proof was upon the carrier to explain the delay and breaking of machinery, so as to excuse himself from the imputation of negligence; and that general allegations of liability in the pleadings were sufficient to entitle plaintiff to relief upon said facts. *Deming v. Merchants' C.-P. & S. Co.*, 90 Tenn. 306, 17 S. W. Rep. 89.

Plaintiff's goods were placed in the company's warehouse at their place of destination, where a large amount of powder was also stored. Upon a fire breaking out in the warehouse, the firemen who came to extinguish it were prevented from entering the warehouse and doing so by reason of the presence of the powder. *Held*, that the presence of the powder might be regarded as the proximate cause of the loss, and

storing it there was such proof of negligence as to render the company liable. *White v. Colorado C. R. Co.*, 5 Dill. (U. S.) 428.

A car loaded with oil was derailed by the breaking of an axle, and while thus delayed a passer-by, through curiosity, struck a match on the car to ascertain whether it was loaded with whiskey or oil. The oil took fire and was destroyed. *Held*, that the owners of the oil could not recover if the defect in the axle could not have been detected by the company's car inspector by the use of reasonable care, and if reasonable care had been exercised otherwise in running the car. *Lucisco Oil Co. v. Pennsylvania R. Co.*, 2 Pittsb. (Pa.) 477.

156. Shipping cotton in open cars.*—The shipment of cotton on open or flat cars is not in itself such negligence as to make the carrier liable for a loss under all contingencies, but it should take additional precautions for its safety; but where, instead, it tries to hurry it forward with fires burning along the track so as to make it more than probable that it will be destroyed, it is such gross negligence as to make the company liable for a loss. *North America Ins. Co. v. St. Louis, I. M. & S. R. Co.*, 3 McCrary (U. S.) 233, 11 Fed. Rep. 380.

In a contract for the transportation of cotton by rail, a provision by which the consignor agrees to assume all risk of loss or damage by fire does not relieve the company from liability for a loss by fire caused by its own negligence; and if placing the goods on an open uncovered car constitutes negligence, notice to the consignor at the time of shipment that the cotton would be carried on such a car will not relieve the company from liability. *Montgomery & W. P. R. Co. v. Edmonds*, 41 Ala. 667.

Cotton was shipped under a bill of lading providing that the carrier should not be liable for injury to goods "whose bulk is such as requires them to be carried upon open cars, or which are usually carried on open cars." *Held*, in an action against the company for a loss of the cotton by fire, that it was competent for the carrier to prove the custom and usage of well appointed and managed roads, as to their method of shipping baled cotton. *Louisville & N. R. Co. v. Manchester Mills*, 88 Tenn. 653, 14 S. W. Rep. 314.

* See also *post*, 463.

Cotton was shipped under an agreement that it might be carried on flat cars, and while being so carried it was destroyed by fire. In an action for the loss the court instructed the jury, at the request of the plaintiff, that it was the duty of the company "to take due precaution to protect the cotton from loss by fire, and to provide all suitable means and appliances to prevent it from catching fire and for extinguishing it if it should catch; and if the cotton was destroyed by fire by reason of the company's failure to provide such appliances or to take such precautions, then it was liable, notwithstanding the contract that it might be carried on flat cars." *Held*, that this instruction was not open to the objection that it denied the company the right to carry the cotton on flat cars, where other instructions show that such right was not controverted, and were sufficient to make it appear that the "means and appliances" referred to meant buckets filled with water, which the company was in the habit of carrying on such cars, but which were not on the cars carrying the cotton. *Chicago, St. L. & N. O. R. Co. v. Moss*, 21 *Am. & Eng. R. Cas.* 98, 60 *Miss.* 1003.

157. Evidence.—Where a railroad company is sued for the loss of goods by fire while being carried, it is error to permit one of its witnesses to state that everything was done which could have been done to save the goods from being burned. This was a matter for the jury to determine, not the witness. *Montgomery & W. P. R. Co. v. Edmonds*, 41 *Ala.* 667.

158. Measure of damages—Interest.*—Goods were shipped from a point in Alabama to New Orleans, and *en route* were burned. In an action to recover their value, the court instructed the jury that the measure of damages was the value of the goods in New Orleans, with 8 per cent. interest from the time they should have been delivered. The rate of interest in Louisiana was less than 8 per cent. *Held*, that the instruction as to the rate of interest was erroneous, but a general exception to the whole charge, part of which was correct, was ineffectual. *Mobile & M. R. Co. v. Jurey*, 16 *Am. & Eng. R. Cas.*, 132, 111 *U. S.* 584, 4 *Sup. Ct. Rep.* 566.—*Quoting Jacobson v. State*, 55 *Ala.* 151; *South & N. Ala. R. Co. v. Jones*, 56 *Ala.* 507.

*d. Conversion of Freights by Carrier.**

159. What amounts to a conversion.—A common carrier who, having received goods to be carried to a designated place, transports them to another place to prevent their coming to the possession of the consignee, and deprives him of their use and disposition, is liable for conversion of the goods. *Baltimore & O. R. Co. v. O'Donnell*, 49 *Ohio St.* 489, 32 *N. E. Rep.* 476.

After such conversion the consignee is under no obligation to receive the goods; and it is no defense to his action for their value, that they were tendered to him after the conversion and then stolen without the negligence of the carrier. *Baltimore & O. R. Co. v. O'Donnell*, 49 *Ohio St.* 489, 32 *N. E. Rep.* 476.

Where goods are shipped in sealed cars, not to be opened until they reach their place of destination, the carrier is not necessarily liable for a conversion because it breaks the seal and transfers the goods to other cars, for its own convenience. If the goods be safely carried and delivered, without loss or injury, the carrier is not liable in trover. *Tucker v. Housatonic R. Co.*, 39 *Conn.* 447.

160. Damages which can be repaired not a conversion.—Where a portion of a consignment of goods is culpably damaged in transit, but is still *in specie* and repairable at little expense, the railway will not be liable as for conversion of such damaged goods; nor, if the consignee tender the charges due on the uninjured portion only of the consignment, will the railway incur the statutory penalty for refusal to deliver such goods. Thus, where a consignee of four wagons, billed and charged as one shipment, refused to receive one of them because a small piece of it is missing, which may be easily restored at small expense, the railway may refuse his tender of the proportionate freight due on three wagons and keep them, or retain the fourth wagon until the entire freight bill is paid or tendered, without incurring the statutory penalty. *St. Louis, A. & T. R. Co. v. Johnson*, 45 *Am. & Eng. R. Cas.* 381, 53 *Ark.* 282, 13 *S. W. Rep.* 1096.

161. Where goods are attached.—The plaintiff had attached a lot of lumber

* See also *post*, 773.

* See also *post*, 303, 315.

† See also *ante*, 27, 100; *post*, 295-302.

as the property of P., upon a writ against him, and had left a copy of the writ and return with the town-clerk in the town where the lumber was situated. Afterward P. employed the defendant company to freight this lumber for him, but before it was moved the plaintiff notified the company of his attachment, and forbade their moving the lumber. But the company removed it according to their contract with P. *Held*, that the company was liable to the plaintiff in trover for the lumber. *Johnson v. Grand Trunk R. Co.*, 44 N. H. 626.

Merchants failed and made an assignment for the benefit of creditors. The assignee sold goods assigned to plaintiffs, who delivered them to a dispatch company to be sent by rail to a distant place, and while *en route* they were attached by the creditors of the insolvent merchants, and the agent of the dispatch company was summoned as garnishee. Some days later plaintiffs demanded the goods of the garnishee, and, being refused, brought suit for a conversion. *Held*, that the action could not be maintained. At the time of the demand the goods were in legal effect in the possession of the sheriff. If the goods were wrongfully attached, the remedy was against the parties attaching. *Stiles v. Davis*, 1 Black (U. S.) 101.

102. When perishable freights may be sold.—Where a carrier is transporting property of a perishable nature, and a delay is occasioned by unavoidable accident, and it becomes impossible to forward the property in time to save it from total loss, he is justified in selling it for the best price which can be obtained. *American Exp. Co. v. Smith*, 33 Ohio St. 511.

103. Carrier cannot convey title by sale.—A common carrier, merely as such, cannot transfer any title by a sale of the property he carries, even if the sale is for a full consideration, to one who purchases in good faith, and in the absence of any marks to indicate ownership in any other person. *Bailey v. Shaw*, 24 N. H. 297.

104. Measure of damages.*—In an action against a common carrier for conversion, plaintiff is entitled to the value of the goods converted, at the point of destination. *Rice v. Indianapolis & St. L. R. Co.*, 3 Mo. App. 27.

In an action for the conversion of perishable goods sold by a carrier, the plaintiff having established the right to recover, the measure of damages is their value at the time of conversion. *Worden v. Canadian Pac. R. Co.*, 30 Am. & Eng. R. Cas. 127, 13 Ont. 652.

c. Diverting Goods from Usual Route.*

105. Effect of change of route, generally.—If a common carrier deviates from his route, or forwards goods by different conveyances from those contemplated by his agreement, he becomes an insurer of the goods, and cannot avail himself of any exemption in his behalf in the contract. *Galveston, H. & H. R. Co. v. Allison*, 12 Am. & Eng. R. Cas. 28, 59 Tex. 193.

Where a carrier receives goods marked to a point beyond its line, if directions are given by the shipper to forward by a particular line, the initial carrier will be liable for failing to obey such directions. The carrier must obey the directions of the shipper, in which case, if loss occurs, no liability attaches. *Michigan S. & N. I. R. Co. v. Day*, 20 Ill. 375.

A contract to forward goods from New York to Detroit "by sail on the lake," all dangers on the lake, etc., to be at the risk of the owners, is restrictive as to the mode of transportation; and the company having departed from it by shipping the goods by steam instead of sail on the lake, and the goods having been lost on the lake, the company were liable as insurers to the owners for the value of the goods. *Merrick v. Webster*, 3 Mich. 268.

Where the carrier received goods at Worcester, Mass., to transport to the consignees at Mattoon, Ill., and carried them by way of Chicago instead of the most usual and direct route by way of Indianapolis, and while stored in Chicago awaiting a reshipment they were destroyed by the great fire of 1871.—*held*, that the carrier was not excused from liability on the ground of inevitable accident, as there was no compulsion to take the goods through Chicago. *Merchants' Despatch Transp. Co. v. Kahn*, 76 Ill. 520.

A railroad company received goods to carry to a certain point on its road, and there to be delivered to the "Merchants' Express" to be forwarded; but instead it

* See also *post*, 757, etc.

* See *post*, 300.

delivered the goods to other carriers, who in turn delivered them to a company called the "Merchants' Express and Transportation Company," by reason of which the goods were carried to the place of destination at a greater cost than if they had been shipped as directed. *Held*, that the initial carrier was liable for the increased cost of transportation, and it was not excused because its agent did not know of the Merchants' Express. *Proctor v. Eastern R. Co.*, 105 Mass. 512, 1 Am. Ry. Rep. 511.

Goods were shipped by rail on the express condition that they were to be carried to the end of the road and there transferred to a certain line of steamers to be carried to the place of destination. The road carried them to the end of its line and, upon the line of steamers refusing to take them, reshipped on a barge without orders from the shipper. *Held*, that the railroad company was liable for a loss of the goods while on the barge. *Johnson v. New York C. R. Co.*, 33 N. Y. 610, 29 How. Pr. 574 n., 39 How. Pr. 135; *reaffirmed on another appeal*, 39 How. Pr. 127; *reversing* 31 Barb. 196.—REVIEWED IN *Maghee v. Camden & A. R. Co.*, 45 N. Y. 514.

Goods were delivered to a carrier in France to be carried by steamer to London and thence to the United States. They were carried to Southampton and thence by rail to London, and were delivered in a damaged condition. A bill of lading provided that the carrier should not be liable for damage resulting from sweating, inherent deterioration, rain, spray, or perils of the sea. *Held*, that by reason of the deviation in the method of carrying, the carrier lost the benefit of the exceptions in the bill of lading and became an insurer. *Robertson v. National Steamship Co.*, 17 N. Y. Supp. 459; *reversing on another point* 14 N. Y. Supp. 313.

100. Transshipment.—A transshipment of freight is only justifiable in cases of necessity, and if made in the absence of such necessity as constitutes a legal excuse, subjects the carrier to liability for the consequent loss of the freight on the vessel to which it is transferred; and the mere grounding of a steamboat on an inland river, from which she could relieve herself with safety and convenience by temporarily placing a part of her cargo on the bank and afterwards take it on board again and finish her voyage, does not constitute such legal excuse. *Cox v. Foscue*, 37 Ala. 505.

The undertaking to deliver goods, the dangers of the river excepted, with privileges of reshipment at a particular point, will not authorize a stoppage short of the point designated for the reshipment; and if the carrier stop short of that point and the cargo be lost in a storm, he will be responsible. But if he had been in the discharge of his duty and undertaking, there would have been no responsibility in such case. *Cassidy v. Young*, 4 B. Mon. (Ky.) 265.

Freight was shipped to pass over several connecting roads. The last road received the freight and carried it over part of its road, but was prevented from carrying it to the place of destination by an obstruction on its track, and thereupon delivered the freight to another road consigned to itself at the place of destination, and received the freight from such road and delivered it to the consignee and collected the charges as due itself, and in all respects dealt with the consignee as if it had been the actual carrier. *Held*, that it thereby made the line over which it had the freight transported *pro hac vice* its own, and subjected itself to liability for any injury to the freight while on such other road. *Levy v. Louisville & N. R. Co.*, 35 La. Ann. 615.

107. Diverting "all-rail" freights to steamer.—Where a railroad to which goods are delivered is directed to forward them from the terminus of its line by a certain route by fast freight, and, in disregard of instructions, it forwards by steamer instead, and a loss ensues, an action for damages is founded, not upon the negligence of the carrier, but upon the breach of contract in failing to forward the goods according to instructions, and the defendant's liability is not dependent upon the doctrine of proximate cause. *Philadelphia & R. R. Co. v. Beck*, 40 Am. & Eng. R. Cas. 140, 125 Pa. St. 620, 17 Atl. Rep. 505.

Goods were delivered to a railroad company for shipment which would require them to pass over several lines, and a bill of lading was given specifying that they were to go through as "all-rail" freight, and exempting the carrier from "unavoidable accidents of the railroad and fire in depots." After passing through several carriers it was delivered to the defendant company, and carried part of the way over its road, but the last 20 miles, before reaching the place of destination, by steamboat. They could have been carried the entire distance

by rail except crossing two rivers. The goods were accidentally destroyed by fire in the defendant's depot. *Held*, that the deviation from all-rail shipment rendered the company liable, notwithstanding the exceptions in the bill of lading, in the absence of any proof that a loss would have occurred if no deviation had been made. *Maghee v. Camden & A. R. Co.*, 45 N. Y. 514.—REVIEWING *Johnson v. New York C. R. Co.*, 33 N. Y. 610.

Where a railroad contracts to carry goods to the end of its line, and there to be delivered to a connecting carrier, and there are connecting carriers both by rail and boat, if plaintiff sues alleging a contract by which they were to go the whole distance by rail, the burden of proving such contract is on him. *Dixon v. Columbus & I. R. Co.*, 4 Biss. (C. S.) 137.

Where goods are received for a point beyond the initial carrier's line, and a bill of lading is given specifying that the goods should be delivered to any connecting carrier willing to receive the same unconditionally, and that the initial carrier should not be liable after delivery to the next carrier, it is not competent to prove a contemporaneous oral agreement to forward by rail only. *Hinckley v. New York C. & H. R. R. Co.*, 56 N. Y. 429.—FOLLOWING *Long v. New York C. R. Co.*, 50 N. Y. 76.—FOLLOWED IN *Dana v. New York C. & H. R. R. Co.*, 50 How. Pr. (N. Y.) 428.

4. After Transit.*

168. Liable as common carrier while goods awaiting delivery.—Where a railway company has carried goods to their place of destination, its liability while they are awaiting delivery will be that of a common carrier, unless there be evidence of some agreement, usage, or special circumstance to show that it is to be liable as warehouseman only. *Buckley v. Great Western R. Co.*, 18 Mich. 121.—APPLIED IN *Western R. Co. v. Little*, 86 Ala. 159. QUOTED IN *Gashweiler v. Wabash, St. L. & P. R. Co.*, 25 Am. & Eng. R. Cas. 403, 83 Mo. 112, 53 Am. Rep. 558. REVIEWED IN *Feige v. Michigan C. R. Co.*, 62 Mich. 1, 28 N. W. Rep. 685.

169. Liability where goods are stolen.—Where a carrier has safely transported goods to the place of destination

and is holding them as warehouseman awaiting delivery, and they are feloniously stolen, it is not answerable even as warehouseman for the loss. *Williams v. Holland*, 22 How. Pr. (N. Y.) 137.

170. Liability for reasonable time after arrival for removal.—If goods are lost after their arrival at the place of destination through the want of ordinary care on the part of the carrier, it seems that the question of whether the consignee has had a reasonable time in which to take them away is immaterial. *Lamb v. Camden & A. R. & T. Co.*, 2 Daly (N. Y.) 454.

Where a consignee calls for grain the next morning after the arrival of the train carrying it, and it cannot be found, though there is proof that it was removed from the car to the platform the night previous, the company is liable for its value. *Milwaukee & M. R. Co. v. Fairchild*, 6 Wis. 403.

171. Failure to deliver on demand.—A teamster was sent to a freight depot for baled goods, but was informed by the freight agent that the goods had already been delivered. He pointed to certain bales and asked if they were not the ones, but the agent turned one bale over so as to exhibit the marks and said that they were not the goods. They were in fact the goods, but the teamster did not know how the goods were marked, and went away. The following night the goods were destroyed by fire. *Held*, that the agent was guilty of such negligence as to make the company liable. *Stevens v. Boston & M. R. Co.*, 1 Gray (Mass.) 277.—DISTINGUISHED IN *Chicago & A. R. Co. v. Addizoat*, 17 Ill. App. 632.

172. Unloading by carrier where consignee should unload.—While goods are in the actual custody of the carrier, although after the time when they ought to have been taken away, and where, by the rules of the company, the goods are to be unloaded by the consignee, if the carrier proceeds to unload them from the cars it is bound to use ordinary care and diligence, and if damage accrues through the want of such care it is liable. *Kimball v. Western R. Co.*, 6 Gray (Mass.) 542.

5. Negligence on Part of Carrier.

173. When proof of delivery and of loss raises a presumption of negligence.*—Proof that plaintiff owned

* See also *post*, 323-374.

* See also *ante*, 151.

property and delivered it to a common carrier for transportation, and of acceptance by it, and its non-delivery to the consignee, is *prima-facie* evidence of negligence, and casts the burden upon the carrier to show facts exempting it from liability. *Bennett v. American Exp. Co.*, 49 *Am. & Eng. R. Cas.* 56, 83 *Me.* 236, 22 *Atl. Rep.* 159. *Little v. Boston & M. R. Co.*, 66 *Me.* 239. *Davis v. Wabash, St. L. & P. R. Co.*, 26 *Am. & Eng. R. Cas.* 315, 89 *Mo.* 340, 1 *S. W. Rep.* 327; reversing 13 *Mo. App.* 449.—QUOTING *Wolf v. American Exp. Co.*, 43 *Mo.* 423; *Read v. St. Louis, K. C. & N. R. Co.*, 60 *Mo.* 199; *Memphis & C. R. Co. v. Reeves*, 10 *Wall. (U.S.)* 189. REVIEWING *Pruitt v. Hannibal & St. J. R. Co.*, 62 *Mo.* 527.

Non-delivery of goods intrusted to a carrier and its admission that the same are lost, so that it cannot make delivery, are presumptive evidence of negligence on the part of the carrier. *Black v. Goodrich Transp. Co.*, 55 *Wis.* 319, 42 *Am. Rep.* 713, 13 *N. W. Rep.* 244.—FOLLOWED IN *Browning v. Goodrich Transp. Co.*, 78 *Wis.* 391.

A carrier's obligation to carry safely what he received safely is independent of the question of negligence; but, in the absence of proof that goods were delivered to him or delivered safely, any presumption that he received them goes behind his duty and enters into the origin of the contract for carriage, since there is nothing for the contract to act on until the goods came into his charge, and until that is proved the contract is not. *Marquette, H. & O. R. Co. v. Kirkwood*, 9 *Am. & Eng. R. Cas.* 85, 45 *Mich.* 51, 7 *N. W. Rep.* 209.

174. How prima-facie case is made out.—The burden rests upon the owner of goods lost or injured during transportation to make out a *prima-facie* case of negligence. This may ordinarily be done by proving the delivery of the goods to the carrier, and the fact of the loss or damage happening during the transit. The burden will then rest upon the carrier to show that such loss or injury was not occasioned by his negligence or default. And where specific acts of negligence are alleged to have caused the injury, as the "bumping" or collision of cars, the owner of goods alleged to be injured thereby must establish such facts by a preponderance of evidence, and this, unexplained, will make out a *prima-facie* case of negligence; and it will then devolve on the carrier, controlling the

agencies and instrumentalities through which the accident or injury occurred, to disprove his negligence by showing that the same was occasioned without his fault. *Boehl v. Chicago, M. & St. P. R. Co.*, 45 *Am. & Eng. R. Cas.* 351, 44 *Minn.* 191, 46 *N. W. Rep.* 333.

When goods are lost by some agency excepted by the carrier in the bill of lading, the plaintiff has merely to aver and prove that they were delivered to the carrier and were not received at the point of destination. This makes a *prima-facie* case of negligence. *Ryan v. Missouri, K. & T. R. Co.*, 23 *Am. & Eng. R. Cas.* 703, 65 *Tex.* 13.

To avoid liability the carrier must show that the loss was caused by one of the excepted agencies, and must also rebut the presumption of negligence. This is in accordance with the rules of evidence and with the important rule that the burden of proof is on him who best knows the facts. *Ryan v. Missouri, K. & T. R. Co.*, 23 *Am. & Eng. R. Cas.* 703, 65 *Tex.* 13.—FOLLOWED IN *Missouri Pac. R. Co. v. China Mfg. Co.*, 79 *Tex.* 26; *International & G. N. R. Co. v. Foltz*, 3 *Tex. Civ. App.* 644.

After the owner of goods has shown a loss through the carrier's negligence he need not show affirmatively how the loss occurred, as ordinarily it is impossible for the owner to make such proof. *Westcott v. Fargo*, 63 *Barb. (N. Y.)* 349.

Where it is shown that poultry was apparently in good condition and properly cooped when received by the carrier, and that the weather, during the transit was favorable, but nevertheless one third died in the transit, lasting but a few hours, the circumstances are such as to make out a *prima-facie* case of negligence against the carrier and throw the burden of proof upon him. *Hance v. Pacific Exp. Co.*, 48 *Mo. App.* 179.—REVIEWING *Witting v. St. Louis & S. F. R. Co.*, 101 *Mo.* 631.

That a machine was delivered to the carrier in good condition, well and securely packed, and was by it after transportation delivered back with legs broken to the shipper, is circumstantial evidence from which a reasonable inference of negligence on the carrier's part may be drawn, and should go to the jury for consideration with the carrier's testimony as to the care taken; and this, too, though the *onus* is on the shipper throughout the trial to prove the

carrier's negligence. *Heck v. Missouri Pac. R. Co.*, 51 Mo. App. 532.—APPLYING *Witting v. St. Louis & S. F. R. Co.*, 101 Mo. 631.

175. Where mere proof of a delivery and of loss is not sufficient.—In an action against a common carrier for goods lost during transit, where, instead of merely declaring on the contract, the plaintiff has alleged negligence on the defendant's part, which was traversed by the defendant, the burden of proof of such negligence is on the plaintiff, and mere presumption of negligence because there was a loss is not enough to authorize a recovery, where there is rebutting proof. The goods were lost while on a side-track, and this was claimed to be sufficient proof of negligence; but this is too remote. The maxim *Causa proxima non remota spectatur* applies to this as to other contracts. *Childs v. Little Miami R. Co.*, 1 Cin. Super. Ct. 480.—QUOTING *Memphis & C. R. Co. v. Reeves*, 10 Wall. (U. S.) 176.

176. When burden to disprove negligence is on carrier.*—The authorities are not uniform in respect to depositaries for hire where goods are lost, whether the *onus probandi* of negligence is on the plaintiff, or of exculpation on the defendant. In England the burden is upon the plaintiff, but in some of the American cases the defendant is required to exonerate himself from negligence. *Boies v. Hartford & N. H. R. Co.*, 37 Conn. 272.

Where a carrier has received goods and undertaken their transportation if a loss occurs, the burden of proof is upon it to show that the circumstances were such as to excuse it, or to relieve it from liability; and in this respect a plain distinction obtains between common carriers and other bailees of goods. *Angle v. Mississippi & M. R. Co.*, 18 Iowa 555; *Tardos v. Toulon*, 14 La. Ann. 432; *Merchants' Dispatch Transp. Co. v. Bloch*, 35 Am. & Eng. R. Cas. 579, 86 Tenn. 392, 6 Am. St. R. 847, 6 S. W. Rep. 881.—QUOTED IN *Louisville & N. R. Co. v. Manchester Mills*, 88 Tenn. 653, 14 S. W. Rep. 314.

Proof that goods were delivered to the carrier, and of a demand and refusal, or of such loss as to render the demand useless, casts the burden upon the carrier to account for the loss. *Alden v. Pearson*, 3 Gray (Mass.) 342.

Under an ordinary bill of lading, with no special exceptions, if the goods are lost by the act of God, the burden is upon the carrier to prove that his negligence did not contribute to the loss. *Ryan v. Missouri, K. & T. R. Co.*, 23 Am. & Eng. R. Cas. 703, 65 Tex. 13.

The mere happening of an injurious accident raises *prima facie* a presumption of negligence, and throws upon the carrier the burden of proof that it did not exist. *Buck v. Pennsylvania R. Co.*, 150 Pa. St. 170, 24 Atl. Rep. 678.

A carrier received goods under a contract relieving it from liability "for the dangers of navigation, fire, collision, or delivery, except to land goods on dock or pier." In an action to recover the value of the goods, it appearing that they were never delivered to the consignee, the burden of proof was upon the carrier to show that they were landed on the dock or pier at their destination. *Browning v. Goodrich Transp. Co.*, 78 Wis. 391, 47 N. W. Rep. 428.

177. Effect of proof that goods are easily breakable.—In a case of limited liability in the transportation of goods of a fragile character, the evidence showed shipment in good order and delivery in bad order, and that the goods were carefully packed, and there was no collision or wreck in the course of transportation. The court, while leaving the whole case to the jury on the general allegation of negligence, charged them that unless the carrier showed how the accident occurred, the legal presumption arose that they were liable. *Held*, error, as it would tend to lead the jury to think that they must find for the plaintiff unless the defendant had shown distinctly the actual facts and circumstances of the accident. The absence of such distinct proof does not deprive the defendant of the right to have the question of negligence considered upon all the testimony. *Buck v. Pennsylvania R. Co.*, 150 Pa. St. 170, 24 Atl. Rep. 678.

Where goods are of so fragile a character that they are liable to break even from careful handling, it seems that such fact may be considered by the jury as evidence to rebut the presumption of negligence. *Buck v. Pennsylvania R. Co.*, 150 Pa. St. 170, 24 Atl. Rep. 678.

178. Failure by carrier to account for loss raises a presumption of negligence.—The burden is upon the plaintiffs to prove that the defendants failed to

* See also *ant.*, 153.

exercise ordinary care and diligence in carrying the goods, but unusual and unexplained delay and failure to deliver the goods according to the general course of business is *prima-facie* evidence of a want of ordinary care. *Mann v. Birchard*, 40 *VI.* 326.

The non-delivery of the goods to the consignee, the circumstances of their loss being unexplained, is presumptive evidence of negligence on the part of the carrier. *Browning v. Goodrich Transp. Co.*, 78 *Wis.* 391, 47 *N. W. Rep.* 428.—FOLLOWING *Black v. Goodrich Transp. Co.*, 55 *Wis.* 319.

If no explanation is given as to how the injury occurred, a presumption of negligence arises which is sufficient to justify a recovery in cases where there is no other proof than of the delivery of the goods to the carrier in good condition and their arrival at the point of destination in a damaged condition. *Buck v. Pennsylvania R. Co.*, 150 *Pa. St.* 170, 24 *Atl. Rep.* 678.

Where goods are lost or damaged while in the custody of a carrier, under a special contract, and he gives no account or explanation of the loss or injury, a presumption of negligence follows, rendering him liable. *Alabama G. S. R. Co. v. Little*, 12 *Am. & Eng. R. Cas.* 37, 71 *Ala.* 611.

Where plaintiff shipped acids in vessels called "carboys," proof that the acids were lost while in possession of the carrier, and that the company when applied to refused to give any account of the loss, except that the vessels were broken while the cars were being switched, is sufficient to raise an inference of negligence, as it is well known that switching, when performed with due care, will not cause such an injury. *Kirst v. Milwaukee, L. S. & W. R. Co.*, 46 *Wis.* 489, 21 *Am. Ry. Rep.* 394.—QUOTING *Scott v. London Dock Co.*, 3 *H. & C.* 596; *Steers v. Liverpool, N. Y. & P. Steamship Co.*, 57 *N. Y.* 1.—DISTINGUISHED IN *Muster v. Chicago, M. & St. P. R. Co.*, 18 *Am. & Eng. R. Cas.* 113, 61 *Wis.* 325, 49 *Am. Rep.* 41; *Stimson v. Milwaukee, L. S. & W. R. Co.*, 1 *Am. & Eng. R. Cas.* 381, 75 *Wis.* 381, 44 *N. W. Rep.* 748.

A carriage was shipped on defendants' railroad. The bill of lading given to the plaintiff provided that except when the agents of defendants were guilty of gross negligence they were not to be responsible for damages of railroad or of fire. The carriage reached its destination much

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injured by fire. On inquiry by plaintiff as to the occasion of the fire and where it occurred, defendants refused to give any information in regard thereto. Held, that by the refusal of defendants to give any account of the cause of the injury, a presumption of negligence arises which they must rebut, and this presumption is not *ipso facto* repelled by evidence that defendants exercised ordinary care, and the court properly left it to the jury to determine whether defendants had been guilty of negligence or not. *Pennsylvania R. Co. v. Miller*, 87 *Pa. St.* 395.—FOLLOWED IN *Pennsylvania R. Co. v. Weiss*, 87 *Pa. St.* 447.

179. Amount of proof necessary to rebut presumption of negligence.—

In an action against a common carrier for damages to goods, the proof must be clear and certain to relieve him from liability that the damages did not arise while the goods were in his hands; for the presumption is against him, not only from the terms of the bill of lading, but from the policy of the law. *Bond v. Frost*, 8 *La. Ann.* 297.

Where the burden is cast on the carrier to exempt itself from liability, it must make a case in which no negligence of its own appears. In that event it is excused, unless the plaintiff shows, or it appears from the evidence, that the carrier's negligence caused or co-operated to produce the loss complained of. *Davis v. Wabash, St. L. & P. R. Co.*, 26 *Am. & Eng. R. Cas.* 315, 89 *Mo.* 340, 1 *S. W. Rep.* 327; reversing 13 *Mo. App.* 449.

If a common carrier undertakes to excuse himself from an injury to property while in his care, he must show that the injury occurred through some act for which he is excused, and that his fault or negligence did not concur in, or contribute to, the injury. *Michaels v. New York C. R. Co.*, 30 *N. Y.* 564.—DISTINGUISHED IN *Stedman v. Western Transp. Co.*, 48 *Barb. (N. Y.)* 97. REVIEWED IN *Lamont v. Nashville & C. R. Co.*, 9 *Heisk. (Tenn.)* 58.

Where goods are shipped under a bill of lading excepting the carrier's liability for certain losses, a loss from negligence is not within the exceptions, and he can only excuse himself for failure to deliver the goods in good order by showing that he was prevented, without his fault, by some one of the causes recognized by law as sufficient or specially provided for in the contract. *Fat-*

man v. Cincinnati H. & D. R. Co., 2 Disney (Ohio) 248.

Where goods are shipped at "owner's risk," a loss while in the carrier's hands is not brought within the exception unless it occurs without negligence on the part of the carrier; and to bring itself within the exception it must at least make a *prima-facie* showing that the injury was not caused by its negligence. *South & N. Ala. R. Co. v. Wilson, 27 Am. & Eng. R. Cas. 41, 78 Ala. 587.*—FOLLOWING *Steele v. Townsend, 37 Ala. 247.*

180. What is sufficient proof of negligence to charge carrier.*—While a carrier is not liable for an injury to goods by getting wet in its depot by reason of an extraordinary flood, yet it is liable for a further injury caused by not drying them and refusing to deliver them to the owner that he may dry them, even though the carrier had not the facilities for drying.—*Pearce v. The Thomas Newton, 41 Fed. Rep. 106.*

Loss of the door to a car containing freight, unexplained, clearly indicates negligence on the part of the carrier and makes it liable. *Little v. Boston & M. R. Co., 66 Mo. 239.*

Leaving leaking barrels of whiskey for a day and night in a car whose doors were nailed up, standing upon the track in a village, at the time a military post, was gross negligence, and rendered the railroad company responsible for its destruction by the provost-marshal under his authority in matters of police. *Patterson v. North Carolina R. Co., 64 N. Car. 147.*

Where several pieces of machinery were shipped to the defendant's agent to be forwarded to plaintiff, and they were described in the bill of lading as "three pipes in one bundie, and two single pipes," and they were delivered by the ship's agent to the defendant's agent, who had a copy of the bill, and by some means the direction on one of the single pipes became illegible, and it was not forwarded,—*held*, that these facts were sufficient to subject the defendant for negligence as a bailee. *Foard v. Atlantic & N. C. R. Co., 8 Jones (N. Car.) 235.*

Defendant railroad company agreed to carry potatoes which were intended for the seed market, and which would require prompt shipment, from an inland point to a seaport, and there deliver them to a vessel

for a foreign port. They were held at the end of its route about a month, and were then shipped on the first vessel sailing direct for the designated port, where they arrived badly damaged and too late for the market. But few vessels sailed to the port direct, but there were vessels weekly for other larger ports, which touched at the designated port, by which the potatoes might have been shipped. *Held*, that it was proper for the owners to prove a custom, as tending to show negligence, to ship freight intended for the port to which the potatoes were consigned by vessels sailing to other ports, but which stopped there, and that it was the universal practice to do so with that class of goods. *McKay v. New York C. & H. R. R. Co., 50 Hun (N. Y.) 563, 20 N. Y. S. R. 816, 3 N. Y. Supp. 708.*

181. What is not sufficient.—It is not negligence for a railroad company to place freight, liable to be injured by water, on an open flat car, when the size of the box in which it is packed renders it impossible to put it in a box car and precautions are taken to protect the property from the weather. *Burwell v. Raleigh & G. R. Co., 25 Am. & Eng. R. Cas. 410, 94 N. Car. 451.*

Where a shipper loads heavy machinery, having wheels and shafts liable to roll, on a platform car without securely blocking or securing the same to the car, the carrier is not liable if the machinery breaks from its fastenings and falls from the car while in transportation, without the fault of the company, though its yardmaster knew that the fastenings were insecure before the injury occurred. *Ross v. Troy & B. R. Co., 49 Vt. 364.*

A railroad is not liable for standards placed upon flat cars to insure the safe transportation of hay, the standards having been erected by the shipper voluntarily and without any contract with the company. *Sloan v. St. Louis, K. C. & N. R. Co., 58 Mo. 220.*—DISTINGUISHED IN *Potts v. Wabash, St. L. & P. R. Co., 17 Mo. App. 394.*

Plaintiff wished to ship a wagon with covered top without taking it apart, and in order to do so selected a platform car. He was assisted in placing it on the car by the company's agents, but was charged with the entire responsibility of loading and securing the wagon to the car. During transportation the wagon was blown from the car. *Held*, that there was not sufficient proof of negligence to support a verdict against the

* See also *ante*, 114.

company. *Milwaukee v. Chicago & N. W. R. Co.*, 37 Wis. 190.—FOLLOWING *Betts v. Farmers' L. & T. Co.*, 21 Wis. 81.—DISTINGUISHED IN *Potts v. Wabash, St. L. & P. R. Co.*, 17 Mo. App. 394.

182. Unlawful purpose of shipper will not excuse negligence.—A common carrier is not exempt from liability for negligence in transporting passengers or freight, even though the purpose of the shipper or passenger is unlawful, and was so known to all the parties, unless the unlawful purpose entered into the consideration of the contract. *Waters v. Richmond & D. R. Co.*, 110 N. Car. 338, 14 S. E. Rep. 802.

183. Bill of lading only prima-facie evidence that goods were received in good condition.—In an action against a common carrier for injury to property while in transit, the bill of lading and manifest showing that the property was received by the defendant in good order is *prima-facie* evidence against the defendant, but it is not conclusive, and may be rebutted. *Gurwell v. Raleigh & G. R. Co.*, 25 Am. & Eng. R. Cas. 410, 94 N. Car. 451.

184. Carrier only bound to exercise due care.—In case of emergency, or when property confided to his care is placed in jeopardy by some *vis major*, the carrier is bound to use actively and energetically all the means at his command and that he might reasonably be expected to possess, to meet the emergency and save the property. *Lamont v. Nashville & C. R. Co.*, 9 Heisk. (Tenn.) 58, 19 Am. Ry. Rep. 284. *Nashville & C. R. Co. v. David*, 6 Heisk. (Tenn.) 261, 12 Am. Ry. Rep. 9.—QUOTING *Memphis & C. R. Co. v. Reeves*, 10 Wall. (U. S.) 191.—*Richmond & D. R. Co. v. White*, 88 Ga. 805, 15 S. E. Rep. 802.

What constitutes reasonable care in case of an interruption upon the line of a connecting carrier, by which a carrier has stipulated to forward goods received by him for transportation, and whether it is the duty of the carrier to forward the goods by a different route, are questions of fact to be determined with reference to all the circumstances. *Regan v. Grand Trunk R. Co.*, 61 N. H. 579.

What is due care and diligence on the part of a carrier depends upon the circumstances and the nature of the article shipped.

Chicago, St. L. & N. O. R. Co. v. Abels, 21 Am. & Eng. R. Cas. 105, 60 Miss. 1017.

The carrier is bound to take notice of the signs of approaching danger, and if of a character to awaken apprehension at a time when the facilities and means of escape are within his control, he is bound to employ such means. It was error, therefore, to charge the jury that in calculating the extent of the danger and means requisite to meet it, the carrier could act upon the experience, history, and tradition of the past. *Lamont v. Nashville & C. R. Co.*, 9 Heisk. (Tenn.) 58.

A consignor of goods must take reasonable precautions to insure their safe delivery to the consignee; and the reasonableness of such precautions depends on whether they were such as to have rendered the carrier liable to the consignee in respect of the goods, in case of their loss during the transit. *Pointin v. Porrier*, 49 J. P. 199.

185. When question of negligence is for jury.—As a rule, where the liability of a carrier turns upon the question whether a loss or injury to the goods was due to a want of ordinary care and diligence, it should be left to the jury to determine, under proper instructions, even where there is no conflict as to the facts. *Lamb v. Camden & A. R. & T. Co.*, 2 Daly (N. Y.) 454.—QUOTING *Philadelphia R. Co. v. Spearen*, 47 Pa. St. 300; *Bernhardt v. Rensselaer & S. R. Co.*, 23 How. Pr. (N. Y.) 168; *Ernst v. Hudson River R. Co.*, 35 N. Y. 40.

Where the fact of injury is established, and negligence on the part of the carrier is shown, to which as a cause the injury can reasonably be imputed, the question as to whether it was so occasioned is one of fact for the jury. *Canfield v. Baltimore & O. R. Co.*, 16 Am. & Eng. R. Cas. 152, 93 N. Y. 532, 45 Am. Rep. 268.

The failure of the carrier to deliver the property or any portion thereof to the consignee, on demand, at the place of destination is *prima-facie* evidence of negligence, which, in the absence of any evidence excusing the non-delivery, presents a question of fact for the jury. *Canfield v. Baltimore & O. R. Co.*, 16 Am. & Eng. R. Cas. 152, 93 N. Y. 532, 45 Am. Rep. 268.

In an action against a railroad company for damages resulting from its negligence in transporting certain nursery stock, it is

* See also *ante*, 136.

* See also *ante*, 154.

for the jury to determine upon the evidence whether the company was guilty of negligence, and whether the damaged condition in which the stock was afterwards found resulted from that negligence. *Congar v. Galena & C. U. R. Co.*, 17 Wis. 477.

A carrier was sued to recover for the loss of a car-load of fruit, and there was no direct evidence as to whether the fruit rotted from high temperature or from other causes. The jury found that it was caused by not keeping the cars at a proper temperature. *Held*, that verdicts need not be based upon absolute knowledge. It was for the jury to find from the evidence what caused the damage, and, having done so, an appellate court will not disturb their finding where there was evidence enough to warrant their conclusion. *Perishable Freight Transp. Co. v. O'Neill*, 41 Ill. App. 423.

6. *Negligence or Fraud on Part of Shipper or Owner.*

a. Generally.

186. Injury resulting from bad packing.*—It is the duty of a shipper of furniture to pack it, where the railway company declines to attend to that matter and denies responsibility for improper packing. Accordingly, if damage is caused to the furniture by the shipper's neglect to pack it, the company is not responsible. *Barbour v. South Eastern R. Co.*, 34 L. T. 67.

Though the owner who improperly packs goods for transportation cannot recover for an injury to the goods to which the improper packing contributes, yet he may recover for injuries happening independently of the defect in packing. *Shriver v. Sioux City & St. P. R. Co.*, 24 Minn. 506.

187. Loss of perishable goods.†—Where perishable goods are shipped in bad condition, the owner cannot recover from the carrier for a loss to which its negligence contributes, unless the loss could not have been avoided by proper care on the part of the shipper. *Reed v. Philadelphia, W. & B. R. Co.*, 3 Houst. (Del.) 176.

188. Delivering turpentine barrels to be filled with ketchup.—A railroad company by mistake delivered empty casks to consignees which had contained turpentine when they should have delivered casks which had contained ketchup.

up. The company's servants knew that the casks were to be refilled with ketchup. The consignees, not knowing of the mistake, refilled the casks with ketchup, which was spoiled. In an action by the consignees against the railroad company—*held*, that there could be no recovery for the loss of the ketchup. *Cunningham v. Great Northern R. Co.*, 16 Am. & Eng. R. Cas. 254, 49 L. T. 394.

189. Where contributory negligence for jury.—The question of the contributory negligence of a shipper that will release the carrier from liability is not one of law but of fact, to be determined by the jury. *Cobb v. Illinois C. R. Co.*, 38 Iowa 601.

It is not contributory negligence *per se* for a shipper to place cotton for shipment on private platform so close to passing engines that it is in danger of being ignited, and to leave it there without watch or guard, if the platform was constructed for the purpose of receiving freight and had been used by the railroad company for receiving cotton. *St. Louis, A. & T. R. Co. v. Fire Assoc.*, 55 Ark. 163, 18 S. W. Rep. 43.

b. Imperfectly Marking Goods.*

190. When defective marking will relieve carrier from liability.—Carriers are not liable for a misdelivery made through a mistake in the direction of a parcel, if such mistake is not known to the carrier and he delivers the parcel according to the direction and the known course of business at the place of destination. *Stimson v. Jackson*, 58 N. H. 138.

Where a box improperly directed was delivered to a railroad for transportation and was safely carried to its destination, and there, after having been kept for two months, and due diligence exercised to ascertain the consignee, was delivered, by reason of the improper direction, to the wrong person, the company was not liable for the loss. *Lake Shore & M. S. R. Co. v. Hodapp*, 83 Pa. St. 22, 16 Am. Ry. Rep. 167.

Where an express package is directed to the wrong street-number, the carrier is not liable for delivery according to the directions, and to a known usage, where he is in no fault for not knowing or discovering the misdirection before delivery. *Stimson v. Jackson*, 58 N. H. 138.

* See also *ante*, 26.

† See also *ante*, 26, 110.

* See *post*, 447.

Where a person is engaged in the business of a common carrier by teams, and delivers goods intrusted to him to a wrong person, whereby they are lost, he is liable; and the fact that the consignor had given him the wrong street-number of the consignee will furnish no excuse for delivering the goods to the wrong person. *McCulloch v. McDonald*, 91 Ind. 240.

The contributory negligence of a shipper in only marking freight to the town and state to which it is to be sent, but omitting the county, will relieve the carrier from liability for loss which results from the fact that there are two towns of the same name in the state. *Congar v. Chicago & N. W. R. Co.*, 24 Wis. 157.

Where goods shipped are to be delivered to a forwarding carrier and the only delay in so forwarding them is caused by a misdirection upon the goods, which were marked by defendant's agent in the presence of plaintiff and in exact accordance with his directions, this delay will be attributed to plaintiff's own want of care and not to defendant's negligence; and a finding of the court to the contrary will be set aside as against the weight of evidence. Nor is the defendant railroad company guilty in the first instance of negligence in not examining maps and shippers' guides to ascertain whether the direction given as the destination of the goods was correct. *Erie R. Co. v. Wilcox*, 84 Ill. 239, 16 Am. Ry. Rep. 457.

Shingles were delivered to a freight agent, each bunch marked "J. S. C.," except one bunch in seven, which was marked "J. S. Clark." Held, in an action against the company for neglecting to forward them, that proof that six or eight lots had been delivered to the same agent during the preceding three years marked in the same way, with bills of lading, was not sufficient to justify the finding that the agent ought to have known that the shingles were for J. S. Clark; nor is such evidence sufficient to justify an instruction that if the agent knew or ought clearly to have known whom the shingles were for, the company was liable. *Finn v. Western R. Corp.*, 102 Mass. 283.

101. When receiving goods is a waiver of defective marking.—A carrier is not bound to receive goods for transportation which are not marked to any place of destination, or which are marked to a place that has no existence; but if it ac-

cepts goods so marked, it is liable for a loss, where they are carried to another station and there left. It should have refused the goods or held them at the receiving station. *O'Rourke v. Chicago, B. & Q. R. Co.*, 44 Iowa 526. *Gulf, C. & S. F. R. Co. v. Maetze*, 18 Am. & Eng. R. Cas. 613, 2 Tex. App. (Civ. Cas.) 553.

The contributory negligence of a shipper of goods in delivering them to a carrier not sufficiently addressed will not relieve the carrier from liability for a loss, where the company's agent receives them with full knowledge of the imperfect address. *O'Rourke v. Chicago, B. & Q. R. Co.*, 44 Iowa 526. *Gulf, C. & S. F. R. Co. v. Maetze*, 18 Am. & Eng. R. Cas. 613, 2 Tex. App. (Civ. Cas.) 553.

102. Duty of carrier to re-mark.—Where a carrier receives goods which are only marked by the initials of the consignee and gives a bill of lading therefor, specifying the consignee, it is bound to re-mark the goods if that is necessary to insure their safe delivery. *Krender v. Woolcott*, 1 Hill. (N. Y.) 223.

103. Liability when wrong address is entered in way-bill, etc.—Goods were delivered to a carrier with the following entry on the manifest: "Order Wright, Dunton & Co., notify Wellington Jones," with the place of consignment given. The receiving carrier delivered the goods to defendant company, which, in making out its manifest, omitted the words "Order Wright, Dunton & Co." and placed upon it the name of Jones alone, dropping also the word "notify," and the goods were delivered to Jones. The shippers had drawn upon Jones for the price of the goods, and forwarded the draft to a bank for collection, with the bill of lading attached, but the draft was returned protested, and the price of the goods was lost to the shippers. Held, that there was sufficient evidence to show that the goods were subject to the order of Wright, Dunton & Co., and that it was their duty to notify Jones, who could obtain the goods only upon payment of the price, and the carrier was liable to the shippers for such negligent delivery. *Wright v. Northern C. R. Co.*, 8 Phila. (Pa.) 19.

The purchaser in Victoria, B. C., of goods of the plaintiffs in Ontario, ordered their shipment through an agent of the No. Pac. Ry. in Victoria, the latter furnishing on behalf of his company a tag marked "Via

Grand T. Ry., and Chicago & N. W., care of No. Pac. Ry., St. Paul." The defendants' agent in Victoria sent this order and tag to their contracting freight agent in Toronto, who communicated with the plaintiffs in this province, and the latter, shipping the goods to their own order at Victoria, drew through a bank on the purchaser against the shipment with a shipping bill attached, marking the goods as above with the addition "notify," naming the purchaser, and advised the defendants' agent in Toronto, who undertook to have the shipment looked after. The G. T. Ry. forwarded the goods in their own car, which went through; each successive forwarding company signed a fresh shipping bill and paid all charges, up to the time of receipt, to the company from whom they received the goods. Before the goods reached defendants' own line, owing to a mistake in copying the way-bill, another name was substituted for that of the plaintiffs, and in the defendants' way-bill the word "order" was left out. These mistakes were continued in the shipping bills over the other lines, until the shipment reached Victoria, when the goods were delivered to the purchaser, who refused to pay for them, and shortly afterwards failed. *Held*, that the goods were received by the defendants in this province by the Grand Trunk Railway Company, as their agents, upon a through contract to deliver them to the order of the consignor at Victoria, and that they were liable to the plaintiffs for their wrongful delivery. *Grant v. Northern Pac. R. Co.*, 22 Ont. 645.

Packages were sent from N. Y. by the C. & N. F. R. addressed to plaintiff at H. to go by the G. W. R. from F. A bill of freight and charges due the C. & N. F. R. was made out to the G. W. R. In consequence of a telegraphic communication—of which defendant knew nothing—the address to H. entered on this bill was struck out and T. substituted, and the G. W. R. was also struck out and E. & O. R. put in its place, but the address on the package was left unchanged. They were brought by the E. & O. R. to L. and thence shipped to T., where defendant received them, with an abstract in which they were described as addressed to plaintiff at T. Defendant, relying on the address to H., which still remained on the cases, shipped them to that place, and they were burned on the passage. *Held*, that it was properly left to the jury to

say whether defendant was guilty of negligence in going by the address in the abstract, instead of that on the packages, and that they rightly decided in his favor. *Held*, also, that the fact of defendant being described in the declaration as a wharfinger and forwarder, and not denying either character, could not make him liable as a forwarder, in face of the evidence. *Hunter v. Borst*, 13 U. C. Q. B. 141.—DISTINGUISHING *Hyde v. Trent & M. Nav. Co.*, 5 T. R. 389.

A package of goods marked "A. R. B.," and addressed to the care of K., plaintiff's agent at Berwick, was forwarded by defendants' railway. The way-bill sent to the station-master showed only the shipment of a package marked "A. R. B.," without indicating the name of the person who was to receive delivery. The goods arrived at Berwick, and within two or three days thereafter K. asked for a package addressed "A. R. B.," to his care, but was told that no such package had come. He made inquiry on three days of the following week, and received the same answer. The station-master, in replying to the inquiries, looked at the way-bill but omitted to look at the package. Subsequently the goods were stolen from the station, and the company were sued for the value of the goods. *Held*, that the refusal of defendants' servant to deliver the goods to the party authorized to receive them, as well as their detention contrary to his wishes, constituted negligence for which defendants were responsible. *Bell v. Windsor & A. R. Co.*, 24 Nov. Sc. 521.—FOLLOWING *Stevens v. Boston & M. R. Co.*, 1 Gray (Mass.) 279.

c. Dangerous Explosives.

194. Duty to give carrier notice—Liability for injury of carrier's employe.—One who has in his possession a dangerous article which is liable to explode and which he desires to send to another may send it by a common carrier if he will take it; but it is his duty to give him notice of its character so that he may either refuse to take it, or be enabled, if he takes it, to make suitable provisions against danger. *Poston & A. R. Co. v. Shanly*, 107 Mass. 568, 3 Am. Ry. Rep. 396, 406.

There is an implied duty on the part of the shippers of such goods as nitro-glycerine to give notice of its dangerous nature to the carrier or its agents in receiving them;

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and a failure to do so will render the shipper liable for the consequence. *Barney v. Burnstenbinder*, 64 Barb. (N. Y.) 212, 7 Lans. 210.

When the carrier is notified what the substance is, and the package is so branded as to apprise the carrier of its dangerous nature, the shipper is not liable merely because knowledge was not brought home to the employé. *Standard Oil Co. v. Tierney*, 49 Am. & Eng. R. Cas. 117, 92 Ky. 367.

If, however, the shipper and the carrier enter into an agreement by which the explosive is to be shipped under some other than its real name, and it is so shipped with nothing to indicate to the employés of the carrier its dangerous nature, and injury to an employé results, the shipper is liable, although the agreement with the carrier may have been made in the best of faith. *Standard Oil Co. v. Tierney*, 49 Am. & Eng. R. Cas. 117, 92 Ky. 367.

A shipper of naphtha is bound to so mark the barrels that the employés of the carrier may ascertain its explosive nature. It is a question for the jury, in an action for injuries received by a conductor owing to an explosion, whether it is a compliance with this rule to brand across the heads of the naphtha barrels the words "Unsafe for illuminating purposes," the naphtha having been billed as "carbon oil." *Standard Oil Co. v. Tierney*, 49 Am. & Eng. R. Cas. 117, 92 Ky. 367.

It was competent for defendant to prove that the railroad company, with the knowledge that the barrels contained naphtha, agreed that they might be shipped as carbon oil, and that under such an agreement it had for a long period been shipping barrels of naphtha branded as these were, and described in the bills of lading as carbon oil. While these facts do not exonerate defendant from liability, they show an absence of bad faith on its part. *Standard Oil Co. v. Tierney*, 49 Am. & Eng. R. Cas. 117, 92 Ky. 367.

105. Liability of shipper for failure of agent to give carrier notice.—The rule of law which makes a principal liable for the acts of his agent done in the course of his employment applies to a principal who ships a dangerous article, such as nitro-glycerine, through his agent, who does not disclose the nature of the goods, and will render the principal liable in a civil action for damages which may result

from an explosion. And the fact that the agent's conduct may render him criminally liable will not release the principal from civil damages. *Barney v. Burnstenbinder*, 64 Barb. (N. Y.) 212, 7 Lans. 210.

106. Liability to third persons.—In an action by a third party against the shippers of a dangerous explosive, that exploded while in the hands of a carrier and destroyed plaintiff's property, a description of the property destroyed is sufficient that describes it as "a certain building and other property of great value belonging to the plaintiff," and situate near where the explosion occurred. *Boston & A. R. Co. v. Shanly*, 107 Mass. 568.

A dangerous article exploded while in charge of a carrier and destroyed property of a third party. *Held*, in an action by such third party against the shippers, that the fact that the carrier had paid the plaintiff for the damages sued for, and a recital in the declaration that the suit was brought for the benefit of the carrier, were not an admission that the loss occurred through the carrier's negligence, and would not defeat the action. *Boston & A. R. Co. v. Shanly*, 107 Mass. 568, 3 Am. Ry. Rep. 396, 406.

107. Joint liability of independent shippers.—A dangerous explosive known as dualin was manufactured by one party, and another preparation, known as exploders of the dualin, was manufactured by another. A person engaged in blasting ordered both articles shipped to him, and each manufacturer delivered his own article to the carrier, without knowing that that of the other had been ordered. The two substances were comparatively new and their danger was not known to the carrier, and while being transported with due care they exploded, destroying property both of the carrier and a third person. There was but one explosion, and there was no way of ascertaining what part of the damage resulted from each explosive. *Held*, that the two manufacturers were liable in a joint action for tort, but that the party ordering the explosives was not liable. *Boston & A. R. Co. v. Shanly*, 107 Mass. 568, 3 Am. Ry. Rep. 396, 406.

108. Criminal liability.—Where a statute makes the sending of dangerous goods by railway without notice a criminal offense, a guilty knowledge on the part of the sender of such goods is necessary to render

him liable; accordingly, if a shipper is misled by the person from whom he received the goods as to their nature and has no guilty knowledge of their dangerous character, he is not liable within the meaning of the statute for sending cases containing vitriol which he described as containing harmless goods. *Hearne v. Garton*, 2 *El. & El.* 66, 5 *Jur. N. S.* 648, 28 *L. J. M. C.* 16, 33 *L. T.* 256.

*d. Fraud of Shipper in Concealing Kind or Value of Goods.**

199. Generally.†—The carrier has a right to inquire as to the value of the articles intrusted to him for carriage, and the owner is bound to answer truly. If he answers falsely, he is bound by the answer. *Little v. Boston & M. R. Co.*, 66 *Me.* 239.

A carrier has no general right to inquire and be informed of the contents of a parcel tendered him for carriage. *Crouch v. London & N. W. R. Co.*, 14 *C. B.* 255, 7 *Railw. Cas.* 717, 2 *C. L. R.* 188, 18 *Jur.* 148, 23 *L. J. C. P.* 73.

The strict rule of the carrier's responsibility is subject to this qualification, that, if the owner of goods is guilty of any fraud or imposition in respect to the carrier, as by concealing their nature or value, or where he deceives the carrier by his own carelessness in treating the parcel as a thing of no value, he cannot hold the carrier liable for loss of the goods. *Chicago & A. R. Co. v. Shea*, 66 *Ill.* 471.

Though a common carrier may require the nature and value of an article delivered to it for transportation to be made known, yet if the sender practise any artifice to give the parcel a mean appearance, and thereby induce the carrier to think it of trifling value, and thus prevent it from making inquiries, this will be such a fraud as will relieve the carrier from liability for its loss. *Southern Exp. Co. v. Everett*, 37 *Ga.* 688.

A carrier of goods must receive and forward articles on the usual terms and deliver them in the condition in which he received them. He has ordinarily no means of opening packages and examining their contents, and has nothing to do with previous deal-

ings with the property by independent carriers. *Marquette, H. & O. R. Co. v. Kirkwood*, 9 *Am. & Eng. R. Cas.* 85, 45 *Mich.* 51, 7 *N. W. Rep.* 209.

A common carrier is liable for the loss of a box or parcel though ignorant of its contents, without regard to their value, unless he makes a special acceptance. *Little v. Boston & M. R. Co.*, 66 *Me.* 239.

200. Fraud that will relieve carrier of liability.*—Where a shipper of goods practises a fraud on a carrier, either by his acts or omissions, as to the value of the goods, fraudulently concealing their value from the carrier, such fraud will operate to discharge the carrier from liability. *Texas Exp. Co. v. Scott*, 16 *Am. & Eng. R. Cas.* 111, 2 *Tex. App. (Civ. Cas.)* 59.

A failure on the part of a shipper to state the just and true value of merchandise delivered to a carrier for transportation will relieve it from liability for the total value of the goods, unless they are lost through the misfeasance or wilful acts of the carrier. *Ghormley v. Dinsmore*, 19 *J. & S. (N. Y.)* 196.—FOLLOWING *Magnin v. Dinsmore*, 62 *N. Y.* 35, 70 *N. Y.* 410.

The carrier may properly regulate his care of property carried by him by its value and the amount of his responsibility, and it is due to him that he should be correctly informed by the shipper of the value of the articles. *Coupland v. Housatonic R. Co.*, 55 *Am. & Eng. R. Cas.* 380, 61 *Conn.* 531, 23 *Atl. Rep.* 870.

But shippers cannot be deemed guilty of fraud in concealing the value of a box when its contents are unknown to them. *Little v. Boston & M. R. Co.*, 66 *Me.* 239.

201. Mere failure to disclose value will not relieve carrier.†—A mere failure on the part of a shipper to inform a carrier as to the value of goods shipped would not, *per se*, be such fraudulent concealment as to value as would discharge the carrier from liability. *Texas Exp. Co. v. Scott*, 16 *Am. & Eng. R. Cas.* 111, 2 *Tex. App. (Civ. Cas.)* 59. *Little v. Boston & M. R. Co.*, 66 *Me.* 239.

But if the property is put up or packed in a manner calculated to deceive the carrier he does not become subject to the

* See also *post*, 444, 518.

Concealments and misrepresentations by shippers, see note, 9 *AM. & ENG. R. CAS.* 73, 16 *Id.* 115, 18 *Id.* 627.

† See also *post*, 203.

* When fraud of shipper will defeat right to recover in case of loss or damage, see note, 23 *AM. ST. REP.* 597.

† Duty of shipper to disclose value of goods, see note, 18 *AM. & ENG. R. CAS.* 634.

extraordinary responsibilities of a common carrier, if there be no disclosure; but if there is justly any doubt about the contents of the package resulting from examination or appearance, he should make inquiry. *Kuter v. Michigan C. R. Co.*, 1 *Biss. (U. S.)* 35.

If the shipper is not guilty of any improper concealment of the contents of boxes shipped or of their value, or of other improper conduct, it is the duty of the carrier to inquire as to the nature and value of the goods; and if it fails to do so, in the absence of such improper conduct by the shipper, it is liable for a loss. *Merchants' Despatch Transp. Co. v. Bolles*, 80 *Ill.* 473. *Gulf, C. & S. F. R. Co. v. Clark*, 18 *Am. & Eng. R. Cas.* 628, 2 *Tex. App. (Civ. Cas.)* 459.

But if, on inquiry made, he answers falsely, or attempts fraudulently to conceal the value, the carrier, it seems, will not be liable for the value in case of loss without his default. *Phillips v. Earle*, 8 *Pick. (Mass.)* 182.

The omission of one dealing with a common carrier to advise him as to the value of the article presented for carriage, and that its actual is greater than its apparent value, will not affect his rights, unless it justified the carrier in adopting the course of conduct through which the loss occurred. *Galt v. Adams Exp. Co., MacArth. & M. (D. C.)* 124.

A person shipping a trunk upon a railroad train is not bound to disclose the fact that there is jewelry therein to the value of about \$465, unless asked. Particularly is this the case where the agent of the company receiving the goods fails to comply with a rule of the company requiring him to demand of the shipper of goods the value thereof. *Texas Exp. Co. v. Scott*, 16 *Am. & Eng. R. Cas.* 111, 2 *Tex. App. (Civ. Cas.)* 59.—**DISTINGUISHING** *Pardee v. Drew*, 25 *Wend. (N. Y.)* 459.

202. Where goods are concealed in others of less value.—Where valuable goods are shipped so boxed as to resemble goods of small value, and without notice of the true character of the goods to the carrier, the latter is not liable for a loss. *Warner v. Western Transp. Co.*, 5 *Robt. (N. Y.)* 490.—**DISTINGUISHED IN** *Gorham Mfg. Co. v. Fargo*, 3 *J. & S. (N. Y.)* 434, 45 *How. Pr.* 90.

Where a railroad company agrees to

transport a bundle of bedding, and there is no agreement to transport wearing-apparel, and no mention is made of wearing-apparel, and the company's agent does not know that the bundle embraces clothing, in case of a loss there can be no recovery for the clothing which was claimed to be wrapped up in the bedding. *Savannah, F. & W. R. Co. v. Collins*, 77 *Ga.* 376, 4 *Am. St. Rep.* 87, 3 *S. E. Rep.* 416.

Where a company receipts for a lot of furniture to be carried, among which is specified "one cradle," which is wrapped about with a carpet, but where those weighing it and handling it could easily tell that there were other things in the cradle, the company is liable for the loss of a valise with clothing in it which was in the cradle. And especially is this so where there is some evidence that the station agent was informed what was in the cradle. *Harmon v. New York & E. R. Co.*, 28 *Barb. (N. Y.)* 323.

A third person rolled up the plaintiff's coat in a bundle with his own coat and placed his own name and address upon the bundle and delivered it to the defendants, who were common carriers, for transportation. *Held*, that the plaintiff might maintain an action against the defendants to recover damages for the loss of his coat. *Elkins v. Boston & M. R. Co.*, 19 *N. H.* 337.—**QUOTING** *Weed v. Saratoga & S. R. Co.*, 19 *Wend. (N. Y.)* 534. **REVIEWING** *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 *How. (U. S.)* 344.

203. Where a lower rate is procured.—A common carrier is entitled to be fairly informed as to the value of the property confided to his care; and where a shipper enters into an agreement with a carrier as to the value of the property shipped, and receives the benefit of low rates by reason of placing a low valuation upon the property, he is estopped from claiming or recovering another and higher valuation after the loss occurs, although said loss may be the result of negligence on the part of the carrier, provided the same is not gross, wanton, or wilful. *Zouch v. Chesapeake & O. R. Co.*, 36 *W. Va.* 524, 15 *S. E. Rep.* 185.

Where boxes are delivered to a railroad company with a statement that they contain household goods, and they are received as such and shipped under a freight rate prescribed for such goods, the owner

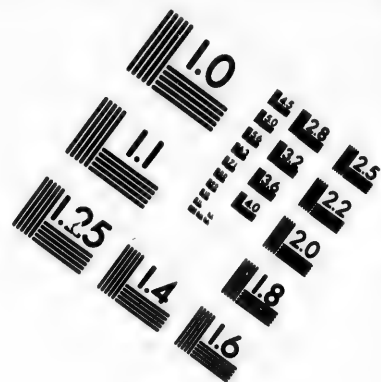
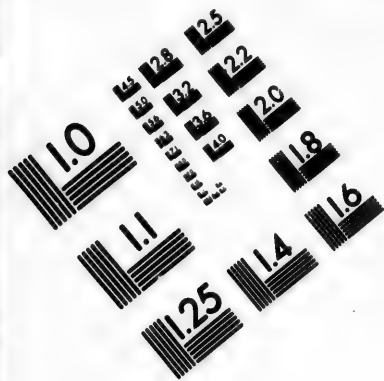
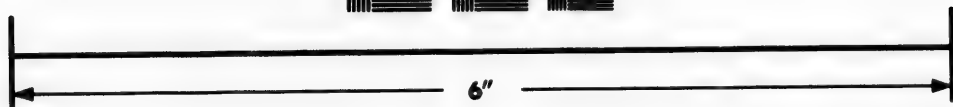
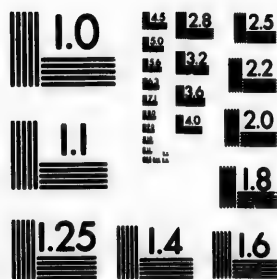


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cannot recover, in addition to the household goods, for a loss of jewelry and wearing apparel, which, under the rules of the company, would be subject to a higher freight rate. *Charleston & S. R. Co. v. Moore*, 35 *Am. & Eng. R. Cas.* 623, 80 *Ga.* 522, 5 *S. E. Rep.* 769.

Where a shipper delivered to a carrier a bundle having the appearance of bedding only, but which contained valuable clothing of the value of \$200, which fact was not disclosed, and thereby shipped them at a low rate of freight,—held, that this was such an imposition and fraud upon the carrier as to release him from liability for loss except as to what might properly be termed bedding. *Chicago & A. R. Co. v. Shea*, 66 *Ill.* 471.

Where articles of greater value are packed in the same box with ordinary freight it does not change their character nor relieve the carrier from liability for the loss of the ordinary freight if the more valuable articles are not lost. *Hyde v. New York & N. O. Steamship Co.*, 17 *La. Ann.* 29.

A shipper of goods acts as the agent of the consignee as to the manner of shipment; and where the shipper fraudulently classifies the goods at too low a rate, the carrier may recover from the consignee the rate according to a proper classification. *Missouri, K. & T. R. Co. v. Trinity County Lumber Co.*, 1 *Tex. Civ. App.* 553, 21 *S. W. Rep.* 290.

Where a carrier is sued and is found liable for a conversion of a part of goods shipped as first-class freight, but which were in fact double-first-class, the carrier is entitled to double rates and to have the amount deducted from the amount of damages; but the manner of shipment will not prevent the consignee from maintaining an action for conversion against the carrier, neither is payment or tender of the higher freight rate necessary to maintain the action. *Rice v. Indianapolis & St. L. R. Co.*, 3 *Mo. App.* 27.

By 11 Geo. IV. & 1 Wm. IV. c. 68, § 1, a carrier by land is exempted from liability for the loss of or injury to any article of the description therein specified, being above the value of £10, where such loss or injury has been occasioned by negligence, unless the value has been declared and an increased charge paid. *Hinton v. Dibbin*, 2 *G. D.* 36, 2 *Q. B.* 646, 6 *Jur.* 601.

V. DELIVERY BY COMPANY.

1. Generally.*

204. Carrier must deliver in a reasonable time.†—When a common carrier undertakes to convey goods, the law implies a contract that they shall be carried and delivered at the place of destination safely and within a reasonable time. *McGraw v. Baltimore & O. R. Co.*, 9 *Am. & Eng. R. Cas.* 188, 18 *W. Va.* 361, 41 *Am. Rep.* 696.

When there is no express contract there is an implied obligation to deliver within a reasonable time, and that means the time within which the carrier can deliver, using reasonable exertion and taking all reasonable precaution to avoid delay. *Philadelphia, W. & B. R. Co. v. Lehman*, 6 *Am. & Eng. R. Cas.* 194, 56 *Md.* 209, 40 *Am. Rep.* 415.

There is no absolute duty resting upon a carrier by railroad to deliver goods within what is, under ordinary circumstances, a reasonable time. *Geismar v. Lake Shore & M. S. R. Co.*, 26 *Am. & Eng. R. Cas.* 287, 102 *N. Y.* 563, 7 *N. E. Rep.* 828, 2 *N. Y. S. R.* 514; reversing 34 *Hun* 50.

Where the trial court has found as a matter of fact that a shipper of goods did not know of certain printed conditions in a bill of lading limiting the carrier's liability, the company will be held as having received the goods subject to its common-law liability, and it will be liable for a failure to deliver within a reasonable time, though such failure was one of the exceptions in the bill of lading. *Coffin v. New York C. R. Co.*, 64 *Barb. (N. Y.)* 379; affirmed in (9) 56 *N. Y.* 632.

205. What is a reasonable time, and how determined.‡—What is a reasonable time for the delivery of goods is ordinarily a mixed question of law and fact, to be determined by the jury under the instructions of the court as to the law. *Derrosia v. Winona & St. P. R. Co.*, 18 *Minn.* 133 (*Gil.* 119), 8 *Am. Ry. Rep.* 363.

What is "reasonable time" within which goods are to be delivered, cannot be defined by any general rule, but must depend upon

* See also *ante*, 80-86.

† Delivery of goods by carrier, see note, 3 *AM. & ENG. R. CAS.* 330.

‡ Liability of common carriers when goods have reached destination, see note, 75 *AM. DEC.* 404.

† See also *ante*, 130.

† See *post*, 341.

the circumstances of each particular case. The mode of conveyance, the distance, the nature of the goods, the season of the year, the character of the weather, and the ordinary facilities of transportation are matters properly entering into the consideration of what is reasonable time. *McGraw v. Baltimore & O. R. Co.*, 9 *Am. & Eng. R. Cas.* 188, 18 *W. Va.* 361, 41 *Am. Rep.* 696.

A reasonable time for a common carrier to keep goods does not depend upon the peculiar circumstances or condition of the consignee. It is such time as would give a person residing in the vicinity and knowing the carrier's usual course of business a suitable opportunity to come to the place of delivery within usual business hours, inspect the goods, and take them away. *Derosia v. Winona & St. P. R. Co.*, 18 *Minn.* 133 (*Gil.* 119), 8 *Am. Ry. Rep.* 363.—NOT FOLLOWED IN *Leavenworth, L. & G. R. Co. v. Maris*, 16 *Kan.* 333.—*Broadwell v. Butler*, 6 *McLean (U. S.)* 296.

Whether goods shipped are delivered by the carrier within a reasonable time is a question of fact for the jury and depends on the facts of each case, including the time ordinarily required for carriage between the two points, the preparations made by the carrier, whether ample or not, the effort at dispatch, the information given to the shipper of peculiar reasons for speedy transit and delivery, the character of the freight, and kindred circumstances. *Columbus & W. R. Co. v. Flournoy*, 75 *Ca.* 745.

206. Consignee entitled to reasonable time to remove goods.*—The liability of a railroad company as a common carrier for goods transported over its road continues until the goods are ready to be delivered at their place of destination on the road and the owner or consignee has had a reasonable opportunity to take them away. *Parker v. Milwaukee & St. P. R. Co.*, 30 *Wis.* 689, 7 *Am. Ry. Rep.* 255.—FOLLOWING *Wood v. Crocker*, 18 *Wis.* 345.—*Jeffersonville R. Co. v. Cleveland*, 2 *Bush (Ky.)* 468.—FOLLOWING *Moses v. Boston & M. R. Co.*, 32 *N. H.* 523. REVIEWING *Bansem v. Toledo & W. R. Co.*, 25 *Ind.* 434; *Norway Plains Co. v. Boston & M. R. Co.*, 1 *Gray (Mass.)* 263.—NOT FOLLOWED IN *Leavenworth, L. & G. R. Co. v. Maris*, 16 *Kan.* 333.—*Bell v. St. Louis & I. M. R. Co.*, 6 *Mo. App.* 363.

Carriers must have places of their own or access to those of others at which to discharge freight and take care of it a reasonable time for the consignees. *Chicago, M. & St. P. R. Co. v. Hoyt*, 37 *Ill. App.* 64.

207. What is a reasonable time.*—The amount of time a railway company ought to allow a consignee to unload and remove a consignment depends upon the varying circumstances of each particular case. *Coxon v. North Eastern R. Co.*, 4 *Ry. & C. T. Cas.* 284.

Where a consignee was notified on Saturday morning, after 10 o'clock, of the arrival of goods, and it was a very stormy day, a finding that the following Monday morning was a reasonable time for a removal will not be disturbed on appeal. *Solomon v. Philadelphia & N. Y. E. Steamboat Co.*, 2 *Daly (N. Y.)* 104.

Where goods are permitted by the consignee to remain eight days in the depot of the carrier at the place of delivery, that is more than a reasonable time; and if the goods are then lost or destroyed without any negligence on the part of the carrier it is not responsible. *Leavenworth, L. & G. R. Co. v. Maris*, 16 *Kan.* 333.

During the month of October a lot of meal was shipped and only part of it removed from the place of destination. Twice the carrier notified the consignees to remove it or it would be sent to store, the second notice being on November 11 following. In the following December persons to whom part of the meal had been sold presented orders for it, but were informed by the company's clerk, who had forgotten its arrival in October, that it had not arrived; but these parties did not inform the consignees till some time in the following January. It appeared that the meal was sent to store November 12 and was burned in the storehouse on the 12th of the following January. Held, that the consignees were guilty of negligence in not removing it sooner, and while the agent may have been negligent in not delivering it when called for, still as to which party was guilty of the greater negligence was a question of fact for the jury, and a verdict for the company will not be disturbed on appeal. *Woodward v. Illinois C. R. Co.*, 33 *Ill. App.* 433.

Plaintiffs shipped a car-load of hams consigned to themselves, the bill of lading pro-

* See also *ante*, 83.

* See also *ante*, 86; *post*, 241.

viding that the carrier should not be liable while the goods were at any of their stations awaiting delivery, and that they must be removed during business hours. The goods arrived on Thursday, but plaintiffs were informed, both on that day and the following day, that they had not arrived. On Saturday evening, too late for removal, they were notified of their arrival, but before they could be removed on Monday morning following they were injured by heating, caused by the delay. *Held*, that the company was liable as a common carrier; that the goods were not "awaiting delivery," within the meaning of the bill of lading, until plaintiffs were notified of their arrival and for a reasonable time thereafter for their removal. *McKinney v. Jewett*, 9 *Am. & Eng. R. Cas.* 209, 90 *N. Y.* 267; *affirming* 24 *Hun* 19.

Goods for plaintiff reached their destination near sundown and were taken from the cars and placed in the warehouse of the company about dark on Saturday evening, and a few minutes afterwards the warehouse was closed for the night. The warehouse was three quarters of a mile from the plaintiff's place of business. Their cartman had called for the goods on Saturday afternoon about three o'clock, and was told by the freight agent that he need not come again that day, as it would be late before the freight train would arrive. He was, however, informed about dusk that the goods had come, but made no effort to get them, as it was nearly time for the warehouse to close. Before Monday morning the goods were destroyed by fire, without fault of the defendant. *Held*, that plaintiff did not have a reasonable opportunity to remove them, and that the company was liable as a common carrier. *Wood v. Crocker*, 18 *Wis.* 345.—*FOLLOWED IN* *Wood v. Milwaukee & St. P. R. Co.*, 27 *Wis.* 541; *Parker v. Milwaukee & St. P. R. Co.*, 30 *Wis.* 689. *NOT FOLLOWED IN* *Leavenworth, L. & G. R. Co. v. Maris*, 16 *Kan.* 333.

208. Delivery by initial carrier at end of line or at destination.*—The mass of American authorities holds that a bill of lading, or receipt of a carrier, for goods marked to a point beyond its line is *prima-facie* evidence of a contract to deliver at the place of destination, yet evidence may be given showing the route, the

termini, and the usage of the carrier. *Angle v. Mississippi & M. R. Co.*, 9 *Iowa* 487.—*FOLLOWED IN* *Mulligan v. Illinois C. R. Co.*, 36 *Iowa* 181. *QUOTED IN* *Western & A. R. Co. v. McElwee*, 6 *Heisk. (Tenn.)* 208. *REVIEWED IN* *Gray v. Jackson*, 51 *N. H.* 9.

But where the carrier claims that his undertaking is only to carry to the end of his own line, the shipper may introduce evidence that the carrier was accustomed to carry beyond his own line, and may show a custom of dealing with goods marked for points beyond his line. *Angle v. Mississippi & M. R. Co.*, 9 *Iowa* 487.

Where a company, without restricting its liability, receives goods consigned to a point beyond its terminus, on the line of a connecting road, it is bound to deliver them to their destination; but if the company contracts to deliver them at its own terminus, it becomes its duty to carry them with all reasonable speed and deliver them to the next carrier; but if there is no connecting carrier ready to receive them, the first carrier should hold the goods and notify the owner. *Louisville & N. R. Co. v. Campbell*, 7 *Heisk. (Tenn.)* 253, 12 *Am. Ry. Rep.* 490.—*QUOTED IN* *Louisville & N. R. Co. v. Weaver*, 16 *Am. & Eng. R. Cas.* 218, 9 *Lea (Tenn.)* 38.

Where a railroad carrier receives goods for a point beyond its line on a watercourse, where the goods must be sent by boat, and where it maintains an agent for the purpose of receiving and delivering goods, it is negligence to merely put the goods off on the bank of the river when neither the agent nor the consignee are present. *Dresbach v. California Pac. R. Co.*, 3 *Am. & Eng. R. Cas.* 281, 57 *Cal.* 462.

A railway company receiving from another railway company goods addressed by the sender to A. B., Argyle Street, Glasgow, is not bound to regard markings by the latter company in the way-bill or invoice as to the carriers to be employed in the delivery. *Pickford v. Caledonian R. Co.*, 1 *Ry. & C. T. Cas.* 252, 4 *Sess. Ca.* 755 (3d ser.).

209. Delivering grain at elevator or at warehouse.*—Under section 22 of the Illinois act of February, 1867, entitled "Warehousemens," railroad companies are positively inhibited from making delivery

* See also *post*, 574-592.

* See also, *ante*, 88; *post*, 255; and title ELEVATORS.

of any grain which they have received for transportation, into any warehouse other than that into which it is consigned, without the consent of the owner or consignee thereof. *Vincent v. Chicago & A. R. Co.*, 49 Ill. 33.

Independent of the statute, the duty to make a personal delivery to the consignee, in cases where such delivery is practicable, is required by the common law. *Vincent v. Chicago & A. R. Co.*, 49 Ill. 33.

The common-law rule requiring common carriers by land to make personal delivery to the consignee has been so far relaxed, as regards railways, from necessity, as in most cases to substitute in place of personal delivery a delivery at the warehouse of the company. But this is upon the ground that a railway has no means of delivery beyond its own lines. *Vincent v. Chicago & A. R. Co.*, 49 Ill. 33.

In cases where a shipment of grain is made to a party having his warehouse on the line of the road by which the grain is transported, and such consignee is ready to receive it, it is the duty of the carrier to make a personal delivery to him at the warehouse to which it is consigned. In cases of this character the rule of the common law must be applied in its full force, the necessity not arising for its relaxation. *Vincent v. Chicago & A. R. Co.*, 49 Ill. 33.—**FOLLOWED IN Merchants' Dispatch Transp. Co. v. Hallock**, 64 Ill. 284.

The provision of Ill. Const. 1870, art. 13, § 5, requiring the delivery of grain shipped in bulk at the warehouse or elevator to which it is consigned, only requires a carrier to so deliver when it can be done by availing itself of tracks which it has the legal right to employ or use, and it cannot be compelled to run cars over tracks which it does not own or in any way has the right to use. *Hoyt v. Chicago, B. & Q. R. Co.*, 93 Ill. 601.

To make a railway liable under Ill. Rev. St., 1874, ch. 114, § 82, for not delivering grain to the consignee, or place of consignment, the freight must be in bulk and must be consigned to the warehouse or place in question at the time of shipment. A demand at the place of destination is not of itself sufficient. *Chicago & N. W. R. Co. v. Stanbro*, 87 Ill. 195, 18 Am. Ry. Rep. 180.

210. Carrier only required to deliver at place of destination.—Where goods marked for a particular destination

are delivered to a carrier, without any direction for their transportation and delivery, save such as may be inferred from the marks themselves, the carrier is only bound to transport and deliver them according to the established usage of the business in which he is engaged, whether the consignor knew of the usage or not. *Hempstead v. New York C. R. Co.*, 28 Barb. (N. Y.) 485.

In the absence of a custom authorizing a station agent, at the request of the consignee, to undertake, after a car has reached its destination, a delivery thereof at another place and to another party than the consignee, an agreement on his part to do so cannot fix any liability on the company on account of the negligence of the agent in carrying it out. *Melbourne v. Louisville & N. R. Co.*, 88 Ala. 443, 6 So. Rep. 762.

Where a carrier receives goods for transportation, knowing they are subject to duty and are being shipped from one collection district to another, and that by law they can be delivered only into a bonded warehouse, he impliedly undertakes that the goods shall be safely delivered at the place of their destination and within a reasonable time, and if a loss occurs in consequence of a neglect of such duty the carrier will be liable. *Chicago & N. W. R. Co. v. Sawyer*, 69 Ill. 285.

A contract to carry goods and deliver them to the consignee at N. cannot be made to bind the carrier to deliver them at A. because the goods were addressed to the consignee at A., nor because the consignee was described as being at A. *Wheeler v. St. Louis & S. E. R. Co.*, 3 Mo. App. 358.—**QUOTED IN** *Bennett v. Missouri Pac. R. Co.*, 46 Mo. App. 656.

211. Duty of carrier to furnish facilities for removal.*—If a railway fails to furnish proper facilities to lumber dealers for removing lumber from the place where it is unloaded, as far as the railway company owns and controls the land, the injured dealer would have cause of action against the company but not against a lessee of it. *Calcasieu Lumber Co. v. Harris*, 43 Am. & Eng. R. Cas. 570, 77 Tex. 18, 13 S. W. Rep. 453.

212. Penalty under Arkansas statute.—Under the Arkansas act of February 27, 1885, providing that no railroad company shall charge and collect, or endeavor

* See also *post*, 262.

to charge and collect, a greater sum for transporting goods than is specified in the bill of lading, and that if any such company shall refuse to deliver any goods to the owner upon payment or tender of the freight charges due, as shown by the bill of lading, it shall be liable in damages to an amount equal to the freight charges for every day the goods are held after such payment or tender, being general and uniform upon all persons coming within the class of carriers designated, is not unconstitutional as being special legislation. *Little Rock & Ft. S. R. Co. v. Hanniford*, 49 Ark. 291, 5 S. W. Rep. 294.

The said act applies only to railroad companies that are bound by the bill of lading, either as having made, authorized, or accepted it. *Loewenberg v. Arkansas & L. R. Co.*, 56 Ark. 439, 19 S. W. Rep. 1051.—FOLLOWING *Fordyce v. Johnson*, 56 Ark. 430.

Where a consignee binds himself by agreement, express or implied, to unload freight at the place of consignment, such agreement excuses the carrier from the duty of unloading imposed by the statute. *Little Rock & Ft. S. R. Co. v. Bruce*, 55 Ark. 65, 17 S. W. Rep. 363.

213. Penalty under Texas statute.*—The statute of May 6, 1882, General Laws, p. 35, giving damages to a consignee for failure to deliver freight in accordance with the provisions of that act, is in violation of no provision of the constitution, but was passed in obedience to art. 2, § 10, of that law, and is a valid, binding law. *Houston & T. C. R. Co. v. Harry*, 18 Am. & Eng. R. Cas. 502, 63 Tex. 256. *Atchison, T. & S. F. R. Co. v. Roberts*, 3 Tex. Civ. App. 370, 22 S. W. Rep. 183.—FOLLOWING *Houston & T. C. R. Co. v. Harry*, 18 Am. & Eng. R. Cas. 502, 63 Tex. 256.

The statute is only applicable when the railroad company has either itself executed the bill of lading or authorized another company to execute it, or has ratified it; and it does not apply where the freight has been received and transported under Tex. Rev. St. art. 4251, which obliges railroad companies to receive and transport cars and freight of any connecting company, although the bill of lading under which the freight was shipped specifies a through rate to the destination. *Gulf, C. & S. F. R. Co. v. Dwyer*, 42 Am. & Eng. R. Cas. 503, 75

Tex. 572, 12 S. W. Rep. 1001.—DISTINGUISHED IN *Gulf, C. & S. F. R. Co. v. Loonie*, 84 Tex. 259.

Under the statute it is not necessary that the bill of lading should be exhibited to the railroad company at the time when delivery of the goods is demanded, except there be a mistake or the agent of the company does not in fact know the contents of the bill. *Gulf, C. & S. F. R. Co. v. Dwyer*, 42 Am. & Eng. R. Cas. 503, 75 Tex. 572, 12 S. W. Rep. 1001.

Sayles' Texas Civil St. art. 4227, providing that railroads shall pay all damages sustained and five per cent, a month on the value of the property, for negligently detaining property beyond the time necessary for transportation, does not repeal art. 428a, imposing a penalty for failure to deliver property on payment of charges. *St. Louis, A. & T. R. Co. v. McKee*, 4 Tex. App. (Civ. Cas.) 28, 15 S. W. Rep. 45.

Where a railroad company does not maintain a freight office at a certain station, but delivers freight for it at a station near by, a demand at the latter station is sufficient; and if the freight is refused the company is liable to the penalty prescribed. Sayles' Texas Civil St. art. 4258a, for failing to deliver freights on payment of charges. *St. Louis, A. & T. R. Co. v. McKee*, 4 Tex. App. (Civ. Cas.) 28, 15 S. W. Rep. 45.

A St. Louis milling company shipped to appellee at B. a car-load of flour, the bill of lading for which (issued by the St. L., A. & T. R. Co.) showed that the rate of freight was 40 cents per 100 pounds, and that it was to be sent via the G., C. & S. F. R. The schedule rate on flour to B., via the G., C. & S. F. R., was 40 cents per 100 pounds, and via H. & T. C. R. was 53 cents per 100 pounds. The flour came by the H. & T. C. R., which refused to deliver it unless the 53 cents rate was paid. Held, the penalty provided by statute for a failure to deliver merchandise upon tender or payment of freight charges shown by the bill of lading cannot in this case be enforced against H. & T. C. R. *Dillingham v. Fischl*, 1 Tex. Civ. App. 546, 21 S. W. Rep. 554.

Evidence offered by the appellant that the milling company offered to hold appellee harmless and to pay the difference between the 40 and 50 cents rate was inadmissible. If the appellant was liable for the penalty, appellee could not be deprived of his right to recover it by the willingness of a third party

* See also *post*, 293.

to pay the difference. Had this difference been paid by the shipper and the goods then tendered to the consignee upon payment of the remainder, it may be that from the time of such tender he would have been relieved from liability, but appellee was under no obligation to assist him in relieving himself from liability that he had incurred or might thereafter incur. *Dillingham v. Fischl*, 1 *Tex. Civ. App.* 546, 21 *S. W. Rep.* 554.

214. Mixing goods.*—Where the master of a vessel gives separate bills of lading for two consignments of iron which he undertakes to transport, it becomes his duty to make delivery to each of the two consignees of their respective parts of the cargo, and to keep the two consignments separate or distinguishable so far as necessary in this behalf; and the fact that the whole cargo was received from one shipper does not affect his duty in this regard. *Eaton v. Neumark*, 37 *Fed. Rep.* 375; *affirming* 33 *Fed. Rep.* 891.

A vessel received a cargo of iron consigned to two different parties and gave separate bills of lading. Upon the arrival of the vessel both consignees directed the iron to be delivered at a railroad wharf for further shipment by rail, each consignee selecting the railway company to receive the iron from the vessel, and requesting the customs officer to see that they got what belonged to them, and giving him necessary information as to the quantity which each bill of lading called for. As the iron was discharged an employé of the railway company designated which cars were the ones for each of the consignees. After the cars were loaded they were weighed and dispatched to the respective consignees. *Held*, that the master's duty ended when he delivered the cars designated for the respective consignees and the iron belonging to each. If any mistake was made by the employé of the railway company in not dividing the iron properly, or by the customs officer, or either of them, in designating the cars or dispatching them to the consignees, the master of the vessel was not liable. *Eaton v. Neumark*, 37 *Fed. Rep.* 375; *affirming* 33 *Fed. Rep.* 891.

215. Delivery at consignee's house or place of business.†—As a general

rule the law requires common carriers to deliver goods to the owner or consignee personally at the place where the transportation ends, and he can only be discharged from this duty by a special contract, or by proof of an opposite usage. *Schroeder v. Hudson River R. Co.*, 5 *Duer* (N. Y.) 55.—*Following* *Gibson v. Culver*, 17 *Wend.* (N. Y.) 305.

Since the introduction of railways, carriers in that mode have been exempted from personal delivery of their parcels, and allowed to deposit them in warehouses, and thus exonerate themselves from the longer continuance of the responsibility of carriers. *Witbeck v. Holland*, 55 *Barb.* (N. Y.) 443, 38 *How. Pr.* 273; *affirmed in* 45 *N. Y.* 13. *New Orleans, J. & G. N. R. Co. v. Tyson*, 46 *Miss.* 729, 1 *Am. Ry. Rep.* 474.

A carrier by railway is neither bound to deliver the goods personally nor to give notice of their arrival. *Francis v. Dubuque & S. C. R. Co.*, 25 *Iowa* 60.

Where goods are marked with the name and place of residence of the owner, and are described in the bill of lading as so marked, and nothing further appears to indicate their destination, the residence of the owner will be held to be their ultimate place of destination. *Brown v. Mott*, 22 *Ohio St.* 149.

If a railway company, receiving goods for transportation over its road, exacts the payment of cartage in advance of shipping, this will constitute an express contract to deliver at the consignee's place of business, and its liability will not cease until this is done. *Cahn v. Michigan C. R. Co.*, 71 *Ill.* 96.

Where a railway company delivered goods arriving at its depot to a carter, to be delivered by him only when the consignee did not furnish his own teams, or give directions to the contrary, and the company was not interested in the cartage of the goods—*held*, that this did not establish a custom to deliver at the consignee's place of business. *Cahn v. Michigan C. R. Co.*, 71 *Ill.* 96.

216. Duty of carrier to unload and store.*—A common carrier is bound to deliver goods safely and to store them when necessary, unless there is a well known usage to the contrary. *McHenry v. Philadelphia, W. & B. R. Co.*, 4 *Harr.* (Del.) 448.

* See also *post*, 266.
Admixture of goods, see note, 16 *Am. & Eng. R. Cas.* 286.

† See also *ante*, 90; *post*, 256.

* See also *post*, 240, 366, 374.

A railroad company must carry goods to the place of destination and remove them from their cars, and either deliver to the owner or deposit them in a suitable place until they are called for. Ordinarily the company's warehouse is regarded as a suitable place for deposit. *Culbreth v. Philadelphia, W. & B. R. Co.*, 3 *Houst. (Del.)* 392.

The duty to carry and deliver safely involves the duty to provide a secure place for the delivery and to adopt proper safeguards to prevent loss. *Sunderland v. Westcott*, 2 *Sweeney (N. Y.)* 260, 40 *How. Pr.* 468.—FOLLOWING *Grosvenor v. New York C. R. Co.*, 5 *Abb. Pr. N. S. (N. Y.)* 345.

It is the duty of a carrier by railroad, when the goods are conveyed to its depot, to unload and place them in a convenient place for delivery, and, if the consignee is then ready to receive them, to deliver them to him; but if he is not, the carrier must then safely store them under the charge of competent and careful servants, ready to be delivered when called for by those entitled to receive them. When this is done the carrier's duty is discharged and his liability ceases. *Cahn v. Michigan C. R. Co.*, 71 *Ill.* 96.—FOLLOWING *Merchants' Dispatch Transp. Co. v. Hallock*, 64 *Ill.* 284.

Where a carrier notifies the consignee of the arrival of goods, and that they must be unloaded by a certain day, it should wait until that day; and if it proceeds to unload them itself before the time, it is liable for any injury that may result, whether it is negligent in doing so or not. *Cook v. Erie R. Co.*, 58 *Barb. (N. Y.)* 312.

Where a carrier notifies the consignee of the arrival of goods, and that they must be unloaded and removed by a certain day, if they are not unloaded and removed within the time, then the carrier is bound to exercise the care of a man of ordinary prudence in unloading and caring for the goods until they are taken away; and, failing to exercise such care, it is liable for any injury that may result. *Cook v. Erie R. Co.*, 58 *Barb. (N. Y.)* 312.

Where a consignee is notified of the arrival of goods, and that they must be removed in a certain time, if he neglects to remove them within the time the carrier has no right to cast the goods away or throw them out where they will be exposed to the weather, but must take such care of them as a prudent man would take of his

own property of the same kind. *Cook v. Erie R. Co.*, 58 *Barb. (N. Y.)* 312.

The situation of the consignee of goods intrusted to a common carrier, and the distance of his place of business from the place of their destination, are not matters which have any proper bearing on or connection with the duty of the carrier in respect to the goods as common carrier. *Blumenthal v. Brainerd*, 38 *Vt.* 402.

217. Carriers by water—Delivering on wharf.*—Where goods are shipped by a vessel, a delivery or offer to deliver at the wharf is sufficient to discharge the carrier from responsibility as a carrier. Carriers by water or railroad are not bound to deliver goods to the consignees at any place other than at the wharf or station, and a notice to the consignee of the arrival of the goods, and readiness to deliver, comes in place of a personal delivery, so far as to release the carrier from his extraordinary liability as insurer. *Zinn v. New Jersey Steamboat Co.*, 49 *N. Y.* 442. *Kilroy v. Delaware & H. Canal Co.*, 121 *N. Y.* 22, 24 *N. E. Rep.* 192, 30 *N. Y. S. R.* 724; *affirming* 24 *J. & S.* 138, 16 *N. Y. S. R.* 873, 1 *N. Y. Supp.* 779.

Where bulky articles of freight are landed from a vessel in the customary manner upon a public wharf, with due notice to the consignee, who pays the freight and takes steps toward removing them, and is afforded a reasonable opportunity to do so, but unnecessarily delays the operation, in consequence of which they are injured by inclement weather, the carrier is not responsible for such injury. It is not his duty to store the goods after the consignee has paid the freight and signified his intention to remove them, and is apparently about to do so. *Goodwin v. Baltimore & O. R. Co.*, 50 *N. Y.* 154; *reversing* 58 *Barb.* 195.

But where goods are delivered at a wharf several weeks before the consignee has any notice that they are there, and they have become in a measure unsalable and their market value diminished, the liability of the carrier continues up to that time, and for a reasonable time thereafter, for their removal, the carrier having failed to use due diligence in giving the consignee notice; but no liability attaches for a subsequent depreciation in value. *Zinn v. New Jersey Steamboat Co.*, 49 *N. Y.* 442, 3 *Am. Ry. Rep.*

* See also *ante*, 93; *post*, 253.

340.—FOLLOWED IN *Sherman v. Hudson River R. Co.*, 64 N. Y. 254. NOT FOLLOWED IN *Leavenworth, L. & G. R. Co. v. Maris*, 16 Kan. 333.

218. Receipting for goods on delivery.—A company has a right when delivering goods to require the consignee to sign a receipt stating that the goods are received in good condition; but on the other hand the consignee has a right to examine the goods before signing such receipt. *Skinner v. Chicago & N. W. R. Co.*, 12 Iowa 191.—DISTINGUISHED IN *Porter v. Chicago & N. W. R. Co.*, 20 Iowa 73.

A written receipt given by a consignee for goods will not be set aside on his evidence alone that he never received the goods from the carrier, with no explanation as to how he came to make the receipt. *Chapman v. Railroad Co.*, 7 Phila. (Pa.) 204.

219. Burden of proving delivery is on carrier.*—Where a common carrier receives goods and contracts to deliver them to the consignee, the burden of showing such delivery is upon the carrier. *Wheeler v. St. Louis & S. E. R. Co.*, 3 Mo. App. 358.

220. Carrier cannot dispute shipper's title.†—Where a common carrier accepts the goods of a shipper to be carried, he cannot dispute the shipper's title. He must deliver according to order and agreement, and take his chances for the consequence. Except perhaps in case of fraud or insolvency, he cannot institute a litigation of interpleader to test the ownership, simply because another claims the property. *M'Gaw v. Adams*, 14 How. Pr. (N. Y.) 461.

2. Notice of Arrival.‡

221. Rule requiring notice.—Common carriers by railroad are excused from a personal delivery of goods carried by them, but in lieu of delivery are required to notify the consignee; and their liability as carriers continues until the consignee has had a reasonable time to remove the property. *Michigan C. R. Co. v. Ward*, 2 Mich. 538.—DISTINGUISHED IN *Francis v. Dubuque & S. C. R. Co.*, 25 Iowa 60.

It is the duty of the carrier to notify the

consignee of the arrival of goods and of their place of deposit, and to secure or safely store them if the owner cannot be found. This duty can only be varied by express contract between the parties, or uniform and well-known usage to the contrary in conformity to which the party may be presumed to have contracted. *Browning v. Long Island R. Co.*, 2 Daly (N. Y.) 117. *The Mary Washington, Chase (U. S.)* 125.

In the absence of special agreement or custom to the contrary, the carrier must give notice of the arrival of the goods to the consignee, if he lives at the place of delivery, and if he does not live there, but has, to the knowledge of the carrier, an agent there, then to the agent. *Pinney v. First Div. St. P. & P. R. Co.*, 19 Minn. 251 (Gil. 211), 20 Am. Ry. Rep. 71.—FOLLOWING *Derosia v. Winona & St. P. R. Co.*, 18 Minn. 133.

Where the consignee is unknown, a reasonable and diligent effort to find and notify him of the arrival is a condition precedent to a right to warehouse the goods. If such effort be not made, the carrier is liable for the damages resulting from the neglect. *Sherman v. Hudson River R. Co.*, 64 N. Y. 254; *affirming* 5 Daly 521.—FOLLOWING *Ward v. New York C. R. Co.*, 47 N. Y. 29.

The measure of damages is the difference in the value of the goods at the time and place they ought to have been delivered and the time of their actual delivery; in fixing the time when delivery should have been made, where there is no charge of negligence in transportation, a reasonable time after arrival should be allowed for delivery. *Sherman v. Hudson River R. Co.*, 64 N. Y. 254; *affirming* 5 Daly 521.—FOLLOWING *Zinn v. New Jersey Steamboat Co.*, 49 N. Y. 442.

Advising consignee of arrival of freight, obtaining consignee's signature acknowledging receipt of same, and clerkage are services incidental to conveyance and not extraordinary ones, it being ordinarily the duty of a carrier to give notice to persons to whom goods are directed of the arrival of the goods, at all events, when delivery is to be taken at the office of the carrier; for the time that they ought to call for the goods is when the carrier is ready to deliver, and he alone is in a position to notify when that is. *Neston Colliery Co. v. London & N. W. R. Co.*, 4 Ry. & C. T. Cas. 257.

* See also *post*, 292.

† To whom carrier may lawfully deliver property, see *note*, 9 AM. ST. REP. 511. See also *post*, 711.

‡ Notice of arrival of goods, see *notes*, 16 AM. & ENG. R. CAS. 775; 30 *Id.* 133, 37 *Id.* 649, *abstr.* See also *ante*, 82; *post*, 336, 338.

2 D. R. D.—7.

Usage will sometimes exempt carriers from actual delivery of goods at the residence of the consignee. But in no case will a carrier be excused from giving notice to the consignee of the arrival of the property, if the consignee is known. *Mier-son v. Hope*, 2 *Sweeney* (N. Y.) 561.

The necessity of notice, under ordinary circumstances, to terminate the character of a common carrier and attach that of a warehouseman, as applied to railroads, and the nature and extent of such notice discussed but not decided. *Hilliard v. Wilmington & W. R. Co.*, 6 *Jones* (N. Car.) 343.

222. No notice required.—A railroad company which delivers goods at its freight depot at the point of destination on time need not notify the consignee of their arrival. *Eaton v. St. Louis, I. M. & S. R. Co.*, 12 *Mo. App.* 386.—FOLLOWING *Rankin v. Pacific R. Co.*, 55 *Mo.* 167. NOT FOLLOWING *McDonald v. Western R. Corp.*, 34 *N. Y.* 497; *McMillan v. Michigan S. & N. I. R. Co.*, 16 *Mich.* 79.—QUOTED IN *Kansas City Transfer Co. v. Neiswanger*, 18 *Mo. App.* 103.—*Rankin v. Pacific R. Co.*, 55 *Mo.* 167.—FOLLOWED IN *Eaton v. St. Louis, I. M. & S. R. Co.*, 12 *Mo. App.* 386. QUOTED IN *Gashweiler v. Wabash, St. L. & P. R. Co.*, 25 *Am. & Eng. R. Cas.* 403, 83 *Mo.* 112; *Kansas City Transfer Co. v. Neiswanger*, 18 *Mo. App.* 103.—*Bergner v. Chicago & A. R. Co.*, 13 *Mo. App.* 499.

A railroad company is not bound, like carriers by wagons, to deliver to the owner at his place of business; nor, like carriers by water, to give notice of the arrival of the goods. *Morris & E. R. Co. v. Ayres*, 29 *N. J. L.* 393.

Where freight is carried on a railroad from station to station, if the owner is not ready to receive it at its destination, the duty of the carrier is discharged by placing it in the warehouse of the company without giving notice to the owner or consignee. *Neal v. Wilmington & W. R. Co.*, 8 *Jones* (N. Car.) 482.—FOLLOWING *Hilliard v. Wilmington & W. R. Co.*, 6 *Jones* (N. Car.) 343.

Although the authorities are very conflicting on the question of notice by the carrier of the arrival of goods, there seems to be a preponderance favoring the proposition that no obligation rests on railroad carriers to give special notice of the arrival of goods to the consignee. *South & N. Ala. R. Co.*

v. Wood, 9 *Am. & Eng. R. Cas.* 419, 66 *Ala.* 167, 41 *Am. Rep.* 749.

The court inclines to the opinion that in regard to the transportation of goods by railroad, as the business is generally conducted in this country, the rule holding the company liable as a common carrier until it has given the consignee notice of the arrival of the goods does not apply. The immediate and safe storage of the goods on arrival in warehouses, and without additional expense, seems to be a substitute better adapted to the convenience of both parties. *Norway Plains Co. v. Boston & M. R. Co.*, 1 *Gray* (Mass.) 263.—CRITICISED IN *Blumenthal v. Brainerd*, 38 *Vt.* 402; *Oulmit v. Henshaw*, 35 *Vt.* 605. DISAPPROVED IN *Wood v. Crocker*, 18 *Wis.* 345. DISTINGUISHED IN *Cary v. Cleveland & T. R. Co.*, 29 *Barb.* (N. Y.) 35. NOT FOLLOWED IN *Leavenworth, L. & G. R. Co. v. Maris*, 16 *Kan.* 333; *Derosia v. Winona & St. P. R. Co.*, 18 *Minn.* 133; *Dunham v. Boston & A. R. Co.*, 46 *Hun* (N. Y.) 245, 11 *N. Y. S. R.* 472. REVIEWED IN *Jeffersonville R. Co. v. Cleveland*, 2 *Bush* (Ky.) 468.

223. Duty to give notice as affected by usage or contract.—Where the carrier and shipper by special contract stipulate for notice, without any limitations or conditions, the reasonable time for removal commences from the time of the notice, and not from that of the arrival of the goods. *Leavenworth, L. & G. R. Co. v. Maris*, 16 *Kan.* 333.

Although there may have been a usage or even an agreement between a carrier and a consignee that the carrier should deliver consignments of grain on a certain side-track near a station, yet when a car of wheat is placed on such side-track without any notice to the consignee, where it remains two days and is then destroyed by fire, the carrier cannot escape liability on the ground that the grain had been delivered before the fire. *Pindell v. St. Louis & H. R. Co.*, 34 *Mo. App.* 675.

Where a common carrier alleges that it was its practice not to give notice to the consignees of the arrival of goods, but to deposit them in its warehouse, where the consignees were expected to call for them on learning from their correspondents, or otherwise, of their arrival, in order to discharge itself from liability it must show that such practice was known to the consignees and assented to by them. And

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after the consignees obtain information of the arrival of the goods, their refusal to remove the goods will not relieve the carrier from liability for any injury sustained before the receipt of such information. *The Mary Washington, Chase (U. S.)* 125.

Where the question is whether goods had remained at the station long enough before they were destroyed by fire to have afforded the consignee reasonable time for their removal, it is not necessary to show actual notice by the carrier to the consignee that the goods were ready for delivery; such notice may be implied from the custom and usage of the carrier and previous dealings between the parties. *Wood v. Milwaukee & St. P. R. Co.*, 27 Wis. 541, 2 Am. Ry. Rep. 342.

A common carrier who, in violation of his general and uniform usage in dealing with consignees, fails to give notice of the arrival of goods, or who wrongfully detains them after they have been applied for by a consignee ready to receive them, is guilty of such negligence in exposing the goods to loss or damage by a subsequent freshet occurring whilst they are in store in his depot, and before giving any notice of their arrival, as to deprive him of excuse by the act of God so far as these goods are concerned. *Richmond & D. R. Co. v. White*, 88 Ga. 805, 15 S. E. Rep. 802.

Goods were shipped on a railroad for a place thirty-six miles distant. The shipper was at their destination in three days to receive them, and called occasionally for twelve days, but they had not arrived. The freight agent then informed him that he would give him notice of their arrival. They arrived six days afterwards. *Held*, that the company was bound to give the shipper notice of their arrival. *Tanner v. Oil Creek R. Co.*, 53 Pa. St. 411.

Where, after a stipulation for notice, without any agreement as to the form or conditions thereof, the carrier gives notice with a condition written thereunder that the liability of the carrier terminates upon the arrival of the goods, and the consignee receives such notices without objection, and continues his shipments over the road—*held*, that this was equivalent to a construction by the parties, and binding upon both, that the agreement for notice was simply for the accommodation of the consignee, and without extending the extraordinary

liability of the carrier. *Leavenworth, L. & G. R. Co. v. Maris*, 16 Kan. 333.

224. Effect of notice in reducing carrier's liability to that of warehouseman.*—A mere notice by the carrier to the consignee that his goods are landed is not sufficient to discharge the carrier in case of loss. The consignees should have time and opportunity to remove the goods. *Maignan v. New Orleans, J. & G. N. R. Co.*, 24 La. Ann. 333.

After the expiration of a reasonable time for removal, after notice of arrival, the carrier is responsible, not as carrier, but only as warehouseman and for ordinary negligence. *Leavenworth, L. & G. R. Co. v. Maris*, 16 Kan. 333.

Tennessee act of 1870, ch. 17, requiring railroad companies to give consignees notice within three days after the arrival of goods, does not change the common-law rule as to when their liability as carriers ceases and that of warehousemen begins. The duty of the company after the arrival of goods is to safely store them if the consignee is not ready to take them away, and their liability as warehousemen then attaches. *Butler v. East Tenn. & V. R. Co.*, 9 Am. & Eng. R. Cas. 249, 8 Lea (Tenn.) 32.—NOT FOLLOWED IN *Western R. Co. v. Little*, 86 Ala. 159.

It was error to instruct the jury that if the plaintiff was properly notified of the arrival of the goods she could not recover, because the defendant was sued on its contract as common carrier and not as warehouseman, although the goods had been delivered as required by the admitted terms of the contract; since a failure to deliver the goods on demand, even after storage, without lawful excuse, was a breach of the carrier's original contract for which suit might be brought upon that contract. The purport of section 2120 of Cal. Civ. Code, providing that if for any reason a carrier does not deliver freight to the consignee or his agent personally he must give notice to the consignee of its arrival and care for it as a warehouseman for a reasonable time, is merely to reduce the degree of care for which the carrier shall be responsible, and does not imply that the storage of the goods creates a new contract which must be specially pleaded in order to recover;

* Notifying consignee of arrival. Duty as warehouseman, see note, 71 AM. DEC. 290.

and in order that the degree of care required of the carrier shall be reduced to that of warehouseman, it is indispensable that the notice required by this section be given. *Wilson v. California C. R. Co.*, 55 *Am. & Eng. R. Cas.* 625, 94 *Cal.* 166, 29 *Pac. Rep.* 861.

225. When consignee is in habit of calling daily for goods.—Where manufacturers were in the habit of making regular shipments of goods to a party who acted as their agent, and the consignee was in the habit of calling daily for the goods, the carrier is not bound to give notice of their arrival, but is discharged after the goods have been unloaded and the agent has had a reasonable time in which to remove them. *Russell Mfg. Co. v. New Haven Steamboat Co.*, 52 *N. Y.* 657.

But where the agent was in the habit of not calling for goods which might arrive on a holiday, the carrier's liability as such does not cease as to goods so arriving, in the absence of notice and a reasonable time for the agent to remove them. *Russell Mfg. Co. v. New Haven Steamboat Co.*, 52 *N. Y.* 657.—**EXPLAINING** *Russell Mfg. Co. v. New Haven Steamboat Co.*, 50 *N. Y.* 121.

226. Where goods are lost before there is time to give notice.—After it is shown by dates of shipment that the goods had time to arrive and be delivered to the consignee before the flood occurred, the burden of showing what part of the goods, if any, did not arrive within that time is upon the carrier; and then the burden is on the consignee to show the damage done to those which did arrive, and the amount thereof, in order to recover on the ground of negligence in not giving notice of arrival, or in not delivering on application. *Richmond & D. R. Co. v. White*, 88 *Ga.* 805, 15 *S. E. Rep.* 802.

As to goods which arrived too late to admit of giving the usual notice to consignees before the flood occurred, the carrier was bound to the exercise of extraordinary diligence in protecting them from damage by the flood whilst they were in his cars or his warehouse. But if they were damaged in spite of such diligence, he would be excused. *Richmond & D. R. Co. v. White*, 88 *Ga.* 805, 15 *S. E. Rep.* 802.

227. Giving notice by mail or through newspapers.—It is the duty of a common carrier to give a consignee actual notice of the arrival of goods, or to show

such a usage as would warrant the presumption that contracts of shipment were made with reference to it; and it is not enough to show a general newspaper notice that all goods not taken away on the day of their arrival would be sent to a warehouse. *Rome R. Co. v. Sullivan*, 14 *Ga.* 277.—**DISTINGUISHED** IN *Southwestern R. Co. v. Felder*, 46 *Ga.* 433. **NOT FOLLOWED** IN *Francis v. Dubuque & S. C. R. Co.*, 25 *Iowa* 60.

The positive evidence of a consignee of goods that he did not receive a mailed notice of their arrival from the carrier until a certain day, is entitled to greater weight than the inference that he received them at an earlier date, which the carrier seeks to draw from the fact that the notice was mailed several days earlier. Where a carrier sees fit to take the chances of sending a notice by mail instead of sending it direct by messenger, it must bear the consequences if any delay occurs in the receipt of the notice. *Solomon v. Philadelphia & N. Y. E. Steamboat Co.*, 2 *Daly (N. Y.)* 104.

Certain household goods were carried by a railway to H., in this state, reaching that point on November 14, 1879, and were placed in the company's depot. Soon afterwards the owner called for the goods, but was informed by the agent that they had not arrived. Certain friends of the owner, at his request also, on the nineteenth, twentieth, and about the twenty-second of that month made a similar inquiry of the agent and were informed that the goods had not been received. The depot was burned November 24, 1879, and the goods destroyed. The custom of the railway company was to give notice through the mail to all persons who are not regular shippers of the arrival of their goods; but no such notice was sent to the consignee in this case. *Held*, that the railroad company was liable for the value of the goods. *Burlington & M. R. R. Co. v. Arms*, 16 *Am. & Eng. R. Cas.* 272, 15 *Neb.* 69, 17 *N. W. Rep.* 351.

228. Duty to give notice of arrival of bonded goods.—Where a carrier received goods subject to duty, which could only be delivered into a bonded warehouse, on written notice, which facts were known to the carrier, and the goods arrived at their destination, but the carrier neglected to notify the consignee or the proper revenue officer, until they were accidentally consumed by fire—*held*, that the liability of the carrier did not cease and that of ware-

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houseman attach upon the arrival of the goods at their destination, and that the carrier was liable to the consignee for the loss. *Chicago & N. W. R. Co. v. Sawyer*, 69 Ill. 285.—*EXPLAINING* *Moses v. Boston & M. R. Co.*, 32 N. H. 523.

229. As to goods for destination beyond carrier's line.—If a carrier receives goods for a point beyond its line, if there be no means of public transportation from the terminus of its line to the place of destination, the end of its line will be considered the place of destination; but the carrier's duty is not ended by mere delivery of the goods to a wharfinger, but he is further required to notify the consignee of their arrival, or to make some reasonable effort to do so. *Hermann v. Goodrich*, 21 Wis. 536.

230. Power of agents to contract to give notice.—A freight agent may bind the company by an agreement to give a consignee notice of the arrival of goods, against a rule of the road that no notice will be given. *Tanner v. Oil Creek R. Co.*, 53 Pa. St. 411.—*REVIEWED IN* *Schlessinger v. Adams Exp. Co.*, 9 Phila. (Pa.) 70.

231. Duty of consignee to leave his address.—A consignee of goods should leave his address with the carrier at the place of destination, so that the latter may give notice of the arrival of the goods; and if he fails to do so, and the carrier, after due inquiry, fails to find his residence or place of business, the absence of notice is excused; and after holding the goods a reasonable time, he may store them and be liable only as warehouseman. *Pelton v. Rensselaer & S. R. Co.*, 54 N. Y. 214.—*FOLLOWING* *Northrop v. Syracuse, B. & N. Y. R. Co.*, 2 Trans. App. 183; *Fenner v. Buffalo & S. L. R. Co.*, 44 N. Y. 505.

232. When carrier not liable for failing to give notice.—Where the owner of a lot of corn ships the same to himself, with directions to the carrier to notify the shipper's agent of the arrival of the grain, the failure of the carrier to give the shipper notice of the neglect of his agent to receive and take care of the same will not render the carrier liable, when such failure does not operate to the injury of the shipper. *Gregg v. Illinois C. R. Co.*, 147 Ill. 550, 35 N. E. Rep. 343.

233. When notice to husband is notice to wife.—Where household goods owned by the wife were shipped in her

name over defendant's road to the city of A., and the husband presented to the defendant's agent at the city of M. the bill of lading, and requested that the goods be re-shipped to the city of M.—*held*, that the defendant had the right to presume that the husband was acting as the wife's agent, and its duty to notify the wife that the goods had been attached was discharged by them giving such notice to the husband. *Furman v. Chicago, R. I. & P. R. Co.*, 23 Am. & Eng. R. Cas. 730, 68 Iowa 219, 26 N. W. Rep. 83.

234. Notice as affecting title to goods.—Where maps are purchased by a township trustee their delivery at a railroad station, with notice to him after the time agreed, vests the ownership in the school township, subject only to his right to refuse them, and relieves the railroad company from any further obligation to the consignee. *Moral School Tp. v. Harrison*, 74 Ind. 93.

235. Measure of damages.—It is a very extreme case which will warrant the refusal of freight on account of depreciation or fall in the price because of a delay in giving notice of its arrival. Upon notice of its arrival, whether early or late, the consignee should receive the freight and sell it for such price as it will command and credit the company with the proceeds; and the difference between such sum and the amount which would have been realized had the notice been promptly given is the measure of damages. *New Orleans, J. & G. N. R. Co. v. Tyson*, 46 Miss. 729, 1 Am. Ry. Rep. 474.

3. *Neglect or Refusal of Consignee to Receive or Unload.**

236. When consignee may refuse to accept.—A failure by a common carrier to carry and deliver goods within a reasonable time does not constitute a conversion, but is a mere breach of contract; and the consignee cannot refuse to accept the goods on account of a delay and recover their full value, unless the delay destroys the full value of the goods, or is equivalent to an entire loss. *Galveston, H. & S. A. R. Co. v. Watson*, 1 Tex. App. (Civ. Cas.) 465.

* Removal of goods by consignee, see note, 9 AM. & ENG. R. CAS. 121.

Failure of consignee to receive and take away goods, see note, 16 AM. & ENG. R. CAS. 275.

† See also *post*, 770.

Where by reason of a failure to deliver goods in a reasonable time the consignee is compelled to and does purchase other goods, he is not compelled to receive such goods when offered at another time. *Gulf, C. & S. F. R. Co. v. Maetze*, 18 *Am. & Eng. R. Cas.* 613, 2 *Tex. App. (Civ. Cas.)* 553.

Where oil is shipped in safe barrels, which are so damaged by the carrier that they cannot be removed with safety, it is the duty of the carrier to repair the barrels if they are capable of repair; and if he fails to do so he cannot compel the owner to take them in that condition; and until the freight is ready for delivery in a safe condition the carrier's duties are not fully ended and the freight charges are not demandable, and an action may be maintained against the carrier without an offer to pay the charges. *Breed v. Mitchell*, 48 *Ga.* 533.

A lot of rags put up in bags were delivered to a carrier, and at the place of destination the carrier offered to deliver less than one third of the amount of rags shipped and those scattered loosely about. There was no proof that they were a part of the same rags shipped. *Held*, that such offer to deliver was not a compliance with the carrier's contract, and the shippers might maintain an action for the value of the whole lot shipped. The shippers were entitled to their own rags, and were not bound to take others. *Chicago & R. I. R. Co. v. Warren*, 16 *Ill.* 502.

237. Must accept where loss is but partial.*—Where the goods in possession of a common carrier are uninjured in quality, but there is a partial loss, the owner cannot abandon the goods and recover their entire value; he can recover only the price, at the place of delivery, of the goods actually lost. *Shaw v. South Carolina R. Co.*, 5 *Rich. (So. Car.)* 462.

Where goods reach their destination damaged, but yet of some value, it is the duty of the consignee to take them up promptly, which will not be considered ordinarily a waiver of any claim for damages; but if he fails to take them up within a reasonable time, and sues for damage, the company may offset against the damage shown a claim for storage. *Galveston, H. & S. A. R. Co. v. Van Winkle*, 3 *Tex. App. (Civ. Cas.)* 538.

Where a part only of property transported

by a carrier is injured, the consignee cannot reject the part uninjured and hold the carrier liable for the whole. *Michigan, S. & N. I. R. Co. v. Bivens*, 13 *Ind.* 263.

Where a number of boxes of goods are shipped by rail, the owner cannot refuse to take any of the goods because one box is missing, and upon his refusal, where the goods are sold to pay freight and storage, he cannot recover their value against the company. *Gulf, C. & S. F. R. Co. v. Booton*, 4 *Tex. App. (Civ. Cas.)* 103, 15 *S. W. Rep.* 502.

Where fluids are shipped in casks, a part of which has leaked out before they reach their place of destination, in the absence of any proof that the remaining portion is of a less value per gallon by reason of the leakage, it is the duty of the consignee to receive the portion remaining, and he can recover only the value of the quantity lost. *Howe v. Oswego & S. R. Co.*, 56 *Barb. (N. Y.)* 121.

Where goods are shipped and part of them lost, and others reach their destination in a damaged condition, and the carrier offers to deliver the goods not lost upon conditions which are unreasonable, the owner may refuse to receive any of the goods on such terms, and may sue and recover the value of the whole, the same as if all had been lost. *Texas & P. R. Co. v. Martin*, 2 *Tex. App. (Civ. Cas.)* 295.

238. May demand goods after once refusing.—Although the consignees of goods have by mistake declined to receive them, they are entitled, upon discovery of the mistake, to demand delivery from the carrier; and if no other rights have intervened the right of the consignees to delivery is not affected by the refusal. *Bacharach v. Chester Freight Line*, 42 *Am. & Eng. R. Cas.* 362, 133 *Pa. St.* 414, 19 *Atl. Rep.* 409.

239. Duty of carrier after refusal.—If the consignee refuses to receive goods, the carrier should regard itself as the agent of the owners, and as such is vested with authority to take such steps as will advance the owners' interest, and to secure freight charges to itself. What should be done in a given case will depend upon circumstances. If such a course is pursued as men of ordinary prudence would follow, the carrier is protected by law whatever may be the result. *Steamboat Keystone v. Motes*, 28 *Mo.* 243. *Lesinsky v. Great Western Dispatch*, 13 *Mo. App.* 575.

* See also *ante*, 113.

Where the consignee refuses to pay the freight, and the carrier declines to deliver the goods, it may retain them at their place of destination for a reasonable time, awaiting directions. *Crouch v. Great Western R. Co.*, 2 H. & N. 491, 3 Jur. N. S. 796, 26 L. J. Ex. 418.

The carrier is not entitled to take the goods back to the starting-point immediately upon the consignee refusing to pay the sum demanded. *Great Western R. Co. v. Crouch*, 3 H. & N. 183, 4 Jur. N. S. 457, 27 L. J. Ex. 345.

The carrier, in order to relieve himself from liability, must deliver the goods at the place designated in good condition. He is not justified in abandoning the goods or negligently exposing them to injury, even if the consignor neglects to receipt or to receive them after notice of their arrival. *Scheu v. Benedict*, 116 N. Y. 510, 22 N. E. Rep. 1073, 27 N. Y. S. R. 526.

When a carrier has transported goods to their destination, and through the default of one who is both consignor and consignee the goods are left on the carrier's hands, it is bound to take reasonable measures for their preservation, and can recover from the owner the expenses so incurred. *Great Northern R. Co. v. Swaffield*, 43 L. J. Ex. 89, L. R. 9 Ex. 132, 30 L. T. 562.

Where the consignee refuses to receive damaged goods of the carrier, and he sells them, he shall account to the consignor or owner for so much as will indemnify him, and has not been paid by the insurer. *Cassidy v. Young*, 4 B. Mon. (Ky.) 265.

240. Duty to store after consignee's refusal to receive.*—Where a consignee refuses to receive goods the carrier's duty, as a common carrier, is discharged by placing the goods in storage, and thereafter it will hold them as warehouseman. *Williams v. Holland*, 22 How. Pr. (N. Y.) 137. *Illinois C. R. Co. v. Cobb*, 64 Ill. 128. *McAndrew v. Whitlock*, 52 N. Y. 40. *Cook v. Erie R. Co.*, 58 Barb. (N. Y.) 312.

Where goods are safely conveyed to the place of destination and the consignee is dead, absent, or refuses to receive, or is not known and cannot after reasonable efforts be found, the carrier may discharge himself from further responsibility by placing the goods in store with some responsible third person in that business, at that place, for

and on account of the owner. In such a case the storehouse keeper becomes the agent or bailee of the owner of the property. *Fisk v. Newton*, 1 Den. (N. Y.) 45.—APPROVED IN *Kremer v. Southern Exp. Co.*, 6 Coldw. (Tenn.) 356.

The doctrine of technical abandonment does not apply to common carriers as it does to insurers. *Nettles v. South Carolina R. Co.*, 7 Rich. (So. Car.) 190.

241. What is a reasonable time.*—What is a reasonable time for the removal of the goods from the railroad depot is a question of law for the court when the facts are undisputed; and in its determination, the convenience or necessities of the consignee and the proximity or remoteness of his residence or place of business from the depot, cannot be considered. *Columbus & W. R. Co. v. Ludden*, 42 Am. & Eng. R. Cas. 404, 89 Ala. 612, 7 So. Rep. 471.

A consignee cannot, after he has notice of the arrival for him of property, defer taking it away while he attends to his other affairs, thus prolonging the duration of the carrier's liability as insurer. It is his duty at once, and with diligence, to act upon the notice, and to seek delivery, and to continue until delivery is complete. So much time as he gives to his other business, after receiving the notice, cannot be allowed to him in estimating what is a reasonable time in which to take delivery. *Hedges v. Hudson River R. Co.*, 49 N. Y. 223, 3 Am. Ry. Rep. 346; reversing 6 Robt. 119.—REVIEWED IN *Spears v. Spartanburg, U. & C. R. Co.*, 11 So. Car. 158.

Plaintiff, who was moving from Indiana to California, shipped goods by freight, but was herself taken sick at an intermediate point, and notified the carrier at the place of destination of the fact, and to safely store the goods until she was able to come on. Held, under the circumstances, that it could not be held as a matter of law that three months was a reasonable time in which to remove the goods from the warehouse. *Wilson v. California C. R. Co.*, 55 Am. & Eng. R. Cas. 625, 94 Cal. 166, 29 Pac. Rep. 861.

242. Duty to give consignor notice—C. O. D. goods.—As a rule a carrier is not bound to notify the consignor of the non-acceptance of goods by the consignee, and it will not be liable for a decline

*See also *ante*, 216; *post*, 366-374.

*See also *ante*, 86, 205, 207.

in the market value of the goods happening before the consignor learns of such refusal by the consignee, and has given orders to the carrier for disposal of the goods. *Kremer v. Southern Exp. Co.*, 6 *Caldw.* (Tenn.) 356.

The carrier is not liable to the consignor for the failure to give him notice of a refusal of the consignee to receive goods, where the consignor has failed to disclose his name or address. *Williams v. Holland*, 22 *How. Pr.* (N. Y.) 137.

The liability of the carrier for failure to give such notice could only arise where such failure would be evidence of gross neglect on his part in the discharge of the duty that devolves upon him from the fact that the goods being lawfully in his custody for a particular purpose, and that purpose having failed through an unforeseen contingency, the law throws upon the party who has assumed the custody the duty of exercising reasonable diligence to protect the property so long as his custody continues. The fact that the package was marked C. O. D. and the refusal of the consignee to pay the price charged was the reason for the non-delivery, makes no difference. *Kremer v. Southern Exp. Co.*, 6 *Caldw.* (Tenn.) 356.—*APPROVING Hudson v. Baxendale*, 2 H. & N. 575.

243. Carrier not liable until demand.*—It is the duty of a consignee to go to the carrier's depot at the place of destination for his goods, and the carrier cannot be sued for non delivery unless there has been a refusal to deliver on request; neither is the carrier required to make personal delivery to the consignee nor offer to so deliver. *Michigan S. & N. I. R. Co. v. Bivens*, 13 *Ind.* 263.

244. Demurrage charge.†—If a consignee fails to unload freight cars within a reasonable time after notice, the company may recover a charge, for the time that such cars are detained after the time they should have been unloaded, in the nature of a demurrage charge. *Kansas Pac. R. Co. v. McCann*, 2 *Wyom.* 3.

Where a cargo of grain is consigned to parties who are not the owners, for the purpose of sale, it is their duty to provide at the earliest moment practicable a place for its storage or removal from the boat, and

they have no right to detain the boat until they can effect a sale. If they keep the boat thus in waiting the owners of the boat are entitled to recover therefor. *Huntley v. Dows*, 55 *Barb.* (N. Y.) 310.

245. Liability of consignee for negligence in unloading.—In an action to recover damages alleged to have been caused by the negligence of defendant, the following facts appeared: Plaintiff transported for defendant a car-load of lumber; it was kept in place upon the car by stakes placed in sockets at the sides, supported by braces nailed to the tops of the stakes and extending across the lumber. The car was delivered to defendant upon a siding alongside of plaintiff's main track. Defendant's agent, in order to unload the lumber, knocked off the cross-pieces, removed a large portion of the lumber, leaving a high narrow pile on the side toward the main track, and, without putting back the cross-pieces, left the car over night. During the night a high wind arose and the lumber fell from the car and upon the main track. The engineer of a train approaching thereon, as soon as he perceived the obstruction, applied the air-brakes, but before the train could be stopped it struck the lumber, and the locomotive and cars were broken and damaged. *Held*, that the evidence justified a finding of negligence on the part of defendant; also that plaintiff was not guilty of contributory negligence; that it owed defendant no duty to unload or superintend the unloading of the car, or to watch and care for it the night after it arrived, and was not bound, as between it and defendant, to anticipate any danger from the lumber after its delivery, but had the right to run its trains on the assumption that defendant would not negligently permit the lumber to be placed or come upon its track. *New York, L. E. & W. R. Co. v. Atlantic Refining Co.*, 49 *Am. & Eng. R. Cas.* 131, 129 *N. Y.* 597, 29 *N. E. Rep.* 829, 42 *N. Y. S. R.* 346; *reversing* 36 *N. Y. S. R.* 658, 13 *N. Y. Supp.* 466.

Defendant offered to prove that plaintiff kept no watchman at the siding; this was objected to and excluded. *Held*, no error, as plaintiff was not bound to keep a watchman there. *New York, L. E. & W. R. Co. v. Atlantic Refining Co.*, 49 *Am. & Eng. R. Cas.* 131, 129 *N. Y.* 597, 29 *N. E. Rep.* 829, 42 *N. Y. S. R.* 346; *reversing* 36 *N. Y. S. R.* 658, 13 *N. Y. Supp.* 466.

* See also *ante*, 92; *post*, 307, 701.

† See also *post*, 377.

Defendant offered to prove that the car used for transporting lumber was a flat car and not a lumber car with sides boarded part way; this was rejected. *Held*, no error; as the lumber was safely transported and delivered and fell from the car, not from any imperfection in it, but from the careless manner in which it was left. *New York, L. E. & W. R. Co. v. Atlantic Refining Co.*, 49 Am. & Eng. R. Cas. 131, 129 N. Y. 597, 29 N. E. Rep. 829, 42 N. Y. S. R. 346; reversing 36 N. Y. S. R. 658, 13 N. Y. Supp. 466.

4. Sufficiency of Delivery.

246. Generally.*—The liability of a common carrier does not end nor change into that of warehouseman by mere delivery at the usual dock of a vessel, or railroad at its depot. There must be such actual delivery as satisfies and fulfils the contract for carriage or delivery to the owner or consignee. The carrier's liability cannot end until that of the owner's, consignee's, or warehouseman's begins; and it can make no difference with the carrier, that in discharging his liability as such he assumes the new relation of storer. Merely reaching the end of the voyage and delivering the goods out of the vehicle in which they are carried will not fulfil the one duty nor create the other. There must be an actual or legal delivery, either to the consignee or to the warehouseman; and the proof of either rests upon the carrier. *Chicago & R. I. R. Co. v. Warren*, 16 Ill. 502.

The undertaking of a common carrier to transport goods to a particular destination includes the duty to deliver them in safety. The delivery must be made or tendered in the proper time and manner, and at a proper place, and *prima facie* to the consignee personally. *Bartlett v. Steamboat Philadelphia*, 32 Mo. 256.

Where goods are delivered to a carrier marked for a particular destination, without any direction as to their transportation and delivery save such as may be inferred from the marks themselves, the carrier is only bound to transport and deliver them according to the established usage of the business in which he is engaged, whether the consignor knew of the usage or not. *Van Santvoord v. St. John, 6 Hill (N. Y.)* 157.—

* Hours during which tender of freight may be made, see note, 40 AM. & ENG. R. CAS. 17.

DISTINGUISHING Weed v. Saratoga & S. R. Co., 19 Wend. (N. Y.) 534.—APPROVED IN *Coates v. United States Exp. Co.*, 45 Mo. 238; *Farmers' & M. Bank v. Champlain Transp. Co.*, 18 Vt. 131. EXPLAINED IN *Barter v. Wheeler*, 49 N. H. 9. REVIEWED IN *Rawson v. Holland*, 59 N. Y. 611.

A carrier without notice to the contrary must regard the consignee of goods as the absolute owner, and a delivery to him, such as will relieve the carrier from further liability to the consignee, is a full discharge of the carrier's liability to the consignor. *O'Dougherty v. Boston & W. R. Co.*, 1 T. & C. (N. Y.) 477.

Tender by a common carrier of goods intrusted to his care to a consignee must be reasonable in respect to time, place, and manner, and this is a question for the jury. If the goods be tendered after the hours of business, or when the consignee is unable to receive them, such tender will not discharge the carrier. *Hill v. Humphreys*, 5 Watts & S. (Pa.) 123.

When the consignee is unknown to the carrier, a due effort to find him and notify him of the arrival of the goods is a condition precedent to the right to warehouse them; and if a reasonable and diligent effort is not made, the carrier is liable for the consequences of the neglect. What is due and reasonable effort and diligence depends upon the circumstances of each case, and is a question of fact for the jury. *Zinn v. New Jersey Steamboat Co.*, 49 N. Y. 442, 3 Am. Ry. Rep. 340.

If a common carrier incurs obligations to different parties, the performance of which might be incompatible with each other, both parties being entitled in equal right, it would be no excuse to the party aggrieved by the default that the company could not perform both obligations, and thought proper to perform that to the other party. *Heirn v. M'Caughan*, 32 Miss. 17.—APPROVED AND QUOTED IN *Purcell v. Richmond & D. R. Co.*, 108 N. Car. 414.

247. Actual delivery.—A carrier, in order to prove a delivery of goods, must show an actual delivery into the possession of the consignee. *Evans v. Bristol & E. R. Co.*, 10 W. R. 559.

248. Constructive delivery.—There being no actual delivery of goods by a carrier to the consignee, a constructive delivery can only be effected by a valid agreement on the part of the carrier to hold for the

consignee. *Farrell v. Richmond & D. R. Co.*, 37 *Am. & Eng. R. Cas.* 704, 102 *N. Car.* 390, 3 *L. R. A.* 647, 9 *S. E. Rep.* 302.

The payment of the freight by the consignee after notice of arrival, without any arrangement as to the further custody of the goods by the warehouseman, is equivalent to a delivery, so far as to throw the risk of loss upon the consignee. *New Albany & S. R. Co. v. Campbell*, 12 *Ind.* 55.

A company carried coals to A., the station to which they were addressed, and gave notice to the consignee of their arrival, upon which, according to the usual course of practice between them and the consignee, it lay upon him to send for them and take them away; and he not having done so within a reasonable time, they unloaded the coals and left them on the siding, where they were lost. *Held*, in an action against them as common carriers, for non-delivery, that they had performed their contract by a constructive delivery. *Bradshaw v. Irish N. W. R. Co.*, 7 *Ir. C. L.* 252, 3 *Ry. & C. T. Cas.* xi.

249. When delivery of part is delivery of all.—Perishable goods arrived at a station about 10 o'clock on a Saturday forenoon and were at once pointed out to a party in the employment of the consignees, who was advised to take them away, as there was no room in the warehouse. He took a part of them and returned on the following Monday for the balance, but they could not be found. *Held*, a sufficient delivery to discharge the carrier. *Culbreth v. Philadelphia, W. & B. R. Co.*, 3 *Houst. (Del.)* 392.

The agent of the consignees of goods went to the station for them, and in the presence of the station-master removed a portion of them from the car and took them away, promising to return for the balance. Some hours afterward the station agent took the remainder of the goods that he found in the car and placed them in the freight-house. Afterward it was discovered that some of the goods were either stolen from the car or from the station-house. *Held*, that the question whether the delivery of a part of the goods to the agent was intended as for a delivery of the whole or only of the part taken away, was proper to be submitted to the jury. *Sessions v. Western R. Corp.*, 16 *Gray (Mass.)* 132.

A party residing 20 miles from a railroad and owning but one team ordered a quan-

tity of goods. He could only take one load a day, and upon being notified of the arrival of his goods went to the station and commenced removing them. Those not removed were thrown out of the car without any protection, by direction of the company's agent, and while there were damaged by getting wet. *Held*, that the questions whether the carrier had taken proper care of the goods and whether they were injured by the want of proper care, were for the jury. *Cook v. Erie R. Co.*, 58 *Barb. (N. Y.)* 312.

Where the evidence, in an action against a railroad company for loss of cotton, showed that the carrier had transported the goods in perfect condition; that the way-bill had been delivered up as receipt to the railroad company; that the car had been placed on a switch which belonged to the consignee, although standing on the right of way of the railroad company; that it was agreed between the parties that the cars should not be guarded by the carrier; that the consignee had the right to break the seals on the doors of the car; that the plaintiff had the right to remove the cotton without any superintendence by the defendant; that a portion of the cotton had been taken out of the car before a fire occurred, and that the carrier had not in any manner interfered with the cotton after such delivery—it was proper to hold, as matter of law, that the cotton had been delivered to the consignee, and to grant a nonsuit. *Whitney Mfg. Co. v. Richmond & D. R. Co.*, 55 *Am. & Eng. R. Cas.* 611, 38 *So. Car.* 365, 17 *S. E. Rep.* 147.

The mere fact that the cotton was in the defendant's car when burned did not make the defendant liable for the loss by fire, on the ground that the cotton was in its possession, where there was no evidence that the carrier interfered in any way to cause the injury. *Whitney Mfg. Co. v. Richmond & D. R. Co.*, 55 *Am. & Eng. R. Cas.* 611, 38 *So. Car.* 365, 17 *S. E. Rep.* 147.

It could not be claimed that the question of the destruction of the cotton while on the defendant's right of way, by fire communicated by the defendant's locomotive, still remained, where the door of the car next to the main track was closed, and there was no evidence whatever to show that the fire was the result of sparks from the locomotive, or of the acts of any of the employees of the railroad company. *Whitney*

Mfg. Co. v. Richmond & D. R. Co., 55 *Am. & Eng. R. Cas.* 611, 38 *So. Car.* 365, 17 *S. E. Rep.* 147.

250. Sufficiency of delivery of money to a bank.—Where a carrier accepts a box of specie to be carried to a bank, and offers to deliver it at any time of the day when business houses in the city where the bank is situate are open, and when convenient means were at hand for the transportation of the specie, it is sufficient, and it need not be made during ordinary banking hours. *Young v. Smith*, 3 *Dana (Ky.)* 91.

Where a package is addressed to the cashier of a bank by name and sent by a carrier, the latter is relieved from liability by delivering it to a receiving teller while in the discharge of his duties, and who had formerly received packages which had been accepted by the bank. *Hotchkiss v. Artisans' Bank*, 2 *Abb. App. Dec. (N. Y.)* 403; *affirming* 42 *Barb.* 517.—FOLLOWING *Sweet v. Barney*, 23 *N. Y.* 335.

Where the defendants, who were common carriers on Lake Champlain, were intrusted with a package of bank bills to carry from Burlington to Plattsburgh which was directed to the cashier of the bank at Plattsburgh, and delivered the same to the wharfinger of the wharf, at Plattsburgh, at which their boat touched, from whom the package was stolen, it was held, in an action brought against them for the value of such package, that it was competent for the defendants to prove that it was their uniform usage to deliver such packages of money, when intrusted to them, to the wharfinger having the care of the wharf where the boat landed, without giving any notice to the consignee, and that this was well known to the plaintiffs. *Farmers' & M. Bank v. Champlain Transp. Co.*, 16 *Vt.* 52.

251. Sufficiency of delivery of bulky articles, such as logs.—Bulky articles cannot be deemed to have been delivered by a carrier to the consignee before the latter has access to them or can obtain possession or control of them, unless there be some usage or regulation, known or assented to by the consignee, taking the case out of the general rule, and making that a delivery which would otherwise not be. *Hungerford v. Winnebago T. B. & T. Co.*, 33 *Wis.* 303.

Where a carrier agreed to transport a raft of logs to a certain point, there was not a sufficient delivery after the logs had reached their destination, so long as they remained tied up in the water beyond the owner's reach, and in the middle of a large fleet of logs. So, in an action against the carrier, it was error to charge that the delivery was good if the logs were tied up securely at the place of destination and notice thereof given to the owner, and it was likewise error to refuse to charge that as long as the logs remained in the middle of the fleet and inaccessible to the owner they were in the carrier's possession. *Hungerford v. Winnebago T. B. & T. Co.*, 33 *Wis.* 303.

252. Delivery of goods in sealed cars.—Where freight reaches its place of destination in sealed cars and is placed on a switch built at the request of plaintiffs, who were manufacturers, who surrender the bill of lading, pay the freight, and open the car, and proceed to remove the goods themselves, without any supervision from any one representing the railroad, there is a complete delivery, so as to relieve the carrier from liability for any loss to the goods that may occur by fire while being unloaded from the car; and the company could not be held liable even as warehouseman. *Whitney Mfg. Co. v. Richmond & D. R. Co.*, 55 *Am. & Eng. R. Cas.* 611, 38 *So. Car.* 365, 17 *S. E. Rep.* 147.—QUOTING *Davis v. Columbia & G. R. Co.*, 21 *So. Car.* 101.

In such case the company could not be held liable after such delivery from the fact that it had permitted the goods to remain in its cars after the delivery. *Whitney Mfg. Co. v. Richmond & D. R. Co.*, 55 *Am. & Eng. R. Cas.* 611, 38 *So. Car.* 365, 17 *S. E. Rep.* 147.

In such case the goods were destroyed by fire, and the door of the car toward the main track where engines passed was closed, with the wind blowing from the car toward the main track. There was no proof whatever that the fire originated in sparks from a locomotive. Held, that it was proper to refuse to submit to the jury whether the fire originated in such sparks. *Whitney Mfg. Co. v. Richmond & D. R. Co.*, 55 *Am. & Eng. R. Cas.* 611, 38 *So. Car.* 365, 17 *S. E. Rep.* 147.

253. Carriers by water—Delivery on wharf.*—In the case of a carrier by

* See also *ante*, 6.

* See also *ante*, 93, 217.

water there must be a landing of the goods at the wharf, or usual landing place, with reasonable notice thereof to the consignee. But this rule may be varied by contract, or affected by well established, reasonable, and generally known local custom and usage of such age, uniformity of observance, certainty, fixedness of character, and notoriety, that a jury would feel clear in saying that it was known to the party sought to be affected by it. *Huston v. Peters*, 1 Metc. (Ky.) 558.—QUOTED IN *Gashweiler v. Wabash, St. L. & P. R. Co.*, 25 Am. & Eng. R. Cas. 403, 83 Mo. 112.

Since one engaged in carrying goods by water from one port to another is not ordinarily supposed to have the means of transporting them on land, unless the contrary appear from the contract, or from established usage, the customary wharf for discharge of the vessel must be regarded as the place of delivery. *Morgan v. Dibble*, 29 Tex. 107.

Where goods are shipped by water and put off on a wharf, and so marked and set apart as to be capable of being found by ordinary diligence, acceptance by the consignee on the wharf will discharge the carrier from further liability. *Scott v. Province*, 1 Pittsb. (Pa.) 189.—FOLLOWING *Hemphill v. Chenie*, 6 Watts & S. (Pa.) 62.

Carriers by water, especially in sparsely settled districts where the consignees live at a distance from the water, may excuse a failure to deliver to the consignee personally by showing a well-established custom or habit to deliver on the banks of the stream; but to make such custom binding on the consignee it must be shown to be reasonable. *Stone v. Rice*, 58 Ala. 95.

A carrier by water cannot avoid liability for putting goods off on the river bank at a point where he had been in the habit of maintaining a warehouse and keeper, who received and took care of goods, by showing that the warehouse building had been washed away, and that the persons constituting the landing had removed. *Stone v. Rice*, 58 Ala. 95.

With carriers by water, the manner of delivering goods depends much upon the custom of the particular place and the usage of particular trades; but where no custom, as in this case, is proven and goods were put out on a bank, and a warehouseman was asked to put them under a shed, which he refused to do, it does not consti-

tute a delivery. *Bartlett v. Steamboat Philadelphia*, 32 Mo. 256.

A man living some distance from a navigable river ordered a portable mill by steamboat, which was put off at a landing where there was no warehouse. It appeared that it was the custom of carriers by water in that section of the country to deliver property on wharves or the river banks. Neither the purchaser of the mill nor any agent of the carrier was present when it was put off, and soon thereafter it was lost by a rise in the river. Held, that the mill having been ordered with knowledge of the custom, it was the duty of the owner to be present or to make arrangements to have the mill cared for. Having failed to do so, he must bear the loss. *The Mill Boy*, 4 McCrary (U. S.) 383.

254. When delivery is not complete—Agreement to deliver at a specified place.—A stipulation to transport freight to a point named therein (in this case Lexington, Mo.) is not complied with by delivering the freight at a point short of its destination, situated in another county, with a large river intervening, unbridged, and accessible only by ferry-boat. A common carrier may, by contract, extend its undertaking to deliver beyond the terminus of its line of transportation. *Loomis v. Wabash, St. L. & P. R. Co.*, 17 Mo. App. 340.

If a railroad company accepts goods for transportation from B. to W., and charges, in addition to the usual freight for transportation between these points, and further compensation for streetage to the foot of Sixth street, and fails to deliver the goods to the consignee or his agent, or at the foot of Sixth street, the consignor is entitled to recover although the jury may find that the terminus of the road is within the depot in W. and that the goods were safely delivered at that point. *Baltimore & O. R. Co. v. Green*, 25 Md. 72.

In this case the court should have left it to the jury to find whether the course of dealing between the railroad company and the consignee was such as to make it unreasonable to expect personal notice of the arrival of the cars; and if such course of dealing rendered such notice unnecessary or dispensed with it, then the company was not imperatively required to give such notice to constitute delivery, notwithstanding the extra charge of streetage. *Baltimore & O. R. Co. v. Green*, 25 Md. 72.

Where goods are consigned to one party the carrier is not justified in delivering them at the place of business of another party simply because the consignee has guaranteed the payment of rent on the building in which the business is done, and, under the guarantee, is compelled to pay it. *Mahon v. Blake*, 125 Mass. 477.

Goods were consigned to certain parties as warehousemen, and were left on a pier some distance from their warehouse or place of business, where they were destroyed by fire. Held, that it was not a sufficient delivery, in the absence of any proof of a custom to make deliveries in that way. *Steamboat Sultana v. Chapman*, 5 Wis. 454.

Plaintiff company contracted to load, transport, and unload oil, to deliver it at its warehouse, and pay all terminal expenses; the freight to be paid on delivery. The contract contained a clause by which the owner assumed "all risks and loss by fire, when in the charge or custody of" the carriers, "whether said property is being moved upon cars or barges, or is stored, or awaiting transportation at any point." A quantity of oil, while on board of barges lying at the dock of defendant's warehouse, was destroyed by an accidental fire. In an action to recover the freight thereon—held, that plaintiff was not entitled to recover, as the freight was earned only upon delivery at the warehouse; that the risk assumed was only a loss to defendant's property, relieving the carriers from their common-law liability. *New York C. & H. R. Co. v. Standard Oil Co.*, 6 Am. & Eng. R. Cas. 353, 87 N. Y. 486; affirming 20 Hun 39.

255. Delivery of grain in elevator or warehouse.*—Under the provisions of Illinois constitution and statutes requiring railroads to deliver grain to elevators to which it is consigned, a company is bound to deliver at that place if it can be reached by any track which the company owns or has leased or has the lawful right to use. *Chicago, B. & Q. R. Co. v. Hoyt*, 1 Ill. App. 374.

But a company cannot be required to deliver grain at an elevator where it will have to use a track, or part of a track, for that purpose which it does not own and has no right to use; and this is so though the owner of such track has made no objection to the use of his track for such purpose.

Chicago, B. & Q. R. Co. v. Hoyt, 1 Ill. App. 374.—QUOTING *Vincent v. Chicago & A. R. Co.*, 49 Ill. 33. REVIEWING *People ex rel. v. Chicago & A. R. Co.*, 55 Ill. 95; *People v. Chicago & N. W. R. Co.*, 57 Ill. 436.

But if the owner of the elevator constructs a track from the elevator to the company's regular track, and asks to be allowed to connect therewith, the company might be required then to deliver over such side-track. *Chicago, B. & Q. R. Co. v. Hoyt*, 1 Ill. App. 374. *Vincent v. Chicago & A. R. Co.*, 49 Ill. 33.—APPLIED IN *Coe v. Louisville & N. R. Co.*, 3 Fed. Rep. 775. QUOTED IN *Chicago, B. & Q. R. Co. v. Hoyt*, 1 Ill. App. 374.

Acquiescence by consignees for a number of years in the delivery of freight by a common carrier to independent warehousemen, from whom they received it, as also notice of its arrival, and to whom they gave the necessary receipts, will relieve the carrier from liability for its safe keeping upon its delivery to such warehousemen. *Black v. Ashley*, 42 Am. & Eng. R. Cas. 428, 80 Mich. 90, 44 N. W. Rep. 1120.

The general custom of doing business in Duluth (known and acquiesced in by both parties) is for railroad companies to deliver grain for and in behalf of the consignee to any one of the public warehouses or elevators in that city immediately upon inspection by the public inspector. *Arthur v. St. Paul & D. R. Co.*, 32 Am. & Eng. R. Cas. 449, 38 Minn. 95, 35 N. W. Rep. 718.—DISTINGUISHING *Moses v. Boston & M. R. Co.*, 32 N. H. 523.

Neither under Ill. Const. art. 11, § 12, nor under Ill. Rev. St. 1874, ch. 114, § 82, is it made the duty of a railroad company to run its cars upon spur-tracks owned by other persons, for the purpose of receiving or delivering any other merchandise than wheat; and if such duty were imposed, it would still not be the duty of the company to run upon any such track that was not reasonably safe. *Steller v. Chicago & N. W. R. Co.*, 49 Wis. 609, 6 N. W. Rep. 303.

256. Personal delivery.*—As a general rule, common carriers by land are bound to deliver the goods to the consignee at his residence, or his place of business, where, from the nature of the parcels, this is the more appropriate place for their delivery; nor is it sufficient that they are left at the

* See also *ante*, 88, 209.

* See also *ante*, 90, 215.

public office of the carrier, unless by express permission, or a usage so established and well known as to be equivalent to such permission. But if the consignee is absent, and the carrier, after diligent inquiry, cannot find him or ascertain the place of his residence or business, then the liability as a carrier is deemed at an end; but it is the duty of the carrier to take care of the goods by holding them himself, or depositing them with some suitable person for the consignee; and, in such case, the person holding the goods becomes the bailee of the owner or consignee, and is only bound to reasonable diligence. *American Exp. Co. v. Hockett*, 30 Ind. 250.

The undertaking of a common carrier, as a general rule, includes the obligation to deliver the goods safely, at the place of destination, either to the consignee or to his authorized agent; but, in the case of railroad companies, by universal custom personal delivery to the consignee or his agent is not required. *South & N. Ala. R. Co. v. Wood*, 9 Am. & Eng. R. Cas. 419, 66 Ala. 167, 41 Am. Rep. 749.—APPROVING *Fitchburg & W. R. Co. v. Hanna*, 6 Gray (Mass.) 539; *Heineman v. Grand Trunk R. Co.*, 31 How. Pr. (N. Y.) 430.—APPLIED IN *Western R. Co. v. Little*, 86 Ala. 159.

The common-law rule requiring common carriers by land to make personal delivery to the consignee has been so far relaxed, as regards railways, from necessity, as in most cases to substitute in the place of personal delivery a delivery at the warehouse of the company. But this is upon the ground that a railway has no means of delivery beyond its own lines. *State ex rel. v. Republican Valley R. Co.*, 22 Am. & Eng. R. Cas. 500, 17 Neb. 647, 24 N. W. Rep. 329, 52 Am. Rep. 424.—REVIEWING *Munn v. Illinois*, 94 U. S. 113.

257. Sufficiency of delivery to consignee's agent.*—A delivery of the goods to the duly authorized agent of the owner or assignee is a good delivery. *Southern Exp. Co. v. Everett*, 37 Ga. 688. *Illinois C. R. Co. v. Simpson*, 17 Ill. App. 325.

But the defense, in such a case, must clearly show that the person to whom the goods were delivered, as agent, was duly authorized as such; for if he delivers to any but the owner he does so at his peril.

* See also *post*, 278.

And although the delivery to a wrong person is made by mistake, or by gross imposition, the carrier will be responsible for the value of the goods. *Adams v. Blankenstein*, 2 Cal. 413.

Where an express company is sued for the wrong delivery of a box, or for not delivering to the person to whom it is addressed, the company will be discharged from liability where it is found as a fact that the delivery was either to the authorized agent of the person to whom it is addressed, or that the seller and shipper sanctioned the delivery to such agent, and where the finding in either event is supported by *prima-facie* evidence. *Platt v. Wells*, 2 Robt. (N. Y.) 101, 26 How. Pr. 442.

Where the consignee of goods gives to a person an order on the railway company, directing that the goods be delivered to such person, and such order is served on the company, which replied by letter, admitting that it holds the goods subject to the direction of the person named in the order, this constitutes an absolute attornment by the company to such person, and the consignee's right of possession as unpaid vendor is destroyed. *Pooley v. Great Eastern R. Co.*, 34 L. T. 537.

If A., for whom goods are transported by a railroad company, authorizes B. to receive the delivery thereof, and to do all acts incident to the delivery and transportation thereof to A., and B., instead of receiving the goods at the usual place of delivery, requests the agent of the company to permit the car which contains the goods to be hauled to a near depot of another railroad company, and such agent assents thereto, and assists B. in hauling the car to such depot, and B. there requests and obtains leave of that company to use its machinery to remove the goods from the car, then the company that transported the goods is not answerable for the want of care or skill in the persons employed in so removing the goods from the car, nor for the want of strength in the machinery used for the removal of them, and cannot be charged with any loss that may happen in the course of such delivery to A. *Lewis v. Western R. Co.*, 11 Met. (Mass.) 509.—FOLLOWED IN *Sweet v. Barney*, 23 N. Y. 335.

In an action against a carrier for non-delivery of a package of money, defendant pleaded not guilty. The plaintiffs' witness, their agent, proved that within a week after

his delivering the parcel to defendant he found that he had absconded; that he then sued out an attachment against him as an absconding debtor; and that, as he believed, defendant was at the time of the trial in jail, charged with stealing the money. *Held*, that this evidence sufficiently showed a felony, as defendant upon it might, as a bailee, be properly convicted of larceny, under Consol. St. C. ch. 92, § 55, and a nonsuit was ordered. *Livingstone v. Massey*, 23 U. C. Q. B. 156.

258. Delivery according to directions of consignor's agent.—While goods were in the hands of a carrier the consignor gave notice not to deliver them to the consignee, but to the consignor's agent, who in turn ordered them delivered to the consignee. On hearing of the delivery the consignor made no objection, but attempted by suit to collect the price from the consignee, but failed. *Held*, that the consignor was bound by the act of his agent, and could not hold the carrier liable for the delivery. *Brasher v. Denver & R. G. R. Co.*, 12 Colo. 384, 21 Pac. Rep. 44.

Plaintiffs, who were manufacturers of sewing-machines, were in the habit of shipping machines intended for their agents, but consigned to a third party, who was instructed to deliver them upon payment of the price. *Held*, that the fact that such third party did not live at the place of destination, and did not expect to be there to receive them, and that the agents informed the freight agent that the machines were intended for them, did not justify the carrier in delivering to them, in the absence of any contract or understanding between plaintiffs and the carrier that they were to be delivered to the agents. *Wilson S. M. Co. v. Louisville & N. R. Co.*, 71 Mo. 203; reversing 3 Mo. App. 578.

A seller of goods consigned them to his local agent. The agent, without transferring the bill of lading, made a contract with the carrier to side-track the goods at the place of delivery, but directed the goods to be delivered to the purchasers only upon his order. *Held*, sufficient testimony to support a finding that the right of possession was not surrendered by the seller or his agent, and that a delivery by the carrier was without authority and at his own risk. *Wolfe v. Missouri Pac. R. Co.*, 37 Am. & Eng. R. Cas. 715, 97 Mo. 473, 3 L. R. A. 539, 11 S. W. Rep. 49.

259. Where goods are consigned

to carrier's local agent.*—Where goods are shipped to a third party in care of a company's local agent, in order to show a custom to deliver to such agents so as to exonerate the carrier, it must appear that there was a tacit understanding between the parties that they were to be delivered to the agent. *Bennett v. Northern Pac. Exp. Co.*, 12 Oreg. 49, 6 Pac. Rep. 160.

Goods were shipped prepaid to a third party, but in care of a local agent of the carrier; but when the goods arrived he declined to receive them, on the ground that he was no longer the agent, and not on the ground that he was not the consignee. *Held*, that it was the duty of the company to deliver to the agent at that station, whoever he was, or at least to deliver at that station; but, having failed to do so, and having carried them to the next station, where they were lost, it is liable. *Edwards v. Cheraw & D. R. Co.*, 32 So. Car. 117, 10 S. E. Rep. 822.

Goods were delivered to a company marked to the owner in care of a third party at the place of destination, and were shipped without any further instructions and delivered to such party, who proved to be the company's agent at the place of destination. *Held*, that the obligation of the company was fully ended when the goods were delivered to such party, regardless of what became of them afterward. *Bristol v. Rensselaer & S. R. Co.*, 9 Barb. (N. Y.) 158.

A number of bundles of iron were shipped by rail, the liability of the company to cease when the iron reached its destination. A lot of iron came in, and the consignee was notified to take it away. He was the company's ticket agent at the point, and instead of removing the iron was permitted to place it on the grounds free of charge and remove it at his convenience. He had access to it at all times, but failed to count the bundles to see if all had arrived. *Held*, under the circumstances, that the company was not bound to show that all the iron shipped had arrived, and that they were not liable for deficiency. *Taylor v. Grand Trunk R. Co.*, 24 U. C. C. P. 582.

260. Delivery at flag or way stations.—Where a car-load of brick is received by a railroad company, as a common carrier, for transportation to a flag-station on its road where it has no side-track, no

* See also *ante*, 68.

warehouse or depot, and no agent, it is its duty to unload and deliver the bricks at that place while the cars are waiting, although the consignee is not there to receive them, such delivery being at his risk. *Louisville & N. R. Co. v. Gilmer*, 42 Am. & Eng. R. Cas. 450, 89 Ala. 534, 7 So. Rep. 654.

The consignee may waive delivery at the named station, and does waive it, by acceptance at a further station; but the fact that several negro tenants on his plantation inquired for the bricks at the further station, unloaded the car, and deposited them on the ground, does not establish such waiver and acceptance by him without other proof of their agency. *Louisville & N. R. Co. v. Gilmer*, 42 Am. & Eng. R. Cas. 450, 89 Ala. 534, 7 So. Rep. 654.

A railway company performs its contract to deliver coal by unloading it and leaving it on a siding, where, according to the usual course of practice between the parties, the consignee was notified and failed to send for it within a reasonable time. If such coal is lost the company is not liable. *Bradshaw v. Irish North Western R. Co.*, 7 Ir. C. L. 252, 21 W. R. 581.

A railway company delivered minerals at T. station, but refused to deliver there damageable traffic consigned to the applicant, and delivered such traffic at L., one mile and a half from T., which was their general goods station for T. The accommodation at T. station being insufficient to receive all the T. goods traffic, and the railway company having no power to enlarge it—held, that the applicant was not entitled to have damageable goods delivered at that station. *Thomas v. North Staffordshire R. Co.*, 3 Ry. & C. T. Cas. 1.

There was a custom that a railroad should deliver freight on the platform of minor stations, whose business would not justify a warehouse, to be received there by the consignee on discharge from the car. Held, a good custom, and to control the general law of liability of carriers. *McMasters v. Pennsylvania R. Co.*, 69 Pa. St. 374.

261. Delivery to fraudulent or insolvent purchasers.*—Where a railroad company carries and delivers the goods to the true consignee, it is not liable at the suit of the consignor because he had been induced to sell and ship the goods by reason of the consignee fraudulently and falsely

representing himself as doing business under a certain firm name. The duty of ascertaining the truth of such representations devolves upon the shipper and not upon the carrier. *Price v. Oswego & S. R. Co.*, 58 Barb. (N. Y.) 599; reversed in 50 N. Y. 213, 3 Am. Ry. Rep. 235.

A common carrier is not chargeable with the value of the goods delivered to an insolvent person, when such delivery is shown to have been authorized by the consignor. *Brasher v. Denver & R. G. R. Co.*, 12 Colo. 384, 21 Pac. Rep. 44.

A carrier who delivers goods for a tortious bailee, without notice that the bailee's possession is wrongful, is not liable to the owner for a conversion. *Nanson v. Jacob*, 12 Mo. App. 125.

If a party fraudulently represents himself to be a merchant of good financial credit and buys goods in the name of such merchant on credit, the property in the goods passes to the purchaser when they are delivered, and the seller cannot maintain an action against a carrier who receives the goods and carries and delivers them to the purchaser. The fact that the seller was induced to sell by fraud makes the sale voidable but not void. *Edmunds v. Merchants' Despatch Transp. Co.*, 16 Am. & Eng. R. Cas. 250, 135 Mass. 283. — FOLLOWING *Samuel v. Cheney*, 135 Mass. 278.

If A., representing himself to be a brother of a reputable merchant in a certain town, buying for him, buys, in person, goods of another, the property in the goods does not pass to A.; and, in an action by the seller against a common carrier to whom the carriage of the goods is intrusted, for delivering them to A., the carrier cannot justify on the ground that he has delivered them to the owner. *Edmunds v. Merchants' Despatch Transp. Co.*, 16 Am. & Eng. R. Cas. 250, 135 Mass. 283.

A party ordered goods from a canning company. The company, not knowing him, sent them to his place of business, consigned to itself, taking two receipts from the transportation company, one of which it sent direct to the purchaser, the other it attached to a draft drawn on him. On the arrival of the goods the purchaser presented the receipt to the agent of the transportation company and received their delivery. He afterwards became insolvent and refused to pay the draft. Held, in an action by the canning company against the carrier, that

* See also *post*, 275.

the possession of the receipt clothed the purchaser with such an authority to receive the goods as would relieve the carrier from any liability incident to his subsequent insolvency. *Weyland v. Atchison, T. & S. F. R. Co., (Iowa) 33 N. W. Rep. 133.*

202. Delivery must be at suitable place.*—Common carriers are bound to deliver freight consigned to them for transportation at a place suitable and reasonable for the consignee to receive it, and whether any given place answers this requirement is a question for the jury, under proper instructions from the court. The rule would be the same if their liability as common carriers had ended and the goods remained in their possession as warehousemen or depositaries. *Jewell v. Grand Trunk R. Co., 55 N. H. 84, 11 Am. Ry. Rep. 496.*—DISTINGUISHED IN *Baltimore City Pass. R. Co. v. Kemp, 61 Md. 619, 48 Am. Rep. 134.* REVIEWED IN *Lakin v. Oregon Pac. R. Co., 34 Am. & Eng. R. Cas. 500, 15 Oreg. 220.*

Where a hogshhead of molasses, instead of being landed on a platform, the usual place for heavy articles, was lost in an attempt to deliver it to the plaintiff at an unusual and an unfit place, the company was held responsible. *Benbow v. North Carolina R. Co., Phil. (N. Car.) 421.*

If the consignee accepts a delivery of goods at a place or in a manner different from what a common carrier is liable by law to deliver them, the business of removing them becomes from that time his business, and the carrier cannot be held liable for the acts or omissions of those employed to do the work. *Jewell v. Grand Trunk R. Co., 55 N. H. 84, 11 Am. Ry. Rep. 496.*

203. Delivery must be at place of destination—Right of consignee to change destination.—Although a carrier has contracted with the consignor to deliver goods at a particular place, it may deliver them at any place which the consignee directs. *London & N. W. R. Co. v. Bartlett, 7 H. & N. 400, 8 Jur. N. S. 58, 31 L. J. Ex. 92, 10 W. R. 109, 5 L. T. 399.* *Cork Distilleries Co. v. Great Southern & W. R. Co. (Ireland), L. R. 7 H. L. Cas. 269, 8 Ir. C. L. 334; affirming 5 Ir. C. L. 177.*

Where goods were shipped by rail and a part of them tendered to the owner some time afterward, at a station different from

the one to which they were marked, the owner is not bound to receive them at such station, but may treat them as lost and sue the company. *Gulf, C. & S. F. R. Co. v. Clark, 18 Am. & Eng. R. Cas. 628, 2 Tex. App. (Civ. Cas.) 459.*—QUOTING *Houston & T. C. R. Co. v. Adams, 49 Tex. 748; Houston & T. C. R. Co. v. Harn, 44 Tex. 628.*

The acceptance of a portion by the consignee at a place different from that specified in the contract, though admissible in the mitigation of damages, does not discharge the common carrier from liability for the residue. *Cox v. Peterson, 30 Ala. 608.*

Where there are two places in one town for the acceptance of freight on a railroad, one called the depot proper and the other a platform, a half-mile distant from the depot, where heavy and bulky articles are received and deposited, the usage of the place as to which one would be the proper place for the reception and shipment of cotton bales may be shown by proof, as also to which place it would be likely to go when addressed to the town generally, without designating either the platform or depot proper. *Homesly v. Elias, 66 N. Car. 330.*

204. Delivery without production of bill of lading.*—It is the duty of a carrier, at common law as well as under the factors' act of this state, to ascertain whether a bill of lading was delivered to the shipper, and if so, to retain the property until demanded by one claiming under that title, and to deliver in accordance with it; if delivery is made without it he runs the risk of showing a delivery in accordance with its instructions. *Furman v. Union Pac. R. Co., 32 Am. & Eng. R. Cas. 500, 106 N. Y. 579, 13 N. E. Rep. 587, 11 N. Y. S. R. 192; reversing 35 Hun 669, mem.*—APPLYING *City Bank v. Rome, W. & O. R. Co., 44 N. Y. 136; Howard v. Shepherd, 9 C. B. 297; Tindall v. Taylor, 4 El. & Bl. 219.*

When the vendor and shipper of goods takes the bill of lading in his own name he thereby retains the title in himself, and the carrier cannot rightfully deliver the goods to any other person except on his order or transfer of the bill of lading. *Young v. East Ala. R. Co., 80 Ala. 100. Douglas v.*

* Delivery of goods by carrier on undorsed bill of lading. Fictitious name, see 45 AM. & ENG. R. CAS. 384, *abstr.* See also *post*, 310.

* See also *ante*, 211.

People's Bank of Ky., 86 Ky. 176, 5 S. W. Rep. 420.

Where goods are shipped consigned to the shipper, and a bill of lading is given showing the fact, the carrier is not authorized to deliver the goods to any one who produces the bill of lading but unindorsed. *Weyand v. Atchison, T. & S. F. R. Co.*, 75 Iowa 573, 1 L. R. A. 650, 39 N. W. Rep. 899; *reversing on rehearing* 30 Am. & Eng. R. Cas. 102.—EXPLAINING *Lickbarrow v. Mason*, 1 Smith's L. Cas. 838; *Dows v. Greene*, 24 N. Y. 638; *Allen v. Williams*, 12 Pick. (Mass.) 297. DISTINGUISHING *Fearon v. Bowers*, 1 Smith's L. Cas. 782.

A carrier may require the production of a bill of lading before he delivers the goods, and he may demand a surrender of the bill before delivery when the consignee refuses to receipt for the goods, but cannot rightfully refuse to deliver the goods after inspecting the bill of lading, on the ground that the bill is not surrendered to him, if the consignee tenders the freight charges as contained in the bill and executes his receipt for the goods. *Dwyer v. Gulf, C. & S. F. R. Co.*, 69 Tex. 707, 7 S. W. Rep. 504.

A railroad company can excuse a delivery of goods to a consignee without production of the bill of lading where they were billed "straight," that is, billed to the consignee and not to the consignor's order, by showing a custom to deliver goods so billed without the production of the bill of lading, where the carrier is satisfied with the identity of the consignee, relying upon the way-bills; and in such case the delivery will be good as against parties who had made advances to the consignee and held the bill of lading as security. *Forbes v. Boston & L. R. Co.*, 9 Am. & Eng. R. Cas. 76 and 80, 133 Mass. 154.

205. Delivery to next connecting carrier.*—If, by custom or course of dealing between the receiving and the next connecting carrier, loaded cars are switched off by the former on a side-track of the latter's road, for immediate transportation, this amounts to a delivery without further notice; but if they are to remain on the side-track until a way-bill is furnished or shipping directions are given, there is no delivery to the connecting carrier until this is done; and he is not liable for the loss of the goods by fire while on the platform.

* See also *post*, 615-623.

Mount Vernon Co. v. Alabama G. S. R. Co., 92 Ala. 296, 8 So. Rep. 687.

206. Mixing goods.*—A company undertook the transportation of a lot of assorted coal and was sued for damages for negligently unloading it on the bare ground and for mixing it "with the soil and different kinds." *Held*, sufficiently specific to entitle a recovery both for mixing earth with the coal and for mixing the different kinds of coal. *Rice v. Boston & W. R. Co.*, 98 Mass. 212.

A lot of barley was shipped by rail and a shipping receipt given with the condition therein that the company "will not, under any circumstances, recognize this as transferable, but as to grain consigned to the company's elevator they will grant a negotiable receipt from the elevator company when the grain shall have been received and weighed there." The barley was carried to the place of destination and placed in the company's elevator, and the consignee was tendered grain of the same amount and grade, which he refused to accept. *Held*, that the provision did not entitle the company to mix the grain in a warehouse, and plaintiff was therefore entitled to recover damages for a failure to deliver the specific grain shipped. *Leader v. Northern R. Co.*, 16 Am. & Eng. R. Cas. 287, 3 Ont. 92.

207. Duty of consignee to examine goods—Presumption of delivery in good order.—When goods are delivered by a carrier at the proper place and at the proper time, the consignee is bound to examine them and ascertain whether they are in good order; and if he does not intimate objection, it will be presumed that they were delivered in good order. *Stewart v. North British R. Co.*, 5 Sc. Sess. Cas. (4th series) 426, 3 Ry. & C. T. Cas. xi.

208. When question of delivery one of law or of fact.—The question of what is a sufficient delivery by a common carrier of goods is ordinarily a mixed question of law and fact, but where there is no conflict in the testimony it may be passed on by the court. *Whitney Mfg. Co. v. Richmond & D. R. Co.*, 55 Am. & Eng. R. Cas. 611, 38 So. Car. 365, 17 S. E. Rep. 147.

209. When shipper may sue for failure to deliver.—The consignee is the presumptive owner of goods shipped, and

* See also *ante*, 214.

when the carrier is not advised that any different relation exists, he is bound to so treat the consignee; but this presumption may be rebutted, and if it be overcome, an action against the carrier for failure to deliver may be maintained by the shipper. *Sweet v. Barney*, 23 N. Y. 335.

270. C. O. D. goods—Duty to collect price, generally.*—A common carrier, receiving goods for transportation, is under no obligation to require the payment of the price before delivering them to the person for whom they are intended; but he may assume this obligation by contract, express or implied; and such contract may be implied when he accepts the goods for transportation with instructions not to deliver until paid for, or when they are so clearly marked as to indicate that payment is a condition to delivery, if he has been in the habit of making such collections as a custom in conducting his business. *Cox v. Columbus & W. R. Co.*, 49 Am. & Eng. R. Cas. 111, 91 Ala. 392, 8 So. Rep. 824. *Murray v. Warner*, 55 N. H. 546.

A local depot-agent has no authority, by virtue of his employment, to assume to collect the price of the goods on delivery; and if he makes an agreement to that effect with the shipper he thereby becomes the agent of the latter, and the railroad company is not liable for a breach of such contract by him, whether by delivering the goods without requiring payment, or by collecting the money and failing to remit it to the shipper. *Cox v. Columbus & W. R. Co.*, 49 Am. & Eng. R. Cas. 111, 91 Ala. 392, 8 So. Rep. 824.

Where it appears that a common carrier never undertook in any case to collect the price of what is called C. O. D. goods, it is not liable where it receives goods so marked, and which are safely carried and delivered to the consignee, without collecting the price, where it further appears that no bill of the price was delivered to the company and that the receipt given by it did not show any undertaking to make such collection. *Chicago & N. W. R. Co. v. Merrill*, 48 Ill. 425.

Where C. O. D. goods are delivered to a railroad for a point beyond its line, under a provision in the shipping note "that when goods are addressed to consignees beyond

the places of the company's stations they will be forwarded by public carriers or otherwise, * * * but the delivery by the company will be complete, and their responsibility cease, when such carriers have received notice that the company is prepared to deliver to them the goods for further conveyance"—no claim can be made against the company for delivering to the consignee without collecting the price. *Rennie v. Northern R. Co.*, 27 U. C. C. P. 153.—REVIEWED IN *Grand Trunk R. Co. v. McMillan*, 16 Can. Sup. Ct. 543.

In a suit against a carrier upon a special contract to collect the price before delivering the goods, the consignor need not prove a compliance with the conditions contained in the bill of lading. *McNichol v. Pacific Exp. Co.*, 12 Mo. App. 401.

C. O. D. goods were negligently delivered by the carrier to the consignee without collecting the price, who afterward sold them to an innocent purchaser for value. *Held*, that the right of property passed to the consignee as vendee when the goods were delivered to the carrier, but the right of possession remained in the vendor until the price was paid; but after the vendee acquired possession and transferred the property, neither the vendor nor the carrier could recover the property from such party. *Norfolk Southern R. Co. v. Barnes*, 40 Am. & Eng. R. Cas. 121, 104 N. Car. 25, 10 S. E. Rep. 83, 5 L. R. A. 611.—APPLYING *Wilmington & W. R. Co. v. Kitchin*, 91 N. Car. 39.

271. Receiving check in payment.—A carrier delivered C. O. D. goods to the consignee, and accepted as payment of the price the consignee's check, which was delivered to the consignor and transmitted by him for collection, but was returned protested. *Held*, in an action against the carrier, that the unconditional acceptance of the check by the consignor was a waiver of a collection in money, and a ratification of the carrier's act in receiving it, and they could not recover; and it was immaterial whether or not the consignee had money in the bank at the time of accepting the check which was subsequently withdrawn. *Rathbun v. Citizens' Steamboat Co.*, 76 N. Y. 376, 57 How. Pr. 191.—DISTINGUISHING *Walker v. Walker*, 5 Heisk. (Tenn.) 425.

272. Right of consignee to inspect goods before paying.—Where a

* See also EXPRESS COMPANIES, and *ante*, 33, 242. Carriers of C. O. D. goods. Duty to collect price on delivery, see note, 49 Am. & Eng. R. Cas. 114.

package of goods is forwarded by a carrier to be paid for on delivery, the consignee is entitled to a reasonable opportunity to inspect them before he accepts them; and the carrier may afford him reasonable facilities for doing so without making himself chargeable for the price, even if he put them into the hands of the consignee for that purpose, and receive from him the price as personal security to the carrier that the goods shall be returned, if not accepted, after a reasonable opportunity to examine them. *Lyons v. Hill*, 46 N. H. 49.—DISTINGUISHED IN *Wiltse v. Barnes*, 46 Iowa 210.

5. *Misdelivery.**

273. Generally.—A carrier is liable for goods lost by misdelivery, whether the misdelivery occurs by mistake, or by fraud or impositions practised upon it. *Little Rock, M. R. & T. R. Co. v. Glidewell*, 18 Am. & Eng. R. Cas. 539, 39 Ark. 487. *Waldron v. Chicago & N. W. R. Co.*, 1 Dak. 351, 1 Dak. T. 336, 46 N. W. Rep. 456. *Furman v. Union Pac. R. Co.*, 32 Am. & Eng. R. Cas. 500, 106 N. Y. 579, 13 N. E. Rep. 587, 11 N. Y. S. R. 192; reversing 35 Hun 669, *mem.* *Wernwag v. Philadelphia, W. & B. R. Co.*, 32 Am. & Eng. R. Cas. 515, 117 Pa. St. 46, 9 Cent. Rep. 603, 11 Atl. Rep. 868, 20 W. N. C. 150. *Houston & T. C. R. Co. v. Adams*, 49 Tex. 748.—APPROVING *Winslow v. Vermont & M. R. Co.*, 42 Vt. 700. QUOTING *McEntee v. New Jersey Steamboat Co.*, 45 N. Y. 34.

All classes of common carriers are responsible, and equally responsible, for a loss of the goods by the delivery of them to the wrong person; and it is no defense to their liability that they delivered them in the customary manner and in the usual course of business. *Winslow v. Vermont & M. R. Co.*, 42 Vt. 700.

It is the prime duty of the carrier to deliver the goods to the consignee, but if he deliver to the wrong party he does so at his peril, and until demand be made by the rightful party the carrier is not in default. *Cole v. Wabash, St. L. & P. R. Co.*, 21 Mo. App. 443.

The negligence of the consignee of goods to call for the same and pay freight, within a reasonable time after they reach their des-

tination, will not justify the carrier in delivering the same to an unauthorized person, or to a person in violation of the written directions of the owner. *Indianapolis & St. L. R. Co. v. Vandusen*, 81 Ill. 143.

There may be cases where a carrier is justified in delivering goods to a party other than the consignee and against the orders of the consignor, but in doing so the carrier assumes the burden of proof to show that such party is the true owner. *Wolfe v. Missouri Pac. R. Co.*, 37 Am. & Eng. R. Cas. 715, 97 Mo. 473, 3 L. R. A. 539, 11 S. W. Rep. 49.

Before a lot of flour which had been shipped was removed from the carrier's depot, the consignees sold fifty barrels of it and gave the purchaser an order for the amount. The order was presented and, as was the usual course of business, was surrendered to the company, and what was known as a "flour check" given in return, it being the duty of a clerk to take receipts on the back of the check from time to time as the flour might be removed. He delivered twenty-two barrels to the purchasers, and the remainder to persons who had no authority to receive it. Held, that the carrier was liable for the flour misdelivered. *Hall v. Boston & W. R. Co.*, 14 Allen (Mass.) 439.—NOT FOLLOWED IN *Bush v. St. Louis, K. C. & N. R. Co.*, 3 Mo. App. 62.

274. Who may sue.*—A factor for the consignor of goods, who has no interest in the goods beyond his lien for commissions, but who is the consignee in the bill of lading, is a "trustee of an express trust," within the meaning of the Missouri statute, and may, when he has contracted with the carrier for the delivery of the goods to himself, maintain an action in his own name for their wrongful delivery to another. *Wolfe v. Missouri Pac. R. Co.*, 37 Am. & Eng. R. Cas. 715, 97 Mo. 473, 3 L. R. A. 539, 11 S. W. Rep. 49.

275. Delivery to fraudulent or insolvent purchasers.†—(1) *General rules.*—A common carrier is liable to the consignor for the value of goods shipped upon a fraudulent order to a fictitious consignee, and delivered by the carrier to the person who had made the fraudulent order and obtained the bill of lading without inquiry or knowledge as to his identity.

* The law of misdelivery by carriers, see notes, 9 AM. & ENG. R. CAS. 82, 16 Id. 249, 18 Id. 542. Liability of carrier for delivery of goods to wrong person, see note, 6 L. R. A. 853.

* See also *post*, 705-722.

† See also *ante*, 281.

Sword v. Young, 89 Tenn. 126, 14 S. W. Rep. 481, 604.—DISTINGUISHING *Weyand v. Atchison*, T. & S. F. R. Co., 1 L. R. A. 650; *Price v. Oswego & S. R. Co.*, 50 N. Y. 213. FOLLOWING *Stephenson v. Hart*, 4 Bing. 476.—QUOTED IN *Shearer v. Pacific Exp. Co.*, 43 Ill. App. 641.

But the carrier's liability is postponed to that of the fraudulent purchaser and his confederates, where they are jointly sued. *Sword v. Young*, 89 Tenn. 126, 14 S. W. Rep. 481, 604.

In the absence of negligence on the part of a carrier, a merchant cannot maintain an action against it for the conversion of goods which are fraudulently ordered by a party assuming the name of a reputable merchant, and forwarded by the seller upon the financial standing of such merchant. The carrier's duty was fully discharged by carrying and delivering them to the consignee that had ordered them. *Samuel v. Cheney*, 135 Mass. 278, 46 Am. Rep. 467.—DISTINGUISHING *Winslow v. Vermont & M. R. Co.*, 42 Vt. 700; *American Exp. Co. v. Fletcher*, 25 Ind. 492; *Price v. Oswego & S. R. Co.*, 50 N. Y. 213.—DISTINGUISHED IN *Shearer v. Pacific Exp. Co.*, 43 Ill. App. 641. FOLLOWED IN *Edmunds v. Merchants' Despatch Transp. Co.*, 16 Am. & Eng. R. Cas. 250, 135 Mass. 283.—*The Drew*, 15 Fed. Rep. 826.—DISTINGUISHING *Price v. Oswego & S. R. Co.*, 50 N. Y. 213; *Winslow v. Vermont & M. R. Co.*, 42 Vt. 700; *American Exp. Co. v. Fletcher*, 25 Ind. 492; *American Exp. Co. v. Stack*, 29 Ind. 27; *Stephenson v. Hart*, 4 Bing. 476; *Duff v. Budd*, 3 Bl. & Bl. 177. QUOTING *M'Kean v. M'Ivor*, L. R. 6 Ex. 36; *The Huntress*, 2 Ware (U. S.) 89.

(2) *Illustrations*.—The goods in question were directed to J. F. Roberts, Roxbury, Mass. There was no such person as J. F. Roberts, and no person who was known or passed by that name. Collins, whom the plaintiffs well knew as Collins, had represented that there was such a person as J. F. Roberts in Roxbury, and had induced the plaintiffs, at Brattleboro, to consign the goods to that address. Collins then went to Boston, and upon the arrival of the goods employed one Clough, a truckman, to get them at the depot and deliver them to the dealer in Boston, representing to Clough that he was J. F. Roberts, and that there were goods at the depot directed to him; the defendants having no knowledge of any fraud being perpetrated.

Collins sold the goods, received the money for them, and left the country, and the plaintiffs were never able to recover it of him. *Held*, that the defendants were liable as common carriers for the loss. *Winslow v. Vermont & M. R. Co.*, 42 Vt. 700.

A merchant at a distance received an order for goods, signed by the name of a party known to him and to whom he was willing to sell. There were two persons in the same place of the same name, and upon the arrival of the goods the carrier tendered them to one of the parties,—to the one that the seller supposed had ordered them—but who said he had not ordered them and refused to accept them. The carrier then stored the goods, and soon afterward the other party bearing the same name appeared with the bill of lading and the goods were delivered to him, who absconded and never paid for them. *Held*, that there was, under the circumstances, no such misdelivery as to render the carrier liable, as it was only holding the goods as warehouseman, and only liable for a failure to exercise due diligence. *Bush v. St. Louis, K. C. & N. R. Co.*, 3 Mo. App. 62.—NOT FOLLOWING *Claffin v. Boston & L. R. Co.*, 7 Allen 341; *Hall v. Boston & W. R. Co.*, 14 Allen 443; *Lichtenhein v. Boston & P. R. Co.*, 11 Cush. 73; *Price v. Oswego & S. R. Co.*, 50 N. Y. 213; *Winslow v. Vermont & M. R. Co.*, 42 Vt. 700; *American Exp. Co. v. Fletcher*, 25 Ind. 493; *American Exp. Co. v. Stack*, 29 Ind. 27.—REVIEWING *Heugh v. London & N. W. R. Co.*, L. R. 5 Ex. 51.

A. B., representing himself as C. D. of P., bought goods of the plaintiff. The goods were marked for C. D. and delivered to the defendants, common carriers, who carried them to P. A. B., who was known to the defendants by his real name, applied for them as the property of C. D., and the defendants delivered them to him on his receipt, but without his producing a bill of lading which the defendants had given to the plaintiff, promising to deliver the goods to C. D. or order. There was no C. D. in P. *Held*, that the defendants were not liable to the plaintiff for delivering the goods to A. B. *Dunbar v. Boston & P. R. Corp.*, 110 Mass. 26.

276. Delivery where bill of lading is forwarded, with a draft on the purchaser attached.—Where a shipper attaches his bill of lading to a draft upon

the consignee he thereby expresses his intention to deliver the goods upon payment of such draft and to retain control of them until such payment, and the carrier who, under such circumstances, delivers them to the shipper while in transit is liable to the consignee who has duly taken up the draft. *Wells v. Oregon R. & N. Co.*, 12 *Sawy. (U. S.)* 519, 32 *Fed. Rep.* 51.

Where time-drafts, accompanied by indorsed bills of lading of cotton, were cashed by a bank, any arrangement between the drawee of the drafts and the shipper, unknown to the bank, that the cotton should be delivered to the drawee without the production of the bills of lading, would be a fraud on the bank and would not excuse an improper delivery by the carrier to such drawee. *Chester Nat. Bank v. Atlanta & C. A. L. R. Co.*, 25 *So. Car.* 216.

A lot of flour was sold, to be shipped to the purchaser to be paid for upon receipt of the bill of lading. A bill of lading in duplicate was given, the original containing a provision that the flour was to be delivered to the purchaser on the presentation of the duplicate bill of lading; but the duplicate, by mistake, did not contain the provision in relation to presentation of the duplicate. The seller then drew his draft on the purchaser and, with the duplicate bill of lading attached, forwarded it to a bank for collection. The draft was presented before delivery of the flour, but was not paid. On the day after the draft was protested the holder presented it, together with the original bill of lading, and demanded the flour from the carrier, which was refused, having already delivered it to the purchaser, who was insolvent. *Held*, that the railroad company was liable for the wrong delivery. *McEwen v. Jeffersonville, M. & I. R. Co.*, 33 *Ind.* 368.—REVIEWING *Collins v. Union Transp. Co.*, 10 *Watts (Pa.)* 384; *Barker v. Havens*, 17 *Johns. (N. Y.)* 234.

A quantity of corn was bought and shipped to the purchaser consigned to the seller, with direction to the carrier to notify the purchaser. The seller drew on the purchaser for the price of the corn and forwarded the draft for collection with the bill of lading attached; but when the draft arrived the purchaser was absent, and after its protest the purchaser's managing clerk asked plaintiff, who had business relations with the purchaser, to cash the draft and hold the bill of lading as security, which he did. The

grain was delivered soon after its arrival to the servants of the purchaser and used in their business, both the delivery and the use being known to plaintiff, who made no objection to its removal or use. *Held*, that upon cashing the draft the title to the grain became vested in plaintiff, and a delivery to any one else was wrongful; and, as he did nothing to induce the delivery, he was not estopped from suing the carrier. *Joslyn v. Grand Trunk R. Co.*, 51 *Vt.* 92.

277. Identification of consignee.*

—Where a common carrier, without requiring evidence of identity, delivers to a stranger goods which have been fraudulently ordered by the latter in the name of a fictitious firm, and which have been shipped in compliance with the order, directed, to the fictitious firm, he is liable to the consignor for their value. *Price v. Oswego & S. R. Co.*, 50 *N. Y.* 213, 3 *Am. Ry. Rep.* 325; *reversing* 58 *Barb.* 599.—DISTINGUISHING *Burnell v. New York C. R. Co.*, 45 *N. Y.* 184; *American Exp. Co. v. Fletcher*, 25 *Ind.* 492; *Heugh v. London & N. W. R. Co.*, L. R. 5 *Ex.* 51. REVIEWING *Duff v. Budd*, 7 *Eng. Com. Law* 399.—DISTINGUISHED IN *The Drew*, 15 *Fed. Rep.* 826; *Samuel v. Cheney*, 135 *Mass.* 278; *Wilson v. Adams Exp. Co.*, 27 *Mo. App.* 360; *Sword v. Young*, 89 *Tenn.* 126. NOT FOLLOWED IN *Bush v. St. Louis, K. C. & N. R. Co.*, 3 *Mo. App.* 62. REVIEWED IN *Shearer v. Pacific Exp. Co.*, 43 *Ill. App.* 641.

A consignee of goods who is not identified and who fails to produce a bill of lading cannot recover from a railroad company damages for a failure to deliver the goods, though he offers the company security. *Gulf, C. & S. F. R. Co. v. Freeman*, 4 *Tex. App. (Civ. Cas.)* 419, 16 *S. W. Rep.* 109.

A consignor of express goods which are not delivered at their destination, but brought back to the place of shipment, may demand their return to him, and cannot be denied them under a rule of the express company requiring the identification of consignees. *Thomas v. Pacific Exp. Co.*, 30 *Mo. App.* 86.

A person professing to be the consignee of a money package was identified by a trustworthy person as the proper consignee, to the satisfaction of the person charged with the delivery, about the time such consignee was expected to call for such a pack-

* See also *post*, 311.

age, and told the person delivering to write his name in the receipt-book. *Held*, that proof of these facts was sufficient to raise a presumption of a proper delivery to the true consignee, which the consignor, in an action against the carrier, must meet by a preponderance of testimony. *Ten Eyck v. Harris*, 47 Ill. 268.

278. Delivery to consignee's agent.*—Where the defense is that a delivery was made to an agent of the owner or consignee, it must be clearly proved that the person to whom the goods were delivered as agent was duly authorized as such. The carrier is under as much obligation to deliver the property to the right person as he is to deliver it in a reasonable time and at the proper place. *Waldron v. Chicago & N. W. R. Co.*, 1 Dak. 351, 1 Dak. T. 336, 46 N. W. Rep. 456.

Where a carrier delivers goods to a person not the owner or consignee, it must show that such person was authorized to receive them; and where the delivery is in a store-room, to one claimed to be a clerk, the mere fact that he was behind the counter is not enough where he receipts in his own name and where the consignee denies his authority to receive them. *Nebenzahl v. Fargo*, 15 Daly (N. Y.) 130, 3 N. Y. Supp. 929, 22 N. Y. S. R. 231, 23 N. Y. S. R. 65.

279. Delivery to persons not agents is at carrier's risk.—A published rule of a railroad company provided that freights must be removed within twenty-four hours after being unloaded from the cars, otherwise they would be stored and charged for. On the arrival of certain goods, by mistake, the company delivered them within twenty-four hours to parties supposed to be agents of the owner, and were placed in their warehouse, where they were destroyed by fire some five or six days afterward. *Held*, that the company was bound to know that the persons to whom the goods were delivered were authorized to receive them, and it was liable for the loss. *Angle v. Mississippi & M. R. Co.*, 18 Iowa 555.

280. Waiver of right of action for wrong delivery.—A common carrier's unauthorized delivery of goods may be ratified by the consignee. *Converse v. Boston & M. R. Co.*, 58 N. H. 521.

A carrier is not justified in delivering goods to a bank that claims them as secur-

ity for a loan made to the consignee; yet where the consignee calls at the bank and agrees that a portion of the goods may be held for the loan, and makes a disposal of the remainder, he waives the original wrong delivery and cannot sue the carrier. *O'Dougherty v. Boston & W. R. Co.*, 1 T. & C. (N. Y.) 477.

The fact that the owner of goods misdelivered by carrier assents to the party who has received them selling them on his account, is not *per se* a defense to an action for the misdelivery, since there is no consideration to make it a discharge. *Sanquer v. London & S. W. R. Co.*, 16 C. B. 163, 3 C. L. R. 811.

281. Evidence.—In an action against a carrier of goods, where it is claimed that he delivered them to a person not authorized to receive them, no greater proof of authority in the person to whom they were delivered to receive them is required than for any other issue in a civil action. *Wilcox v. Chicago, M. & St. P. R. Co.*, 24 Minn. 269.

282. Delivery of wife's goods to husband.—A husband shipped household goods which belonged to his wife and took a bill of lading therefor from the carrier and delivered it to the wife. At the place of destination the husband delivered the bill of lading to a drayman, who took the goods to a salesroom, where they were sold and the money delivered to the husband, the wife seeing them and making no objection. *Held*, that an action against the carrier for a wrong delivery could not be sustained upon the wife's evidence that she had not given the bill of lading to her husband, and that she thought the salesroom was a railroad store-house, and where, in addition to the above, it further appeared that the husband had made other sales of the wife's property through the same salesman, and on one occasion in his presence she had asked for the proceeds of the sale. *Reynolds v. New York C. & H. R. R. Co.*, 21 N. Y. S. R. 319, 50 Hun 606, *mem.*, 3 N. Y. Supp. 331.

283. Delivery to unauthorized draymen.—Carriers by railroads, or steamboats engaged in the internal coasting and river trade, in the absence of a contract for a particular mode of delivery, must deliver freight received by them to the owner, consignee, or some authorized agent, or safely land it upon the wharf at the place of destination, or deposit it in their depot houses,

* See also *ante*, 257.

and promptly notify the consignee. If delivered to a drayman, cartman, or any other person not authorized by the consignee to receive it, it is at the risk of the carrier. *Dean v. Vaccaro*, 2 Head (Tenn.) 488.

284. Power of shipper's drayman to direct as to whom goods shall be delivered.—A person who is employed to haul flour from a mill to a railroad station for shipment has no authority to direct the company as to whom the flour shall be delivered; and the mere statement by him that the flour is intended for certain parties will not justify a delivery to such parties without further directions from the shippers. *Sawyer v. Chicago & N. W. R. Co.*, 22 Wis. 403.

285. Where carrier's liability is limited to wilful misconduct.—A misdelivery of goods does not amount to wilful misconduct on the part of the company's servants so as to render it liable under a contract relieving it of all liability, except for loss or damage arising from the wilful misconduct of its servants. *Stevens v. Great Western R. Co.*, 52 L. T. 324, 49 J. P. 310.

286. Right of action over by carrier against person wrongfully receiving goods.—A carrier who delivers goods to the wrong person and pays their value to the rightful owner may recover the sum so paid against the person who received the goods, as money paid to his use, but not as the price of goods sold and delivered to him. *Brown v. Hodgson*, 4 Taunt. 189.

Goods consigned to the owner at Nashville, Tenn., to the care of N. W. & Co., Louisville, Ky., were delivered to M. & Co., at Louisville, to be stored and forwarded by them to the owner at Nashville; M. & Co. delivered the goods to a party who was not authorized to receive them, and in consequence thereof they were not delivered to the owner. *Held*, that the owner was entitled to a judgment against the carrier, and the carrier was entitled to a judgment against M. & Co. as for a conversion for the value of the goods. *Jeffersonville R. Co. v. White*, 6 Bush (Ky.) 251.

287. Where company is liable as carrier and not as warehouseman.—Where a common carrier receives goods to transport and deliver, at a certain point, to a person named, and immediately upon their arrival delivers them to another person, and they are thereby lost, the carrier is liable as

such, if liable at all, and not as a warehouseman. *Winslow v. Vermont & M. R. Co.*, 42 Vt. 700. — APPROVED IN *Houston & T. C. R. Co. v. Adams*, 49 Tex. 748. DISTINGUISHED IN *The Drew*, 15 Fed. Rep. 826; *Samuel v. Cheney*, 135 Mass. 278. NOT FOLLOWED IN *Bush v. St. Louis, K. C. & N. R. Co.*, 3 Mo. App. 62.

A rule of a railroad company that if goods were not taken away within twenty-four hours after their arrival they would be placed in storage, changes it from a common carrier to a warehouseman where the goods are not placed in store until after the expiration of the twenty-four hours; but where the goods were wrongfully delivered to a party not entitled to receive them within the twenty-four hours, its liability as common carrier is not changed, though the owner did not make any demand until after the expiration of the time. *Angle v. Mississippi & M. R. Co.*, 18 Iowa 555. — APPROVED IN *Porter v. Chicago & N. W. R. Co.*, 20 Iowa 73. REFERRED TO IN *Francis v. Dubuque & S. C. R. Co.*, 25 Iowa 60.

288. Measure of damages.—Where an article was delivered to a common carrier, to be delivered to a factor at a certain market, who had been instructed not to sell until ordered, and such carrier delivered it to a factor at a different market, who had no instructions concerning it, and it was by him immediately sold, upon its appearing that the article in question rose in price from that day until the suit was brought—*held*, that in a suit against such common carrier for misfeasance, the plaintiff was entitled to recover the highest price attained by the article within that period, such suit having been brought within a reasonable time. *Arrington v. Wilmington & W. R. Co.*, 6 Jones (N. Car.) 68.

The receipt of the proceeds of the sale from the factors, making it, was no bar to the recovery of damages for this misfeasance. *Arrington v. Wilmington & W. R. Co.*, 6 Jones (N. Car.) 68.

Under Cal. Civ. Code, § 3336, providing that, in an action brought by a consignee against a carrier for wrongfully delivering up goods in transit to a party other than the consignee, the measure of damages shall be the highest market value of the property at any time between the conversion and the verdict, without interest, and a fair compensation for the time and money properly

expended in pursuit of the property, it is incumbent on the plaintiff to show the circumstances under which the expenditure claimed by him to have been incurred was made, so that the court can decide whether it was proper. *Wells v. Oregon R. & N. Co.*, 12 *Sawyer* (U. S.) 519, 32 *Fed. Rep.* 51.

When goods have been delivered by a carrier to a person, other than the shipper or his consignee, not entitled to them, and the latter delivers the goods to the shipper or consignee, or pays him their value, in a suit against the carrier for the non-delivery of the goods, the shipper or consignee can only recover nominal charges. *Rosenfield v. Express Co.*, 1 *Woods* (U. S.) 131.

6. Non-delivery.

a. Generally.*

280. Only the act of God or the public enemy will excuse non-delivery.†—Common carriers are bound to deliver property received for transportation according to the undertaking, subject only to contingencies arising from the act of God or from the public enemy. *Angle v. Mississippi & M. R. Co.*, 18 *Iowa* 555. *Illinois C. R. Co. v. McClellan*, 54 *Ill.* 58.

Obstructions and difficulties that might and ought to have been foreseen are not legal excuses or justifications for non-delivery, and damages are recoverable for losses actually sustained by reason of such non-delivery. *Berje v. Texas & P. R. Co.*, 37 *La. Ann.* 468.

Under a written contract, by which the owners of a steamboat bound themselves, as common carriers, to deliver certain goods at a specified point, the loss of the goods by fire after having been deposited in a warehouse at the highest point to which, on account of the low stage of the water, the boat could ascend the river, does not excuse the defendant's failure to deliver the goods at the specified place. *Cox v. Peterson*, 30 *Ala.* 608.

290. Prepayment of charges necessary to maintain action.‡—The consignee of goods must either pay, or offer to pay, freight charges before he can maintain an action against the carrier for a refusal to deliver them. *Henderson v. 300 Tons Iron Ore*, 38 *Fed. Rep.* 36.

* Right of carrier to detain goods against owner where possession was not received from him, see note, 40 *AM. DEC.* 44.

† See also *ante*, 12, 104.

‡ See also *ante*, 42, 120; *post*, 715.

Under the act of February 27, 1885, imposing a penalty for the refusal of a railway company to deliver freight upon payment or tender of charges due, as shown by the bill of lading, the entire amount of freight charges for a single shipment must be tendered before any part of the goods can be demanded. *St. Louis, A. & T. R. Co. v. Johnson*, 45 *Am. & Eng. R. Cas.* 381, 53 *Ark.* 282, 13 *S. W. Rep.* 1096.

A carrier pleaded a lien for tolls as a reason for non-delivery of goods, to which plaintiff replied that he was ready and willing, and had, within a reasonable time, offered to pay the tolls, and requested delivery; but defendants neglected and refused to deliver, and thereby discharged plaintiff from tendering the tolls. *Held*, bad on demurrer. *White v. Canadian Pac. R. Co.*, 6 *Man.* 169.

The rule that to entitle the consignee to the possession of the goods he must pay or tender to the carrier the legal charges for their carriage, has no application in an action against the carrier for the conversion of the goods. *Baltimore & O. R. Co. v. O'Donnell*, 49 *Ohio St.* 489, 32 *N. E. Rep.* 476.

291. Power of consignor to change consignee.*—A shipper has a right to change the destination while goods are *in transitu*, and may order them delivered to a different consignee, and the carrier being notified must deliver accordingly. And where the carrier is notified of such change before the first consignee has obtained possession, the latter obtains no lien on the goods, though he may have a general balance on account against the shipper. *Strakorn v. Union S. Y. & T. Co.*, 43 *Ill.* 424.—*FOLLOWING* *Lewis v. Galena & C. U. R. Co.*, 40 *Ill.* 281.

A consignor of goods, after they have passed from the hands of the railroad company with which the contract of affreightment was made into the hands of another company, has the same right to change their destination while *in transitu*, by taking a new bill of lading, as if the first company had a continuous line to the place of destination. Such new bill of lading is valid,

* Change in destination of freight by consignor or consignee. See note, 23 *AM. & ENG. R. CAS.* 683. See also *post*, 309.

Orders to carrier for delivery of goods to third person. See note, 21 *AM. & ENG. R. CAS.* 86.

when called in question between a *bona-fide* holder and one claiming a lien by virtue of an attachment. *Sutherland v. Second Nat. Bank*, 6 Am. & Eng. R. Cas. 368, 78 Ky. 250. —DISTINGUISHING *Childs v. Digby*, 24 Pa. St. 23.

202. Burden on carrier to excuse non-delivery.*—The burden of proof is upon the company to show an excuse for non-delivery of property which it is proved to have received for transportation. *Chapman v. New Orleans, J. & G. N. R. Co.*, 21 La. Ann. 224.

And an agreed statement of facts will be taken most strongly against him. *Isenberg v. St. Louis & V. Anchor Line*, 13 Mo. App. 415.

203. Penalty for failure to deliver under Texas statute.†—Section 24, art. 16, of the constitution refers to only such fines and forfeitures as under the law may accrue to the public, and has no application to such sums as under the statute may inure to the benefit of a citizen for wrong done to himself, the extent of recovery alone being regulated by statute. Without reference to the statute, a party whose goods are detained without necessity therefor, after the payment, or tender of payment, of the carriage price as evidenced by the bill of lading, has cause of action against the railroad. The statute simply provides the measure of damage. *Houston & T. C. R. Co. v. Harry*, 18 Am. & Eng. R. Cas. 502, 63 Tex. 256.

Whether the Texas act of May 6, 1882, § 3, prescribing a penalty upon any railway company refusing to deliver freight upon payment or tender of the freight charges, as due by the bill of lading, be remedial or penal, the remedy under it is strictly statutory. It does not take away the ordinary remedy for a failure to deliver goods, but prescribes an additional one; but in order to recover the statutory penalty a plaintiff must bring himself strictly within the provisions of the act. *Schloss v. Atchison, T. & S. F. R. Co.*, 85 Tex. 601, 22 S. W. Rep. 1014.

Under the above statute the measure of damages is fixed by the statute, i.e., the amount of freight due as shown by the bill of lading for each day that the goods are detained, and in order to recover under the

statute the petition must set out the amount due under the bill of lading; otherwise it is insufficient. *Schloss v. Atchison, T. & S. F. R. Co.*, 85 Tex. 601, 22 S. W. Rep. 1014.

The defendant company refused to deliver to the plaintiff certain goods consigned to him, without a surrender of the bill of lading. The goods had been hauled over several connecting lines, and the freight charges as shown by the way-bill were greater than those shown in the bill of lading. The company gave as a reason for its refusal to deliver the goods except upon a surrender of the bill of lading, that such bill of lading was useful to it in making settlement of the freight with the other roads. In an action to recover the statutory penalty for the refusal to deliver the goods—*held*, that the plaintiff is entitled to recover, notwithstanding a custom requiring a surrender of the bill of lading. *Dwyer v. Gulf, C. & S. F. R. Co.*, 32 Am. & Eng. R. Cas. 461, 69 Tex. 707, 7 S. W. Rep. 504.

204. Measure of damages for failure to deliver grain at elevator.—In a simple action on the case, without reference to the statute, against a railway for not delivering grain shipped in bulk to a particular warehouse, the measure of damage is the necessary cost of moving the cars to the place required. If the suit is under the statute the depreciation in the price of the grain may be considered. *Chicago & N. W. R. Co. v. Stanbro*, 87 Ill. 195, 18 Am. Ry. Rep. 180.

*b. Where Goods are Attached or Taken Under Other Legal Process.**

205. When seizure relieves carrier from liability.†—Seizure under legal process, like the act of God, will excuse the common carrier from delivering goods intrusted to his care for shipment. *MacVeagh v. Atchison, T. & S. F. R. Co.*, 18 Am. & Eng. R. Cas. 651, 3 N. Mex. 205, 5 Pac. Rep. 457. *Savannah, G. & N. A. R. Co. v. Wilcox*, 48 Ga. 432, 11 Am. Ry. Rep. 375.—FOLLOWED IN *Jewett v. Olsen*, 42 Am. & Eng. R. Cas. 435, 18 Oreg. 419.—*Jewett v. Olsen*, 42 Am. & Eng. R. Cas. 435, 18 Oreg. 419, 23 Pac. Rep. 262.—FOLLOW—

* See also *ante*, 27, 100, 161.

† Attachment of goods in hands of carrier, see note, 14 AM. & ENG. R. CAS. 709.

Seizure of goods under process, non-delivery, see notes, 18 AM. & ENG. R. CAS. 656, 13 L. R. A. 35.

* See also *ante*, 219.

† See also *ante*, 213.

ING Savannah, G. & N. A. R. Co. v. Wilcox, 48 Ga. 433. QUOTING Ohio & M. R. Co. v. Yohe, 51 Ind. 184.—*Pingree v. Detroit, L. & N. R. Co.*, 66 Mich. 143, 9 West. Rep. 703, 33 N. W. Rep. 298.

Whatever may be a carrier's duty to resist a forcible seizure without process, he cannot be compelled to assume that regular process is illegal, and to accept all the consequences of resisting officers of the law. If he is excusable for yielding to a public enemy he cannot be at fault for yielding to actual authority what he may yield to usurped authority. *Pingree v. Detroit, L. & N. R. Co.*, 66 Mich. 143, 9 West. Rep. 703, 33 N. W. Rep. 298.

A carrier will not be held liable in damages for permitting the property of his bailor to be taken out of his custody upon a writ issued under a statute which is subsequently decided to be unconstitutional. He is not bound to know that it is unconstitutional. *McAlister v. Chicago, R. I. & P. R. Co.*, 7 Am. & Eng. R. Cas. 373, 74 Mo. 351.—DISTINGUISHED IN *Robinson v. Memphis & C. R. Co.*, 16 Fed. Rep. 57.

The fact that goods were taken from the possession of the carrier by one having title paramount to that of the consignor is a good defense to an action by the consignee or indorsee of the bill of lading for the non-delivery of the property. *National Bank v. Chicago, B. & N. R. Co.*, 44 Minn. 224, 46 N. W. Rep. 342, 560.

A common carrier cannot of his own motion set up title in another as a reason for not delivering the goods to the shipper or consignee. But when such carrier, upon demand made or suit brought by the real owner, delivers the goods to him, such delivery will constitute a defense to an action brought to recover the value of the goods, brought by the shipper or his consignee. *Rosenfield v. Express Co.*, 1 Woods (U. S.) 131.

296. When not.—If a carrier of goods allow an officer to take possession of the same, he cannot defend against an action by the owner for their conversion, unless he shows that the officer had a legal right to take the property by virtue of his writ. *Gibbons v. Farwell*, 63 Mich. 344, 29 N. W. Rep. 855.

Where a common carrier surrenders mules in transportation to a person who exhibits only a telegram from a sheriff directing him to seize the mules under a writ of at-

tachment, alleged to be in the sheriff's hands, the carrier will be liable to the shipper in damages, for negligence, whether there be a contract in limitation of such a liability or not. And the liability will not be released by the subsequent appearance of the sheriff and his actual levy of the attachment on the mules. *Nickey v. St. Louis, I. M. & S. R. Co.*, 35 Mo. App. 79.

It is no defense to an action against a common carrier for breach of his contract to deliver goods, that they were taken from him by an officer under an attachment against a person who was not their owner. *Edwards v. White Line Transit Co.*, 104 Mass. 159.

Where goods are attached while in the hands of a carrier, but not taken out of its custody, a subsequent dissolution of the attachment makes it the duty of the carrier to transport the goods according to the original contract. It might be otherwise if the officer had taken the goods out of the custody of the carrier. *Faust v. South Carolina R. Co.*, 8 So. Car. 118.

The property of the plaintiff, while lawfully in the possession of the defendant as a common carrier, was seized unlawfully by an officer without any warrant or legal process, nor was any afterwards obtained. *Held*, that the officer was a trespasser, and that the common carrier was liable in the same manner as if it had allowed any other trespasser to take the property out of its custody. Me. Rev. St., c. 30, § 12, which imposes a penalty for killing, destroying, or having in possession during certain portions of the year "more than one moose, two caribou, or three deer," does not apply to common carriers in the performance of their duties. *Bennett v. American Exp. Co.*, 49 Am. & Eng. R. Cas. 56, 83 Me. 236, 22 Atl. Rep. 159.

To a declaration against a carrier for non-delivery of goods, defendants pleaded that the goods had, prior to the delivery to the carrier, been forfeited to the crown for non-payment of customs dues. *Held*, not a valid defense. *White v. Canadian Pac. R. Co.*, 6 Man. 169.

297. Duty to give notice of the seizure.—A common carrier is excused from liability for not carrying and delivering goods when, without any act, fault, or connivance on the part of the carrier, they are seized by virtue of legal process and taken out of his possession. But he should

give immediate notice to the persons interested, of the seizure. *Ohio & M. R. Co. v. Yohe*, 51 *Ind.* 181.—FOLLOWED IN *The M. M. Chase*, 37 *Fed. Rep.* 708. QUOTED IN *Jewett v. Olsen*, 42 *Am. & Eng. R. Cas.* 435, 18 *Oreg.* 419.—*Bliven v. Hudson River R. Co.*, 36 *N. Y.* 403; *affirming* 35 *Barb.* 188.—APPLIED IN *Robinson v. Memphis & C. R. Co.*, 16 *Fed. Rep.* 57. FOLLOWED IN *The M. M. Chase*, 37 *Fed. Rep.* 708; *Livingston v. Miller*, 48 *Hun (N. Y.)* 232, 16 *N. Y. S. R.* 71.—*Jewett v. Olsen*, 42 *Am. & Eng. R. Cas.* 435, 18 *Oreg.* 419, 23 *Pac. Rep.* 262.

The object of the statute is to relieve railroad companies and other carriers from the duty of defending suits against property intrusted to their care after such notice. *Lemont v. New York, L. E. & W. R. Co.*, 28 *Fed. Rep.* 920.

298.—Duty of owner to defend after notice.—If property in the hands of a common carrier is seized under legal process, and the owner has timely knowledge thereof, the carrier has a right to presume that such owner will take the proper steps in the premises without formal notice from him. In such a case the negligence or laches of the owner, if it does not occasion the loss, so far contributes towards it that he must bear the burden of it; and he cannot be heard to attribute the fault to another. *MacVeagh v. Atchison, T. & S. F. R. Co.*, 18 *Am. & Eng. R. Cas.* 651, 3 *N. Mex.* 205, 5 *Pac. Rep.* 457.

A carrier of goods which have been seized under legal process has a right to presume that both consignor and consignee, to whom it has given notice of such seizure, and who have made no reply and taken no further notice of the proceedings, have abandoned the property, and such facts and notice will justify the carrier in making no defense to such seizure. *Savannah, G. & N. A. R. Co. v. Wilcox*, 48 *Ga.* 432.

The plaintiff shipped a quantity of household goods from Chicago, by way of defendant's railway, to Atchison, Kan. In an action to recover the value of said goods for the failure of defendant to transport them to their destination, the jury returned a special verdict, finding that subsequent to the shipment the plaintiff's husband called at defendant's office in Muscatine, Iowa, with the bill of lading in his possession, to order the delivery of said goods at Muscatine instead of Atchison, and was then notified by defendant that the goods had

been taken from its possession in Chicago in a writ of attachment, and that this notice to plaintiff's husband was given in time to assert plaintiff's right and title to the goods before the goods were sold under the attachment proceedings. Held, that defendant's motion for judgment upon the special findings, notwithstanding the general verdict, ought to have been sustained. *Furman v. Chicago, R. I. & P. R. Co.*, 45 *Am. & Eng. R. Cas.* 385, 81 *Iowa* 540, 46 *N. W. Rep.* 1049; *former appeals*, 6 *Am. & Eng. R. Cas.* 280, 57 *Iowa* 421, 10 *N. W. Rep.* 272, 62 *Iowa* 395, 17 *N. W. Rep.* 598, 23 *Am. & Eng. R. Cas.* 730, 68 *Iowa* 219, 26 *N. W. Rep.* 83.—DISTINGUISHED IN *Robinson v. Memphis & C. R. Co.*, 16 *Fed. Rep.* 57.

299. Seizure by public authority—Intoxicating liquors.—As a general rule, a common carrier is not liable for the loss of goods if they be taken from his possession by legal process against the owner, or if, without the fault of the carrier, they have become obnoxious to the police regulations of the state and are seized and destroyed under their authority; but to protect the carrier in such cases it is necessary that the seizure be made without his procurement or connivance, that the proceeding or process under which it is made appear to be valid, and that the carrier give prompt notice of the seizure to the owner. *Baltimore & O. R. Co. v. O'Donnell*, 49 *Ohio St.* 489, 32 *N. E. Rep.* 476.

Mass. Gen. St. ch. 86, § 28, as re-enacted in 1889, ch. 415, §§ 30, 65, prohibiting the sale of intoxicating liquors directly or indirectly, except as authorized in that chapter, applies to sales by officers under attachment or execution, and therefore an attachment of liquors while in the hands of a common carrier is illegal and the officer is a trespasser. *Kiff v. Old Colony & N. R. Co.*, 117 *Mass.* 591.

When a carrier is sued for a failure to deliver liquors it cannot defend on the ground that they were attached and taken from him by an officer against his will and without his fault, where it appears that the goods were not liable to attachment, and the officer making the attachment a mere trespasser. *Kiff v. Old Colony & N. R. Co.*, 117 *Mass.* 591.

Liquors were shipped by a carrier from New York to Maine, and while in the carrier's hands were seized by an officer as liquors intended for sale in violation of the

laws of that state, and were declared forfeited and destroyed. The carrier gave regular notice of the seizure to the owners. *Held*, that the seizure and destruction being in conformity to the laws of that state, the carrier was relieved from further liability. *Wells v. Maine Steamship Co.*, 4 *Cliff. (U. S.)* 228.

A railway company is justified in refusing to hand over goods to one claiming to be the owner if it has been intrusted with such goods by the police, who have taken possession of them for the purpose of prosecuting a person charged with theft. *Tyler v. London & S. W. R. Co.*, 1 *C. & E.* 285.

300. Carrier not bound to resist officer, nor remove goods, to prevent seizure.—It is not the duty of a common carrier to keep his doors locked and to refuse entrance to a sheriff who comes to seize property in the possession of the carrier, if the sheriff have legal process. *Savannah, G. & N. A. R. Co. v. Wilcox*, 48 *Ga.* 432, 11 *Am. Ry. Rep.* 375.

It is not the duty of a common carrier to remove goods committed to him in order to prevent their being subjected to an attachment levy. *MacVeagh v. Atchison, T. & S. F. R. Co.*, 18 *Am. & Eng. R. Cas.* 651, 3 *N. Mex.* 205, 5 *Pac. Rep.* 457.

301. Carrier not bound to surrender goods to a mortgagee.*—A common carrier who has received goods for transportation from one person, and given him a bill of lading therefor, is not liable for conversion, upon refusal to surrender the goods to a mortgagee of the shipper, who claims that the condition of the mortgage has been broken and that he is therefore the true owner, where the goods were not seized or demanded under any legal process. (Pope, J., dissenting.) *Kohn v. Richmond & D. R. Co.*, 55 *Am. & Eng. R. Cas.* 675, 37 *So. Car.* 1, 16 *S. E. Rep.* 376.

302. Goods cannot be attached for vendor's debts.—A railroad receiving freight from a vendor consigned to the vendee is the agent of the latter and liable to him only for its safe delivery. The vendor having no further authority over it except the right of stoppage *in transitu*, it cannot be attached for his debt. *Louisville & N. R. Co. v. Spaulding, (Ky.)* 22 *Am. & Eng. R. Cas.* 418.

* Duty and liability of company when adverse claim is set up to property received for transportation, see note, 34 *AM. ST. REP.* 731.

7. Conversion of Goods.*

303. What is a conversion.—When a carrier refuses to deliver goods to the owner except upon a condition which is unreasonable, this is equivalent to an absolute refusal, and constitutes a conversion. *Loeffler v. Keokuk N. L. Packet Co.*, 7 *Mo. App.* 185.

Common carriers deliver property at their peril, and must take care that it is delivered to the right person, for if the delivery be to the wrong person, either by an innocent mistake or through fraud of others, they will be responsible, and the wrongful delivery will be treated as a conversion. *McEntee v. New Jersey Steamboat Co.*, 45 *N. Y.* 34, 6 *Am. Rep.* 28.—QUOTED IN *Houston & T. C. R. Co. v. Adams*, 49 *Tex.* 748.—*Claffin v. Boston & L. R. Co.*, 7 *Allen (Mass.)* 341. *Scheu v. Erie R. Co.*, 10 *Hun (N. Y.)* 498. *Hall v. Boston & W. R. Co.*, 14 *Allen (Mass.)* 439.

When parties ship fruit-trees to a point to their own address, the carrier is not authorized, either at common law or by the statute, to place the trees in the hands of a stranger, with directions to him to sell enough of them to pay the charges of transportation; and if he does he will be liable in trover to the owners. *Indianapolis & St. L. R. Co. v. Herndon*, 81 *Ill.* 143.

Where a railway company parts with goods which it holds as bailee for the plaintiffs upon the unauthorized order of G., and shortly afterwards plaintiff sends a delivery order for the same goods to T., who indorses it to G., who lodges it with the company to cover the previous delivery, the company has been guilty of conversion, but the plaintiffs can recover only nominal damages. *Hiort v. London & N. W. R. Co.*, *L. R.* 4 *Ex. D.* 188, 48 *L. J. Ex. D.* 545, 40 *L. T.* 674, 27 *W. R.* 778; *reversing* 38 *L. T.* 424.

304. Illustrations.—The agent of Rhode Island cotton buyers bought cotton in Arkansas and delivered it to a carrier, which was by mistake sent to wrong parties in Maine, and there delivered by a connecting road. Upon being informed of the

* Action for conversion of goods by carrier. Improper delivery, see 55 *AM. & ENG. R. CAS.* 674, *abstr.*

Carriers of perishable goods. Action for loss as for a conversion. Admissibility of evidence of conversation at the time of shipment as to how long it would take, see 35 *AM. & ENG. R. CAS.* 656, *abstr.* See also *ante*, 159-164.

mistake the Arkansas carrier agreed to have the cotton forwarded to the proper owners, and gave the agent a through bill of lading, who drew on his principals for the price, on the faith of the bill of lading, which draft was paid. The parties in Maine refused to surrender the cotton. *Held*, that an action might have been maintained against the last carrier which wrongfully delivered the cotton in Maine, or the parties there receiving it, but the purchasers might waive this right, and maintain an action against the Arkansas carrier. *St. Louis & I. M. R. Co. v. Larned*, 6 Am. & Eng. R. Cas. 436, 103 Ill. 293.

Dutiable oil was shipped from a foreign country into the United States, marked to the consignees in care of one C. It appeared that C's only duties were to attend to payment of the custom-house duties, which was known to the carriers. The consignees not being at once found, the carrier delivered the oil, by direction of C., to third parties under a mistaken supposition that they owned it. *Held*, that the carrier was liable as for a conversion. *Claf-lin v. Boston & L. R. Co.*, 7 Allen (Mass.) 341.—NOT FOLLOWED IN *Bush v. St. Louis, K. C. & N. R. Co.*, 3 Mo. App. 62.

The owners of a quantity of hop-poles contracted with defendant for their carriage by water, on a steamboat owned by him, to Detroit, and on the arrival of the vessel the master delivered the poles to a third party without the consent of the consignees or consignor. *Held*, that such delivery was a tortious one, and must be regarded as conversion of the property by defendant. *Gibbons v. Farwell*, 63 Mich. 344, 29 N. W. Rep. 855.

By a mistake of the plaintiffs, a lot of hides were carried by the defendant's servants to his tannery, and there appropriated and used for his benefit. Before the conversion the defendant had notice from the plaintiffs that the hides were claimed as the property of another person; but no proof of the ownership was produced. In trover for the hides—*held* that this amounted to a conversion, and that defendant was not entitled to an instruction, to the effect that he was not liable unless before the conversion he had reasonably satisfactory proof that the hides were not his. *Cheshire R. Co. v. Foster*, 51 N. H. 490.

Goods part of which were in payment of a loan were delivered by a firm to a car-

rier, consigned to plaintiffs, who advanced money on the other part, invoices of which were forwarded to them through the post-office. While the goods were in the hands of the carrier, a member of the firm, for his individual benefit, but in the name of the firm, changed the destination of the goods, and the carrier delivered them accordingly. *Held*, that the title to the goods vested in plaintiffs when they were delivered to the carrier, and it was legally chargeable with knowledge of their vested rights, and was liable as for a conversion. *Bailey v. Hudson River R. Co.*, 49 N. Y. 70, 3 Am. Ry. Rep. 318.

305. Act not amounting to a conversion.—To constitute a conversion of goods by a carrier there must be a wrongful disposition or withholding thereof; a mere non-delivery will not suffice, nor will a refusal to deliver on demand, if the goods have been lost through negligence or have been stolen. *Magnin v. Dinsmore*, 70 N. Y. 410; reversing 10 J. & S. 16.

If the demand upon a carrier for goods is by a person entitled to receive them, and a refusal to deliver is absolute and unqualified, there is sufficient proof of a conversion; but if the refusal be qualified, then the question is whether the qualification is reasonable; and if reasonable, and made in good faith, it is no evidence of a conversion. *McEntee v. New Jersey Steamboat Co.*, 45 N. Y. 35, 6 Am. Rep. 28.

The owner of goods lying in a depot demanded them of the company, but the agent in charge, through inadvertence supposing them not to have arrived, so stated, and failed to deliver them. *Held*, not to be a conversion. *Louisville & N. R. Co. v. Campbell*, 7 Heisk. (Tenn.) 253, 12 Am. Ry. Rep. 490.

Where goods are transported by a railroad company, and, upon their reaching the place of destination, stored at a warehouse at the expense of the owner, without actual notice of their arrival, under a newspaper publication that all articles not removed within a given time will be thus disposed of—*held*, that such erroneous delivery, notwithstanding it made the party chargeable for all the loss and injury resulting therefrom, still did not of itself amount to a conversion of the property; and that to maintain trover a demand and denial were necessary. *Rome R. Co. v. Sullivan*, 14 Ga. 277.

306. When trover will lie—Venue.

—Trover will lie for the conversion of a chattel, by the owner against a carrier, where the latter refuses to deliver it, on demand, until a larger sum is paid for transportation than had been agreed upon; and interest may be recovered from the time of the demand. *Northern Transp. Co. v. Sellick*, 52 Ill. 249.—DISTINGUISHED IN *Illinois C. R. Co. v. Cobb*, 72 Ill. 148.

It is the duty of a common carrier to deliver goods to the consignee at the place of destination named in the bill of lading, and for a wrongful delivery it is liable in trover. *St. Louis & T. H. R. Co. v. Rose*, 20 Ill. App. 670.

A demand by the consignee and refusal by the defendant to deliver the goods would be a conversion for which trover would lie; and the county where such demand and refusal occurred would be the proper venue of the action. *Bird v. Georgia R. Co.*, 27 Am. & Eng. R. Cas. 39, 72 Ga. 655.

307. When previous demand is necessary.*—If a carrier fails to deliver goods for other causes than non-payment of freight, no demand or tender of charges is necessary in order to maintain an action for conversion. *Wiggin v. Boston & A. R. Co.*, 120 Mass. 201.

It is the duty of the carrier to deliver goods to the consignee or his assigns, and he must at his peril deliver them to the true owner; and a previous demand is not necessary to enable the true owner to maintain an action against the carrier for non-delivery and conversion. *Missouri Pac. R. Co. v. Heidenheimer*, 82 Tex. 195, 17 S. W. Rep. 608. *Fulton v. Lydecker*, 17 N. Y. Supp. 451.

Where the owner of goods demands them from the carrier at their place of destination, and the agent demands a greater sum for transportation than had been agreed on, the owner does not waive the effect of the demand so as to defeat an action for the conversion of the goods by agreeing that the goods may remain in the depot until he could correspond with another agent about the overcharge. *Northern Transp. Co. v. Sellick*, 52 Ill. 249.

To bring an action for non-delivery and conversion, within the provisions of 42 Vic. ch. 9, § 17 (D), the goods must remain in the defendant's possession for at least a

year, unless the tolls have been demanded from the persons liable, and payment refused or neglected for six weeks after demand; and though sub-section 3 says nothing of a demand, the whole section must be read together, which shows a demand is required. A post-card is not a sufficient demand unless it reached the person to whom it was addressed. *Worden v. Canadian Pac. R. Co.*, 30 Am. & Eng. R. Cas. 127, 13 Ont. 652.

308. Who may maintain trover.*

—A person holding "inspector tickets" of wheat, whether he has the full title thereto or only a special property therein, may maintain an action against a railroad, as for a conversion, upon a failure to deliver the wheat on a proper demand. *Lewis v. St. Paul & S. C. R. Co.*, 20 Minn. 260.—FOLLOWED IN *Hurt v. St. Paul, M. & M. R. Co.*, 39 Minn. 485, 40 N. W. Rep. 613.

M. & Co., at G., bought a car-load of wheat on commission for C. They paid for it themselves and shipped it by defendants' railway, taking the railway receipt in their own name as consignees. The car was addressed to the care of C. at W., M. & Co. being aware that it was intended to be ground there for C., and the receipt was indorsed by them to the order of the C. Bank. Through this bank they drew upon C. at fifteen days sight for the price, with their commission and bank charges, and discounted the draft with the receipt attached as collateral security. At W. the wheat was delivered by defendants, upon C.'s order, to his brother, who had a mill there. It was mixed by him with other wheat and ground, and fifty-five barrels of flour, the equivalent for it, were delivered by him to the defendants for C. C. became insolvent before the draft matured, and M. & Co. took it up and got the railway receipt re-indorsed to them. C.'s assignee, having sued the defendants in trover and detinue for the flour, they, in privity with M. & Co., denied the plaintiff's right to it and set up the title of M. & Co. The case having been tried without a jury—*held*, that M. & Co., on the re-indorsement by the bank to them, were in as of their former title, not as assignees of the bank, with the rights given to the latter by the statute; that their rights must be considered as if the bank

* Payment of freight charges as condition precedent to right to maintain trover for failure to deliver goods, see note, 21 L. R. A. 117.

* See also *ante*, 92, 243; *post*, 701.

had never intervened; and that the defendants were entitled to set up the title of M. & Co. as a defense. *Mason v. Great Western R. Co.*, 31 U. C. Q. B. 73.

309. Right of consignor to stop delivery, or to change consignee.*—

Where goods are shipped to a factor for sale the shipper may at any time before delivery direct a delivery to another party; but when they are consigned to one who has advanced money, a delivery to a common carrier amounts to a delivery to the consignee, and the consignee has a right to sell them to reimburse himself; and the shipper has no right to control the sale or interfere in any way, except as to any surplus from the proceeds of sale that may remain after reimbursing the consignee for advances made. *Nelson v. Chicago, B. & Q. R. Co.*, 2 Ill. App. 180.—QUOTING *Brown v. M'Gran*, 14 Pet. (U. S.) 479.

A shipper has a right, after the property is in the hands of a carrier, to change its destination and order delivered to another consignee, although the former consignee has accepted bills on the strength of the consignment; and if the carrier refuses to deliver to the second consignee named, it is evidence of a conversion for which it is liable. *Lewis v. Galena & C. U. R. Co.*, 40 Ill. 281.—DISTINGUISHING *Brown v. M'Gran*, 14 Pet. (U. S.) 479.—FOLLOWED IN *Strahorn v. Union S. Y. & T. Co.*, 43 Ill. 424.

After goods were in the hands of a carrier the shipper sold them to a third party, and directed the carrier to deliver them to him instead of the original consignee. *Held*, that a refusal by the carrier to deliver according to such directions rendered it liable in trover at the suit of the shipper. *Lewis v. Galena & C. U. R. Co.*, 40 Ill. 281.

Notice to the agent of a carrier who, in the regular course of his agency, is in the actual custody of goods at the time notice is given, is notice to the carrier. So a letter by a shipper of goods to the agent of a carrier who still has control of the goods, not to deliver them to the consignee, and giving sufficient reasons therefor, is notice to the carrier; and if they afterward be delivered, the carrier will be deemed guilty of a conversion and liable to the shipper. *Jones v. Earl*, 37 Cal. 630.

Where the shipper has given subsequent

direction not to deliver to the consignee, and the carrier, notwithstanding, delivered the goods to the consignee, and in consequence thereof the consignor sues and obtains a judgment against the carrier in another state for a misdelivery of the goods, this will not avail in a suit by the carrier against the consignee. *Philadelphia & R. R. Co. v. Wireman*, 88 Pa. St. 264.

310. Delivery without production of bill of lading.*—A common carrier by

railroad, who delivers goods intrusted to him for carriage, without production of the bill of lading describing the goods, is liable in trover for their value to a *bona fide* holder of such bill, taken for value, before the delivery of the goods at destination. *First Nat. Bank v. Northern R. Co.*, 58 N. H. 203.

A consignee of goods cannot recover them from the last of connecting carriers without producing a bill of lading, or without proof that its non-production would not render the carrier liable to any assignee of the same. *Bass v. Glover*, 1 Am. & Eng. R. Cas. 277, 63 Ga. 745.

311. Identification of consignee.†—

Common carriers deliver property at their peril; for if delivered to a wrong person, they will be responsible to the rightful owner. It is their duty, therefore, in all cases to be diligent in their efforts to secure a delivery to the person entitled, and they will be protected in refusing delivery until reasonable evidence is furnished them that the party claiming is the party entitled, so long as they act in good faith and solely with a view to a proper delivery; but it is their duty in all cases to be diligent in their efforts to secure a delivery to the person entitled. *Baltimore & O. R. Co. v. Pumphrey*, 9 Am. & Eng. R. Cas. 331, 59 Md. 390.

The fact that a package is imperfectly addressed and the plaintiff refuses to produce any evidence of title to the property or identify himself as the consignee, justifies the carrier in exercising caution in the delivery; and in such case it should be left to the jury whether a refusal to deliver was qualified by the defendants, on account of the doubt as to the identity of the claimant, and if so, whether the qualification was reasonable and the true reason for not delivering the goods. *McEntee v. New Jersey Steamboat Co.*, 45 N. Y. 34.

* See also *ante*, 264.

† See also *ante*, 277.

* See also *ante*, 201.

312. Evidence as to goods lost.—

Where grain is shipped in bulk and the carrier is sued for a conversion of a part of it, it is competent for plaintiffs to prove that they had bought and paid for a certain amount of grain, which was shipped in the car consigned to them. And oral evidence that the bill of lading called for the amount already testified to is harmless error, where the bill of lading is afterward put in evidence. *Peebles v. Boston & A. R. Co.*, 112 *Mass.* 498.

313. Special Defenses.—A carrier cannot dispute the title of the shipper of goods in an action against it for conversion; and where the shipper is the agent of another, the carrier cannot excuse itself by showing that the real title was in the principal, unless it shows that the principal took the property out of its possession. *Great Western R. Co. v. McComas*, 33 *Ill.* 185.

Where a carrier is sued by a consignee for a conversion of goods, the latter cannot defend on the ground that the shipper perpetrated a fraud on it by misstating the weight of the goods, which was known to the plaintiff but not communicated to the carrier. *Wiggin v. Boston & A. R. Co.*, 120 *Mass.* 201.

A refusal by a carrier to deliver goods to the consignee is evidence of a conversion, and it is no defense that the goods were delivered by mistake to a third person and that the consignee was offered other goods of equal value. *Clement v. New York C. & H. R. R. Co.*, 30 *N. Y. S. R.* 713, 9 *N. Y. Supp.* 601, 56 *Hun* 643.—**DISTINGUISHING** *Magnin v. Dinsmore*, 70 *N. Y.* 410.

Where a carrier holding goods as a warehouseman for the consignee redelivers them to the consignor upon the consignee becoming insolvent, under a mistaken supposition that the *transitus* was not yet over, in an action of trover against it an equitable plea of rescission of the contract, on the ground of fraud of the consignee, in not intending to pay for the goods, raises a good defense, although such fraud was not discovered until the time of the trial. *Clough v. London & N. W. R. Co.*, *L. R.* 7 *Ex.* 26, 41 *L. J. Ex.* 17, 25 *L. T.* 708.

An advice note sent to a consignee of goods is not such a representation of the possession of them as will, without evidence of a custom to do so, entitle the consignee to act upon it in the way of reselling; nor will it, in the absence of wilful misstatement

2 D. R. D.—9.

or culpable negligence, estop the company in an action of trover from denying that it in fact ever had the goods, although the consignee had paid the charges. *Carr v. London & N. W. R. Co.*, 31 *L. T.* 785, *L. R.* 10 C. P. 307, 23 *W. R.* 747.

314. Carrier cannot convey title—Remedy of owner.—A common carrier cannot sell goods so as to divest the title of the consignee; and the consignee may follow up the goods and recover them, or recover the price thereof, from one who has purchased of the carrier and sold them. *Crumbacker v. Tucker*, 9 *Ark.* 365.

315. Measure of damages.—The measure of damages is the value of the goods at the time of the conversion; and where there is a question as to the injury consequent upon their detention, the owner is not bound to accept a subsequent tender. *Loeffler v. Keokuk N. L. Packet Co.*, 7 *Mo. App.* 185.

VI. LIABILITY OF COMPANY AS WAREHOUSEMAN.*

1. Liability as to Goods Awaiting Shipment.

316. Warehousemen bound to ordinary care only.—Warehousemen and forwarders in regard to property intrusted to their charge are bound to use ordinary care and diligence, such as a prudent man would exercise over his own property of like nature; and such care should be proportioned to the injury or loss likely to be sustained by the absence of it. *Baltimore & O. R. Co. v. Schumacher*, 29 *Md.* 168.

317. Where shipment is delayed at request of shipper.—Where goods are delivered to a common carrier to await further orders from the shipper before shipment, the carrier, while they are so in his custody, is only liable as warehouseman. *O'Neill v. New York C. & H. R. R. Co.*, 60 *N. Y.* 138, 10 *Am. Ry. Rep.* 121; *reversing* 3 *T. & C.* 399. *Little Rock & Ft. S. R. Co. v. Hunter*, 18 *Am. & Eng. R. Cas.* 527, 42 *Ark.* 200.

But if a package marked with the name and address of the consignee is delivered to

* Liability of railroads as warehousemen, see note, 7 *AM. & ENG. R. CAS.* 404.

Carrier's liability for goods deposited in warehouse, see note, 31 *AM. & ENG. R. CAS.* 101.

Liability of carrier for goods in transit and as warehouseman, see note, 13 *L. R. A.* 33. See also *ante*, 168-172.

and received by a carrier, he has the right, and it is his duty, at once to forward it to its destination in the usual course of business. It is thenceforth in his possession, and he is responsible therefor as carrier. *O'Neill v. New York C. & H. R. R. Co.*, 60 N. Y. 138; *reversing 3 T. & C. 399*.—QUOTED IN *Milloy v. Grand Trunk R. Co.*, 23 Ont. 454.

A quantity of hay was delivered to a carrier, but before it was shipped the owner requested the carrier to hold it until he could see the party to whom it was to be shipped. The next day the hay was destroyed by sparks from a passing locomotive. *Held*, that while the hay was being held back at the request of the owner the company was liable only as warehouseman. *St. Louis, A. & T. H. R. Co. v. Montgomery*, 39 Ill. 335.

318. Where shipment is delayed while awaiting cars.*—While the defendants had flour received at O., awaiting the means to forward it, they held it as common carriers and not as warehousemen, unless by some order or agreement of plaintiffs they were authorized to store it for them; and this would be so even if plaintiffs had reason to expect a delay of some weeks at O., by reason of the accumulation of freight there. *Barter v. Wheeler*, 49 N. H. 9.—DISTINGUISHING *Judson v. Western R. Co.*, 4 Allen (Mass.) 520.

The plaintiff delivered from time to time a quantity of apples to defendants at their warehouse for the purpose of shipment by their railway. A sufficient quantity having been delivered to fill a car, plaintiff applied for and was by defendants promised one at a named date. In the ordinary course of business, on the barrels being loaded on the car a shipping bill would have been signed by defendants, containing an exemption from liability for loss by fire. The defendants failed to furnish the car at the date specified, and, a fire occurring, the apples were destroyed. The court was evenly divided, Galt, C.J., being of the opinion of the trial judge, that the responsibility of the defendants was that of carriers and not of warehousemen, and that they were liable for the loss sustained by the plaintiff; while Rose,

J., was of the contrary opinion. *Milloy v. Grand Trunk R. Co.*, 55 Am. & Eng. R. Cas. 579, 23 Ont. 454.—QUOTING *O'Neill v. New York C. & H. R. R. Co.*, 60 N. Y. 138.

319. Where shipment is delayed by carrier.—If goods are deposited in a company's warehouse to wait for the usual trains, and it holds them beyond such trains for its own convenience, it does so in the capacity of a common carrier; but if they are kept back for the convenience or by order of the owner, it is only liable as warehouseman. *Moses v. Boston & M. R. Co.*, 24 N. H. 71.

Where a railroad company erects a platform for the purpose of shipping cotton, and its course of business is such that it induces parties to store cotton on it, under a promise to ship by the next freight train, and it passes and neglects to take on said cotton, and it is afterwards destroyed by fire from a passing train, the company is liable for the value of the cotton. *Meyer v. Vicksburg, S. & P. R. Co.*, 41 La. Ann. 639, 6 So. Rep. 218.

Where machinery was consigned to the agent of a railroad, to be forwarded to the plaintiff over such road, and it was negligently detained for a time—*held*, that the defendants were not liable as common carriers for this neglect, but only as bailees. *Foard v. Atlantic & N. C. R. Co.*, 8 Jones (N. Car.) 235.

320. Where goods are accidentally destroyed between loading and shipping.—In an action against a railroad company for negligence in burning timber on a car intended for shipment, it appeared that plaintiff loaded the car on defendant's track, but did not notify the agent that it was ready for shipment, nor of the name of the consignee; the car was moved by defendant's agent to another track (erected for shippers' convenience) very close to a dry-kiln, from which it took fire. The court found by consent that the timber had been left with defendant, awaiting orders for shipment; and, as a conclusion of law, that defendant was not an insurer, but a simple warehouseman, being merely a gratuitous bailee and not a common carrier, and the fire being accidental, no such negligence was shown as entitled the plaintiff to recover. *Basnight v. Atlantic & N. C. R. Co.*, 111 N. Car. 592, 16 S. E. Rep. 323.

* Liability of companies as carriers for goods in store received for transportation, see note, 18 AM. & ENG. R. CAS. 529.

321. Statutory liability for loss by fire from locomotive does not apply to goods in store.*—Mass. Pub. St. ch. 112, § 214, which provides that a railroad corporation shall be responsible for property injured by fire communicated by its locomotive engine, does not cover goods destroyed by fire while in its possession under a contract of carriage. *Bassett v. Connecticut River R. Co.*, 32 Am. & Eng. R. Cas. 528, 145 Mass. 129, 5 N. Eng. Rep. 207, 13 N. E. Rep. 370.—FOLLOWED IN *Blaisdell v. Connecticut River R. Co.*, 145 Mass. 132. REFERRED TO IN *Bassett v. Connecticut River R. Co.*, 40 Am. & Eng. R. Cas. 118, 150 Mass. 178, 22 N. E. Rep. 890.

But if goods which have been transported over a railroad and have been received by the owner and placed in a storehouse occupied exclusively by him and owned by the corporation, adjoining its freight depot at a station, and other goods therein intended for transportation, but not having been delivered to the corporation, are destroyed by fire communicated by its locomotive engine, the owner may maintain an action against the corporation, under Mass. Pub. St. ch. 112, § 214, for the loss of the goods. *Blaisdell v. Connecticut River R. Co.*, 145 Mass. 132, 13 N. E. Rep. 373.—FOLLOWING *Bassett v. Connecticut River R. Co.*, 145 Mass. 129.

322. Charter liability for goods "on deposit" does not include goods awaiting shipment.—A provision in the charter of a railroad company providing that it shall not be responsible for goods "on deposit in any of its depots awaiting delivery," refers only to goods which have reached their place of destination, and not to goods that have been received and are awaiting transportation. *Michigan C. R. Co. v. Mineral Springs Mfg. Co.*, 16 Wall. (U. S.) 318.

2. Liability as to Goods at Place of Destination:

a. Nature and Extent of Liability.

323. Only held to ordinary care.†—Common carriers are liable in two capacities, one as insurers and the other as warehousemen. As insurers, they are liable for

* Liability of company for goods destroyed by fire from engine. Goods in warehouse. Massachusetts statute construed, see 32 AM. & ENG. R. CAS. 530, *abstr.*

† Liability of company that is both carrier and warehouseman, see note, 67 AM. DEC. 82.

all losses, except those caused by the act of God or the public enemy, during transportation and until the owner has had a reasonable time in which to remove them after their arrival at the place of destination. After the lapse of such reasonable time their liability as warehousemen attaches and continues until the goods are actually removed, during which time they are bound to the exercise of ordinary prudence or care. *Goodwin v. Baltimore & O. R. Co.*, 58 Barb. (N. Y.) 195. *Jackson v. Sacramento Valley R. Co.*, 23 Cal. 269. *McHenry v. Philadelphia, W. & B. R. Co.*, 4 Harr. (Del.) 448. *Cincinnati & C. A. L. R. Co. v. McCool*, 26 Ind. 140. *Whitney v. Chicago & N. W. R. Co.*, 27 Wis. 327, 5 Am. Ry. Rep. 291.

In an action against a railroad company, as warehousemen, for a failure to deliver property received by them, the judge instructed the jury, among other things, "that if the property was taken by mistake from the defendant's depot, and they exercised ordinary care in the matter, they would not be liable; but if the defendant's agent delivered it by mistake to a wrong person, they would be answerable." *Held*, that such instructions taken together were no cause for a new trial. *Lichtenhein v. Boston & P. R. Co.*, 11 Cush. (Mass.) 70.—NOT FOLLOWED IN *Bush v. St. Louis, K. C. & N. R. Co.*, 3 Mo. App. 62.

324. Liability of bailees for hire.*—A railroad company which keeps a warehouse for storing goods carried over its line until they shall be called for by the consignee, in respect to goods so carried and stored in its warehouse is regarded as a bailee for hire, and is required to exercise the care and diligence of ordinary warehousemen in keeping such goods. *White v. Colorado C. R. Co.*, 3 McCrary (U. S.) 559, 5 Dill. 428. *Culbreth v. Philadelphia, W. & B. R. Co.*, 3 Houst. (Del.) 392.

Putting a large quantity of powder in the same warehouse with plaintiff's goods was negligent conduct for which defendant is liable in damages to the extent of the loss resulting to plaintiff from the presence of such powder in the warehouse. *White v. Colorado C. R. Co.*, 3 McCrary (U. S.) 559, 5 Dill. 428.

After the responsibility of a railroad as a common carrier has ceased, a charge may

* Liability of common carrier as bailee, see note, 6 L. R. A. 853.

be made for the storage of goods as warehousemen, in which case they will be liable for ordinary care in relation to the goods. *Brown v. Grand Trunk R. Co.*, 54 N. H. 535, 11 Am. Ry. Rep. 195.—REVIEWING *Smith v. Nashua & L. R. Co.*, 27 N. H. 86.

A railway company, as carriers, brought some goods by their railway to one of their stations, and immediately gave the consignee notice of their arrival, and that they held the goods. "not as common carriers, but as warehousemen, at owner's sole risk, and subject to the usual warehouse charges. The consignee acquiesced in this, and the goods remained in the charge of the company, and, by their negligence, were damaged. In an action by the consignee against the company—held, that on the true construction of the notice, the company was not exempted from all liability, but was bound as bailees to take reasonable care of the goods. *Mitchell v. Lancashire & Y. R. Co.*, 10 Q. B. 256. 44 L. J. Q. B. 107, 3 Ry. & C. T. Cas. xxviii.

325. Liability of gratuitous bailees.

—An agreement for storage made with a common carrier is not valid unless supported by a consideration; but it may bind the carrier so far as to prohibit the delivery of the goods to a third person. *Angle v. Mississippi & M. R. Co.*, 18 Iowa 555.

Proprietors of a railroad who transport goods over their road and deposit them in their warehouse without charge, until the owner or consignee has a reasonable time to take them away, are not liable as common carriers for the loss of the goods from the warehouse, but are liable as depositaries only for want of ordinary care. *Thomas v. Boston & P. R. Co.*, 10 Metc. (Mass.) 472.—DISTINGUISHED IN *Cary v. Cleveland & T. R. Co.*, 29 Barb. (N. Y.) 35. QUOTED IN *Porter v. Chicago & R. I. R. Co.*, 20 Ill. 407.

Where the owner of goods, which have not remained for an unreasonable length of time in the warehouse of a railroad, is notified by its agent that the goods may remain a short time longer free of charge, the company will still be liable for ordinary care as warehouseman, and not liable only as gratuitous bailee. *Western & A. R. Co. v. Camp*, 53 Ga. 596.

Where a railroad company are acting in good faith as mere depositaries, without pay, they are only responsible for slight care, and will not be liable for an act of ordinary negligence on the part of their servants in

taking charge of goods. *Brown v. Grand Trunk R. Co.*, 54 N. H. 535, 11 Am. Ry. Rep. 195.

The carrier in whose possession goods are left becomes chargeable as a depositary, unless the circumstances are such as to entitle him to a compensation for his services, in which case he is liable as a bailee for hire. As a depositary he is liable only for gross neglect; as a bailee for hire, for ordinary neglect. *Smith v. Nashua & L. R. Co.*, 27 N. H. 86.

Where the owner of goods carried by railroad is present at their arrival, and is told that the railroad company cannot store them for want of room, and he still leaves them on their hands, they may be chargeable as depositaries, if they assume the care of the goods by putting them in their storehouse. *Smith v. Nashua & L. R. Co.*, 27 N. H. 86.

They may refuse to store them, and if they do nothing with them, or merely put them off their premises, without damage, they will not be chargeable. *Smith v. Nashua & L. R. Co.*, 27 N. H. 86.

But if, after such refusal, they assume any care of the goods, it will be competent for the jury to find a waiver of the refusal and an assumption of the duties of depositaries. *Smith v. Nashua & L. R. Co.*, 27 N. H. 86.

There is no presumption, where the owner is notified that the carrier cannot store the goods, and is requested to take them away, but he still leaves them, that he has made the carrier's servants his own, although they may be forbidden to contract for the keeping of the goods at the risk of the carrier. *Smith v. Nashua & L. R. Co.*, 27 N. H. 86.

After goods have reached their destination, are safely stored and protected from the weather and from trespassers, and are ready for delivery, the company become warehousemen, liable only as bailees without hire and only responsible for ordinary neglect. *Morris & E. R. Co. v. Ayres*, 29 N. J. L. 393.—NOT FOLLOWED IN *Leavenworth, L. & G. R. Co. v. Maris*, 16 Kan. 333. QUOTED IN *Spears v. Spartanburg, U. & C. R. Co.*, 11 So. Car. 158.

In a suit for damages for loss of the goods, if there are two counts in the complaint, the one on a contract of common carriers and the other on a contract of a warehouseman without hire, a charge asked by the defendant under the latter count,

that the company is only responsible for losses and injuries occasioned by gross negligence, is proper, and should be given. *Mobile & G. R. Co. v. Prewitt*, 46 Ala. 63.—CRITICISED IN *Bennett v. Northern Pac. Exp. Co.*, 12 Oreg. 49.

326. Shipment held not a gratuitous bailment.—An agreement by a railroad company to transport grain in sacks at a fixed price, and to return the empty sacks "free," is not to be regarded as a gratuitous bailment, as to the return of the sacks, so as to exempt the company from liability except for gross negligence. *Pierce v. Milwaukee & St. P. R. Co.*, 23 Wis. 387.

It makes no difference that the undertaking is described as being to carry the bags free. In determining whether they are really carried "free" or not, the whole transaction between the parties must be considered. "When this is done, all that is meant by saying that the empty bags are carried free, is, that the customers pay no other consideration for it than the freight derived from the business they give the company." This is sufficient to prevent the transportation of the bags from being gratuitous. *Pierce v. Milwaukee & St. P. R. Co.*, 23 Wis. 387.

327. Liability of a compulsory bailee.—Where wool arrived damaged, and in a perishing condition, from causes for which the carrier was not responsible, and the consignees declined to receive it, and it was subsequently sold by the carrier to prevent its perishing on his hands—*held*, that the carrier's duty and liability terminated on the discharge of the wool and reasonable notice and opportunity given to the consignees to take it away. He thenceforth became a compulsory bailee of the goods, bound only to such reasonable care as a prudent and honest man would take of property of which he has become the involuntary custodian. *The Bobolink*, 6 Savvy. (U. S.) 146.

328. Liability for loss through negligence.—After the transit is ended and the carrier notifies the consignee that he holds the goods as a warehouseman at his risk, the carrier is still bound as a bailee to take reasonable care of the goods, and is liable if the damage is caused by its negligence. *Mitchell v. Lancashire & Y. R. Co.*, 44 L. J. Q. B. 107, L. R. 10 Q. B. 256, 23 W. R. 853, 33 L. T. 161.

After goods are unloaded and stored, the

liability of the carrier becomes that of a warehouseman whether the depot or place of storage belongs to it or another; and if through its negligence the goods are delivered to a wrong person, it is liable to the owner, upon its contract, for damages as for a conversion. *Merchants' D. & T. Co. v. Merriam*, 31 Am. & Eng. R. Cas. 78, 111 Ind. 5, 11 N. E. Rep. 954.

If the owner is prevented getting his goods when called for by negligence of the warehouseman's agent in charge, and they are destroyed by a fire, though accidental, the warehouseman is liable. *Derosia v. Winona & St. P. R. Co.*, 18 Minn. 133 (Gil. 119), 8 Am. Ry. Rep. 363.

A railroad company, the carriage over its road being complete, had in its possession, as warehouseman, the goods of plaintiff, upon which the freight had been paid. The goods were retained in the warehouse at plaintiff's request. A fire broke out near the warehouse, but not on the property of the company. While the fire was burning plaintiff asked permission to remove his goods. This was refused, because, in the opinion of the company's officers, if the warehouse were opened much of the property stored therein would be stolen, and also because they did not think at that time there was danger of the warehouse taking fire. The company made every effort in its power to prevent the communication of the fire to the warehouse, and after it was plain that such efforts would prove fruitless, had the doors of the warehouse broken open and as many goods removed therefrom as possible. The company had property of very great value so located that it must have been burned before the warehouse could take fire, and the utmost diligence to remove this property was proved. If such efforts had been successful, the danger of the warehouse taking fire would have been greatly reduced. *Held*, that it was not the duty of the company to act upon the suggestion of plaintiff, or strangers, as to the best method to save the goods in the warehouse; that if it used all means at its command and acted upon the bona fide judgment of its employes as to the best method to prevent the destruction or loss of the warehouse and goods therein, it was not liable for the destruction of plaintiff's goods. *Turrentine v. Wilmington & W. R. Co.*, 100 N. Car. 375, 6 S. E. Rep. 116.

329. Liability where goods are stolen.—The obligation of a company as a warehouseman is to take common and reasonable care of the property intrusted to its charge, and exercise toward it such diligence as men usually exert in respect to their own concerns. It would be liable for theft if it were the result of a want of proper care. *Mote v. Chicago & N. W. R. Co.*, 27 Iowa 22.

Where a declaration charges that goods were negligently lost while in the carrier's warehouse, mere proof that the goods were stolen from the warehouse, without any proof of negligence on the part of the company, is not sufficient to make out a *prima-facie* case against the company, and the court is justified in instructing the jury to find for the defendant. *Lamb v. Western R. Co.*, 7 Allen (Mass.) 98.—RECONCILED IN *Cass v. Boston & L. R. Co.*, 14 Allen (Mass.) 448.

In an action against a railroad company to recover for property stolen from them while they were keeping it as warehousemen, evidence is competent in defense to show that they exercised the same degree of care in relation to the property that was usually exercised in the vicinity in relation to such property by other railroad companies. *Cass v. Boston & L. R. Co.*, 14 Allen (Mass.) 448.

330. Burden of proof to show negligent loss.—To charge a company as warehouseman it is necessary to show want of ordinary care and diligence in keeping and delivering goods; and in case of loss, the burden of proof to show want of ordinary care and diligence is upon the plaintiff. *Jackson v. Sacramento Valley R. Co.*, 23 Cal. 269. *Texas & P. R. Co. v. Wever*, 3 Tex. App. (Civ. Cas.) 85. *National Line Steamship Co. v. Smart*, 107 Pa. St. 492.

Where it is shown that a company held goods as warehouseman and that they disappeared, proof of a failure to deliver the goods to the owner casts the burden upon the warehouseman to account for them; and if it fails to show how or when they were lost, or to show that they were lost without negligence on its part, it is liable for their value. *Williamson v. New York, N. H. & H. R. Co.*, 24 J. & S. (N. Y.) 508, 4 N. Y. Supp. 834, 22 N. Y. S. R. 431.—DISTINGUISHING *Claffin v. Meyer*, 75 N. Y. 260.

331. Right of carrier by water to store.—Where goods are ordered by boat

by one who was fully acquainted with the custom of the carrier to place the goods in storage at the place of destination where the owner was not present to receive them, and to charge for such storage, such custom becomes a part of the implied contract under which the goods are shipped, and he is bound to pay a reasonable storage. And this is so where the keeper of the storage house owns it, and receives the entire storage charge for himself. *Hurd v. Hartford & N. Y. Steamboat Co.*, 40 Conn. 48.

332. Party estopped by former suit against company as carrier.—A declaration was against defendants for loss of goods as carriers; after verdict it was presumed that this was made out; and in another action for the loss of the same goods against defendants as warehousemen plaintiff would be estopped by his allegation that they were carriers. *Aronson v. Cleveland & P. R. Co.*, 70 Pa. St. 68.

b. When Liability as Carrier Ends and that of Warehouseman Begins.*

333. Generally.—A railroad company does not remain liable as a common carrier after the arrival of goods for a time equal to that for which it has a lien on the goods for freight charges. *Spears v. Spartanburg, U. & C. R. Co.*, 11 So. Car. 158. *Porter v. Chicago & N. W. R. Co.*, 20 Iowa 73.

At what time the liability of a railroad company as common carrier terminates after the arrival of goods, not decided, each member of the court differing in opinion. *Spears v. Spartanburg, U. & C. R. Co.*, 11 So. Car. 158.—QUOTING *Morris & E. R. Co. v. Ayres*, 29 N. J. L. 393; *Chicago & A. R. Co. v. Scott*, 42 Ill. 132. REVIEWING *Norway Plains Co. v. Boston & M. R. Co.*, 1 Gray (Mass.) 263; *Moses v. Boston & M. R. Co.*, 32 N. H. 523; *Francis v. Dubuque & S. C. R. Co.*, 25 Iowa 60; *McCarty v. New York & E. R. Co.*, 30 Pa. St. 247; *McDonald v. Western R. Corp.*, 34 N. Y. 497; *Hedges v. Hudson River R. Co.*, 49 N. Y. 223.

334. Liability of warehouseman attaches when goods are unloaded and stored.—A railroad company may assume the double duty of carrier and warehouseman. Its duty as carrier is ended when goods are placed in a safe depot of its own or in other safe warehouses. *Ill-*

* See also *ante*, 79-94.

Hois C. R. Co. v. Alexander, 20 Ill. 23.—FOLLOWED IN *Merchants' Dispatch Transp. Co. v. Hallock*, 64 Ill. 284.

Where goods are shipped by railway, and arrive at their destination within the usual time required for transportation, and are there deposited and held to be delivered on demand, the liability as common carrier ceases, unless the custom of trade is shown to be otherwise as to delivery; and that of warehouseman commences. *Southwestern R. Co. v. Felder*, 46 Ga. 433, 11 Am. Ry. Rep. 419. *Buddy v. Wabash, St. L. & P. R. Co.*, 20 Mo. App. 206.

Where goods have reached their destination, and for any reason the consignee is not ready to receive them, and the carrier puts them in store, or in the charge of competent and careful servants, ready to be delivered when called for, the carrier's liability as insurer ceases, and he will thereafter be liable only as warehouseman; and if the goods are destroyed by fire, without fault on his part, he will not be responsible. *Rothschild v. Michigan C. R. Co.*, 69 Ill. 164.—FOLLOWING *Merchants' Dispatch Transp. Co. v. Hallock*, 64 Ill. 284.—APPROVED IN *Gashweiler v. Wabash, St. L. & P. R. Co.*, 25 Am. & Eng. R. Cas. 403, 83 Mo. 112, 53 Am. Rep. 558. NOT FOLLOWED IN *Western R. Co. v. Little*, 86 Ala. 159.—*Francis v. Dubuque & S. C. R. Co.*, 25 Iowa 60.—DISTINGUISHING *Smith v. Nashua & L. R. Co.*, 27 N. H. 86; *Alabama & T. R. R. Co. v. Kidd*, 35 Ala. 209; *Michigan C. R. Co. v. Ward*, 2 Mich. 538. NOT FOLLOWING *Moses v. Boston & M. R. Co.*, 32 N. H. 523; *Rome R. Co. v. Sullivan*, 14 Ga. 277.—FOLLOWED IN *Mohr v. Chicago & N. W. R. Co.*, 40 Iowa 579. NOT FOLLOWED IN *Leavenworth, L. & G. R. Co. v. Maris*, 16 Kan. 333; *Derosia v. Winona & St. P. R. Co.*, 18 Minn. 133 (Gil. 119). REVIEWED IN *Spears v. Spartanburg, U. & C. R. Co.*, 11 So. Car. 158.—*McCarty v. New York & E. R. Co.*, 30 Pa. St. 247.—APPROVED IN *Gashweiler v. Wabash, St. L. & P. R. Co.*, 25 Am. & Eng. R. Cas. 403, 83 Mo. 112, 53 Am. Rep. 558. DISTINGUISHED IN *Spears v. Spartanburg, U. & C. R. Co.*, 11 So. Car. 158. NOT FOLLOWED IN *Western R. Co. v. Little*, 86 Ala. 159; *Leavenworth, L. & G. R. Co. v. Maris*, 16 Kan. 333.

Under the rule adopted in Tennessee a common carrier ceases to be liable as carrier *eo instanti* with the deposit of the goods in the depot of destination. Thereafter his

liability is that of a warehouseman. *East Tenn., V. & G. R. Co. v. Kelly*, 91 Tenn. 699, 20 S. W. Rep. 312.

Goods were safely carried to their place of destination, and the consignee not being present to receive them, they were stored in the company's warehouse, which was reasonably safe. During the night they were destroyed by some one entering the warehouse through a grain-chute. Held, that the company was only holding the goods as warehouseman, and as it had exercised ordinary care, was not liable for the loss. *Cincinnati & C. A. L. R. Co. v. McCool*, 26 Ind. 140.—NOT FOLLOWED IN *Leavenworth, L. & G. R. Co. v. Maris*, 16 Kan. 333. REVIEWED IN *Pittsburgh, C. & St. L. R. Co. v. Nash*, 43 Ind. 423.

335. Where consignee has not had an opportunity for removal.—The liability of a common carrier of goods ceases when they are carried to the place of destination and placed in a warehouse, and thereafter it acts as warehouseman, and is only liable for loss of the goods by fire where there is a want of ordinary care; and this is so, though the owner or consignee did not have a reasonable opportunity to remove them before they were placed in the warehouse. *Norway Plains Co. v. Boston & M. R. Co.*, 1 Gray (Mass.) 263.—APPROVED IN *Gashweiler v. Wabash, St. L. & P. R. Co.*, 25 Am. & Eng. R. Cas. 403, 83 Mo. 112, 53 Am. Rep. 558. FOLLOWED IN *Rice v. Hart*, 118 Mass. 201; *Faulkner v. Hart*, 12 J. & S. (N. Y.) 471. NOT FOLLOWED IN *Columbus & W. R. Co. v. Ludden*, 89 Ala. 612; *Moses v. Boston & M. R. Co.*, 32 N. H. 523. QUOTED IN *Merchants' Dispatch Transp. Co. v. Hallock*, 64 Ill. 284. REVIEWED IN *Spears v. Spartanburg, U. & C. R. Co.*, 11 So. Car. 158.

And this is so, though the owner has had no notice of the arrival of the goods, and where they arrived at 8 o'clock in the evening and were destroyed by fire the same night. *Francis v. Dubuque & S. C. R. Co.*, 25 Iowa 60.—REFERRING TO *Angle v. Mississippi & M. R. Co.*, 18 Iowa 555.

A consignee was present to receive goods when they arrived at their place of destination, but was told by the carrier's agent that they would not be unloaded from the cars in time for delivery that day. After the time for delivery they were unloaded and placed in the company's warehouse, and the following night were destroyed by an acci-

dental fire. *Held*, that the company's liability as common carrier ceased when the goods were discharged from the car. *Rice v. Hart*, 118 *Mass.* 201.—FOLLOWING *Norway Plains Co. v. Boston & M. R. Co.*, 1 *Gray (Mass.)* 263.—FOLLOWED IN *Faulkner v. Hart*, 12 *J. & S. (N. Y.)* 471. NOT FOLLOWED IN *Western R. Co. v. Little*, 86 *Ala.* 159; *Dunham v. Boston & A. R. Co.*, 46 *Hun (N. Y.)* 245, 11 *N. Y. S. R.* 472.

Plaintiffs contracted in New York with the N. Co. for the transportation of certain goods by that company from New York to Boston, and the delivery thereof to plaintiffs, who were the consignees. The goods were received by defendants, who were residents of Massachusetts and connecting carriers over the latter part of the route. Upon arrival of the goods at Boston they were called for, but a delivery was refused until the next day, as it was not convenient to deliver at the time. They were unloaded the same afternoon and placed in defendants' warehouse, but too late for delivery; and during the night the warehouse, with the goods, was destroyed by fire. In an action to recover the loss—*held*, that defendants were liable; and this, although under the decisions of the courts of Massachusetts the operators of a railroad, as matter of law, cease to be common carriers and become warehousemen when the duty of transportation is completed and goods are deposited in a warehouse awaiting the orders of the owner or consignee. *Faulkner v. Hart*, 82 *N. Y.* 413, 37 *Am. Rep.* 574; *reversing* 12 *J. & S.* 471.—DISTINGUISHING *Moses v. Boston & M. R. Co.*, 32 *N. H.* 523; *Curtis v. Delaware, L. & W. R. Co.*, 74 *N. Y.* 116.—FOLLOWED IN *Dunham v. Boston & A. R. Co.*, 46 *Hun (N. Y.)* 245, 11 *N. Y. S. R.* 472. REVIEWED IN *Hartmann v. Louisville & N. R. Co.*, 39 *Mo. App.* 88.

336. When notice must be given of arrival of goods.*—Under Cal. Civ. Code, § 2120, a carrier, in order to reduce his liability to that of a warehouseman, as to goods which have arrived at the place of consignment and which have been stored in a warehouse, must notify the consignee of their arrival. The rule laid down in this section is not changed or qualified by §§ 3152 to 3157, inclusive, of the Political Code. *Wilson v. California C. R. Co.*, 94 *Cal.* 166, 29 *Pac. Rep.* 861.

*See also *ante*, 221-235.

Under Cal. Civ. Code, § 2120, as amended in 1874, providing that carriers shall give notice to the consignee of the arrival of goods and keep the same in safety as warehousemen "until the consignee has had a reasonable time to remove them," a company is not liable as carrier where the consignee has had notice of their arrival and they are not taken away, and are destroyed by an accidental fire the night after their arrival; and in the absence of negligence it is not liable as warehouseman. *Hirshfield v. Central Pac. R. Co.*, 7 *Am. & Eng. R. Cas.* 398, 56 *Cal.* 484.

A railroad corporation having transported merchandise to its destination, having unloaded it, and having notified the consignee of its arrival, is not liable as a common carrier, but at most as a warehouseman, for a damage happening to it after the lapse of a reasonable time for its removal. *Stowe v. New York, B. & P. R. Co.*, 113 *Mass.* 521.

A railroad company who have transported freight and afterwards placed it in their warehouse, and who, knowing the consignee, have given him no notice to remove it, are bound, so long as they keep it, to keep it with ordinary care. *Lane v. Boston & A. R. Co.*, 112 *Mass.* 455.

The statute (Paschal's Dig. 445) altering the liability from that of common carriers to that of warehouseman, does not apply where no effort was shown to notify the consignee of the arrival of the goods shipped. *Houston & T. C. R. Co. v. Russell*, 49 *Tex.* 748.

337. When no notice required.—The warehouse or depot at the town or station to which goods are shipped by railroad is the proper place of delivery to the consignee. When they are discharged from the cars and, in the absence of the consignee, are safely stored in the company's warehouse, the liability of the railroad company as a common carrier is terminated, without notice to the consignee of the arrival of the goods. *Bansemer v. Toledo & W. R. Co.*, 25 *Ind.* 434.—QUOTING *Hyde v. Trent & M. Nav. Co.*, 5 *T. R.* 389.—NOT FOLLOWED IN *Leavenworth, L. & G. R. Co. v. Maris*, 16 *Kan.* 333. REVIEWED IN *Jeffersonville R. Co. v. Cleveland*, 2 *Bush (Ky.)* 468.—*Columbus & W. R. Co. v. Ludden*, 42 *Am. & Eng. R. Cas.* 404, 89 *Ala.* 612, 7 *So. Rep.* 471. *Gashweiler v. Wabash, St. L. & P. R. Co.*, 25 *Am. & Eng. R. Cas.* 403, 83 *Mo.* 112, 53 *Am. Rep.* 558.—APPROVING

Norway Plains Co. v. Boston & M. R. Co., 1 Gray (Mass.) 265; Rothschild v. Michigan C. R. Co., 69 Ill. 164; Merchants' Dispatch Transp. Co. v. Hallock, 64 Ill. 284; McCarty v. New York & E. R. Co., 30 Pa. St. 247; Shenk v. Philadelphia S. P. Co., 60 Pa. St. 109; Mohr v. Chicago & N. W. R. Co., 40 Iowa 580; Alabama & T. R. R. Co. v. Kidd, 35 Ala. 209. FOLLOWING Cramer v. American Merchants' Union Exp. Co., 56 Mo. 528. QUOTING Holtzclaw v. Duff, 27 Mo. 395.—NOT FOLLOWED IN Western R. Co. v. Little, 86 Ala. 159.—*Chicago & A. R. Co. v. Scott*, 42 Ill. 132.—APPROVED IN Mohr v. Chicago & N. W. R. Co., 40 Iowa 579. FOLLOWED IN Illinois C. R. Co. v. Friend, 64 Ill. 303. NOT FOLLOWED IN Leavenworth, L. & G. R. Co. v. Maris, 16 Kan. 333; Derosia v. Winona & St. P. R. Co., 18 Minn. 133 (Gil. 119). QUOTED IN Spears v. Spartanburg, U. & C. R. Co., 11 So. Car. 158.

The same rule applies to other corporations using railroads as a means of conveyance, where, by their usage, they merely undertake to deliver the goods at their depots. *Merchants' Dispatch Transp. Co. v. Hallock*, 64 Ill. 284.—FOLLOWING Vincent v. Chicago & A. R. Co., 49 Ill. 33; Illinois C. R. Co. v. Alexander, 20 Ill. 23; Porter v. Chicago & R. I. R. Co., 20 Ill. 407. QUOTING Davis v. Michigan S. & N. I. R. Co., 20 Ill. 412; Norway Plains Co. v. Boston & M. R. Co., 1 Gray (Mass.) 263.—APPROVED IN Gashweiler v. Wabash, St. L. & P. R. Co., 25 Am. & Eng. R. Cas. 403, 83 Mo. 112, 53 Am. Rep. 558. FOLLOWED IN Illinois C. R. Co. v. Friend, 64 Ill. 303; Rothschild v. Michigan C. R. Co., 69 Ill. 164; Cahn v. Michigan C. R. Co., 71 Ill. 96.

No notice to the consignee, where the goods arrive on time, is necessary to reduce the liability of a railroad from that of common carriers to that of warehousemen. *Southwestern R. Co. v. Felder*, 46 Ga. 433, 11 Am. Ry. Rep. 419.—DISTINGUISHING Rome R. Co. v. Sullivan, 14 Ga. 277.

In the absence of proof that the failure to give notice of arrival caused their loss, the carrier is not liable as a warehouseman for their loss. *Mohr v. Chicago & N. W. R. Co.*, 40 Iowa 579.—APPROVING Porter v. Chicago & R. I. R. Co., 20 Ill. 407; Chicago & A. R. Co. v. Scott, 42 Ill. 133; Richards v. Michigan S. & N. I. R. Co., 20 Ill. 404. FOLLOWING Francis v. Dubuque & S. C. R. Co., 25 Iowa 60.—APPROVED IN Gashweiler

v. Wabash, St. L. & P. R. Co., 25 Am. & Eng. R. Cas. 403, 83 Mo. 112, 53 Am. Rep. 558. NOT FOLLOWED IN Western R. Co. v. Little, 86 Ala. 159.

If the notice is given, no other liability grows out of it than that the goods will be retained, free of charge, for the time specified. *Davis v. Michigan S. & N. I. R. Co.*, 20 Ill. 412.—QUOTED IN Merchants' Dispatch Transp. Co. v. Hallock, 64 Ill. 284.

338. When neither personal delivery nor notice required.—A railroad carrier is not bound to deliver to the consignee personally, nor give notice of the arrival of the goods, to change its liability from carrier to warehouseman. Its duty as carrier ends when the goods are safely carried to their place of destination and placed in a warehouse. *Porter v. Chicago & R. I. R. Co.*, 20 Ill. 407.—QUOTING Thomas v. Boston & P. R. Co., 10 Metc. (Mass.) 472.—APPROVED IN Mohr v. Chicago & N. W. R. Co., 40 Iowa 579. FOLLOWED IN Richards v. Michigan S. & N. I. R. Co., 20 Ill. 404; Davis v. Michigan S. & N. I. R. Co., 20 Ill. 412; Merchants' Dispatch Transp. Co. v. Hallock, 64 Ill. 284; Illinois C. R. Co. v. Friend, 64 Ill. 303; Chicago & N. W. R. Co. v. Bensley, 69 Ill. 630.—*Richards v. Michigan S. & N. I. R. Co.*, 20 Ill. 404.—FOLLOWING Porter v. Chicago & R. I. R. Co., 20 Ill. 407.—APPROVED IN Mohr v. Chicago & N. W. R. Co., 40 Iowa 579. FOLLOWED IN Illinois C. R. Co. v. Friend, 64 Ill. 303.—FOLLOWING Porter v. Chicago & R. I. R. Co., 20 Ill. 407; Richards v. Michigan S. & N. I. R. Co., 20 Ill. 404; Chicago & A. R. Co. v. Scott, 42 Ill. 132; Merchants' Dispatch Transp. Co. v. Hallock, 64 Ill. 284.—*Buddy v. Wabash, St. L. & P. R. Co.*, 20 Mo. App. 206.

339. Consignee entitled to reasonable time for removal after arrival.—The liability of a railroad company as a common carrier does not cease on the arrival of the goods at their destination and their deposit there in a warehouse, but continues until the lapse of a reasonable time for the removal of the goods by the consignee; and its liability as a warehouseman does not begin until its liability as a common carrier has ceased. *Columbus & W. R. Co. v. Ludden*, 42 Am. & Eng. R. Cas. 404, 89 Ala. 612, 7 So. Rep. 471.—EXPLAINING Alabama & T. R. R. Co. v. Kidd, 35 Ala. 209. FOLLOWING Louisville & N.

R. Co. v. McGuire, 79 Ala. 395; Moses v. Boston & M. R. Co., 32 N. H. 523; McMillan v. Michigan S. & N. I. R. Co., 16 Mich. 79. NOT FOLLOWING Norway Plains Co. v. Boston & M. R. Co., 1 Gray (Mass.) 263.—APPLIED IN Anniston & A. R. Co. v. Ledbetter, 92 Ala. 326.—*Graves v. Hartford & N. Y. Steamboat Co.*, 38 Conn. 143.—DISTINGUISHING BUT APPROVING Gatliffe v. Bourne, 4 Bing. N. C. 314.

After depositing goods in their warehouse at their place of destination the company keeps them for the exclusive benefit of the owner, whose duty it is to remove them in a reasonable time. *Morris & E. R. Co. v. Ayres*, 29 N. J. L. 393.

After the expiration of such reasonable time the liability of the carrier becomes modified, and it is only bound to exercise ordinary care to secure the safety of the goods. The liability is that of a bailee for hire, and grows out of the original contract. *National Line Steamship Co. v. Smart*, 107 Pa. St. 492.

The responsibility of the carrier continues until the owner or consignee has had a reasonable opportunity, during the hours when such goods are usually delivered there, of examining them so far as to judge from their outward appearance of their identity, and whether they are in a proper condition, and to take them away; and it is the duty of the owner or consignee, under the contract of carriage, to take notice of the course of business at the station of delivery, and of the time of the arrival of the train when his goods may be expected at the place of delivery, and to be ready to receive them in a reasonable time after their arrival, and when in the common course of business they may fairly be expected to be ready for delivery. But if the goods are not called for by the party entitled to receive them after they are ready for delivery, etc., it then becomes the duty of the carrier to store them and preserve them safely and in readiness for delivery, and then the carrier is released from his responsibility as a common carrier for the goods and becomes liable for them as a warehouseman. *Blumenthal v. Brainerd*, 38 Vt. 402.—CRITICISING Norway Plains Co. v. Boston & M. R. Co., 1 Gray (Mass.) 263. FOLLOWING *Moses v. Boston & M. R. Co.*, 32 N. H. 523. REVIEWING AND DISTINGUISHING *Ouimit v. Henshaw*, 35 Vt. 605.

Where the consignee of goods suffers an

interval of several days to elapse after their arrival, and before he calls for them, the railway company's liability as a common carrier ceases and it becomes liable only as a warehouseman, and is not responsible for the destruction of the goods by fire, in the absence of negligence on its part. *Chapman v. Great Western R. Co.*, L. R. 5 Q. B. D. 278, 49 L. J. Q. B. D. 420, 42 L. T. 252, 28 W. R. 566.

340. Consignee entitled to reasonable time for removal after notice.

—The liability of a railroad company as a common carrier continues after the goods have been carried to the place of destination and stored in the depot until the consignee (owner) has had notice and a reasonable time to move them, after which it is only liable as a warehouseman; yet it may stipulate by special contract that its liability as carrier shall cease when the goods have been stored in its depot at the place of destination, being afterwards liable only as warehouseman. *Western R. Co. v. Little*, 37 Am. & Eng. R. Cas. 659, 86 Ala. 159, 5 So. Rep. 563.—APPLYING *South & N. Ala. R. Co. v. Wood*, 66 Ala. 167; *Buckley v. Great Western R. Co.*, 18 Mich. 121. APPROVING *Alabama & T. R. R. Co. v. Kidd*, 35 Ala. 209. FOLLOWING *Louisville & N. R. Co. v. Oden*, 80 Ala. 38. NOT FOLLOWING *Rice v. Hart*, 118 Mass. 201; *Gashweiler v. Wabash, St. L. & P. R. Co.*, 83 Mo. 112; *Rothschild v. Michigan C. R. Co.*, 69 Ill. 164; *McCarty v. New York & E. R. Co.*, 30 Pa. St. 247; *Mohr v. Chicago & N. W. R. Co.*, 40 Iowa 580; *Butler v. East Tenn. & V. R. Co.*, 8 Lea (Tenn.) 32.—APPLIED IN *Anniston & A. R. Co. v. Ledbetter*, 92 Ala. 326.

A company does not remain liable as a common carrier until notice has been given to the consignee of the arrival of goods and a reasonable time has been given for their removal. (Haskell, A. J., dissenting.) *Spears v. Spartanburg, U. & C. R. Co.*, 11 So. Car. 158.

If goods are not removed after notice of their arrival within a reasonable time, the strict liability of a railroad company as a common carrier ceases; and it may charge storage itself or deposit the goods in the warehouse of another, at the risk and expense of the owner. *Rome R. Co. v. Sullivan*, 14 Ga. 277.—NOT FOLLOWED IN *Michigan C. R. Co. v. Hale*, 6 Mich. 243.—*Kennedy v. Mobile & G. R. Co.*, 21 Am. & Eng. R. Cas. 145, 74 Ala. 430.

A common carrier may discharge his liability entirely by placing the goods in a warehouse at the place of destination, or by delivering them safely to some responsible third person who will undertake to keep them safely and deliver them to the consignee when called for, in case the consignee cannot be found, or he refuses or neglects to take them away within a reasonable time after tender or notice. *Cook v. Erie R. Co.*, 58 Barb. (N. Y.) 312.

341. What is a reasonable time.—"Reasonable time" allowed a consignee in which to receive goods is such as would enable one residing in the vicinity of the place of delivery, and who was informed of the probable time of the arrival of the goods and of the course of the carrier's business, to inspect and remove the goods during business hours. When such time has elapsed, the carrier's liability becomes that of a warehouseman. *Bell v. St. Louis & I. M. R. Co.*, 6 Mo. App. 363.

Six days is more than a reasonable time for a carrier to keep goods; and where they have been in his warehouse ready for delivery that length of time his liability as carrier has ceased. *Derosia v. Winona & St. P. R. Co.*, 18 Minn. 133 (Gil. 119), 8 Am. Ry. Rep. 363. *Anniston & A. R. Co. v. Ledbetter*, 92 Ala. 326, 9 So. Rep. 73.—APPLYING *Western R. Co. v. Little*, 86 Ala. 163; *Columbus & W. R. Co. v. Ludden*, 89 Ala. 612.

A piano being forwarded over the defendant's road from Columbus, Ga., to Goodwater, Ala., consigned to a person who lived twenty-eight miles from that town—held, that three days was a reasonable time for its removal, after which the railroad company was liable only as a warehouseman. *Columbus & W. R. Co. v. Ludden*, 42 Am. & Eng. R. Cas. 404, 89 Ala. 612, 7 So. Rep. 471.

The grain which had arrived over defendant's road, consigned to plaintiffs at Duluth, was inspected in part on the 25th and in part on the 26th of November, 1886, and weighed by the state weigh-master and stored by defendant on November 26th in a public warehouse fit for such purposes, for and on behalf of plaintiffs, subject to a general instruction given by the railway companies to all the elevator companies not to issue any warehouse receipts until the paid freight bills were presented. On the afternoon of November 27th (Saturday), between four and five o'clock, the elevator

company gave plaintiffs written notice that the wheat had been placed to their credit, accompanied with a report of the weight and grade. The defendant did not present its freight bill to plaintiffs until November 29th (Monday). The wheat was accidentally destroyed by fire in the elevator on the night of November 27th, without any fault of either party. Held, that defendant's liability as carrier had terminated before the destruction of the property; also, that the instruction not to issue warehouse receipts to consignees until the paid freight bills were presented imposed no condition or restriction upon their issue not imposed by the public warehouse act (Gen. Laws 1885, ch. 144, § 6). *Arthur v. St. Paul & D. R. Co.*, 32 Am. & Eng. R. Cas. 449, 38 Minn. 95, 35 N. W. Rep. 718.

342. What is not a reasonable time.—A consignee is entitled to a reasonable time for the removal of goods. So where goods arrived at their place of destination on one day and are destroyed by fire on the following, the company's liability is that of carrier and not that of warehouseman. *Louisville & N. R. Co. v. McGuire*, 79 Ala. 395.—FOLLOWED IN *Columbus & W. R. Co. v. Ludden*, 89 Ala. 612.

Cotton reached its destination on Friday night, but the consignee was told on Saturday morning that it had not arrived. The cotton was burned on the next day (Sunday). Held, that, under the circumstances, the consignee had not had a reasonable time for the removal of the cotton, and that the company was liable as carriers and not as warehousemen. *Louisville & N. R. Co. v. Oden*, 80 Ala. 38.—FOLLOWED IN *Western R. Co. v. Little*, 86 Ala. 159.

Ten bags of wool, delivered by the plaintiff to the defendants at Exeter, N. H., to be transported to Boston and there delivered to a consignee, were carried over defendant's railroad in a train which arrived at their freight-house in Boston between one and three o'clock in the afternoon. In the usual course of business from two to three hours were required to unload the freight from the cars into the warehouse, and the gates were closed at five o'clock, so that no goods could be removed from the warehouse after that hour until the next morning. During the night the warehouse and most of its contents, including the wool, were consumed by fire. Held, that upon these facts the jury were warranted in finding that

the consignee had not a reasonable opportunity to take the wool into his possession before the fire, and that the defendants were liable as common carriers therefor, notwithstanding it might be proved by them that before the fire the wool had been placed upon the platform in the warehouse, from which such goods were usually delivered, separate from other goods, and ready for delivery. *Moses v. Boston & M. R. Co.*, 32 N. H. 523.—DISTINGUISHED IN *Bansmer v. Toledo & W. R. Co.*, 25 Ind. 434; *Faulkner v. Hart*, 82 N. Y. 413, 37 Am. Rep. 574. FOLLOWED IN *Derosia v. Winona & St. P. R. Co.*, 18 Minn. 133 (Gil. 119); *Blumenthal v. Brainerd*, 38 Vt. 402. NOT FOLLOWED IN *Francis v. Dubuque & S. C. R. Co.*, 25 Iowa 60. REVIEWED IN *Spears v. Spartanburg, U. & C. R. Co.*, 11 So. Car. 158.

Goods arrived at a depot at the place of destination and were unloaded and ready for delivery to the consignee about four o'clock in the afternoon. The depot was closed for the night two hours later, and the goods were destroyed by fire before business hours the next morning. Held, that a finding that the company's liability as common carrier had not ceased, on the ground that the consignee had not had a reasonable time in which to remove the goods, was warranted by the evidence. *Parker v. Milwaukee & St. P. R. Co.*, 30 Wis. 689, 7 Am. Ry. Rep. 255.

343. When question of reasonable time is for the jury.—Where a company is sued for the loss of goods, if there is any doubt or question made as to whether they were lost while the company was liable as common carriers or as warehousemen, the question should be submitted to the jury; and if the jury fail to consider the question upon being especially instructed to do so, it is ground for reversal. *Sessions v. Western R. Corp.*, 16 Gray (Mass.) 132.

It is error to refuse to submit to the jury whether the company's liability was simply that of warehouseman, where the plaintiff's uncontradicted evidence fails to show that the goods were not ready for delivery long enough before they were destroyed to afford a reasonable time for their removal. *Wood v. Milwaukee & St. P. R. Co.*, 27 Wis. 541, 2 Am. Ry. Rep. 342.

Where goods are destroyed in the hands of a carrier after their arrival, the question whether its liability is as carrier or as ware-

houseman depends upon whether the consignee has had a reasonable time in which to remove them; but what is a reasonable time is for the jury. *Wood v. Milwaukee & St. P. R. Co.*, 27 Wis. 541, 2 Am. Ry. Rep. 342.

344. When question of negligence for the jury—Agency.—Where a railway company holding goods as a warehouseman, after the consignee had refused to accept them, makes a delivery to a person who had fraudulently obtained possession of an advice note sent by it to the consignee, it is a question of fact whether the company has, under the circumstances, acted with reasonable care. *Heugh v. London & N. W. R. Co.*, 39 L. J. Ex. 48, L. R. 5 Ex. 51, 21 L. T. 676.—DISTINGUISHED IN *Hurt v. Bott*, 30 L. T. 25.

After a trunk, which had been sent by express, had arrived at the place of destination the owner called and asked permission to open it and take out some of the contents and to leave it until the next day. The agent informed him that he could do so upon paying charges and receipting for the trunk. On the following day it was delivered to persons who were not authorized to receive it. Held, that there had been no sufficient delivery to relieve the company from liability, and it was error to order a nonsuit; but that the question of the company's negligence as warehouseman should have been left to the jury. *Oderkirk v. Fargo*, 34 N. Y. S. R. 166, 58 Hun 347, 11 N. Y. Supp. 871.—REVIEWING *Tarbell v. Royal Exch. Shipping Co.*, 110 N. Y. 170, 17 N. Y. S. R. 153; *Matteson v. New York C. & H. R. R. Co.*, 76 N. Y. 381.

If the arrangement for leaving the trunk was made before the payment of charges and signing the receipt, and with a view to give plaintiff a reasonable opportunity to send for it, it was within the apparent scope of the agent's authority, and would bind the company in the absence of any notice to plaintiff of any restriction on the agent's authority. *Oderkirk v. Fargo*, 34 N. Y. S. R. 166, 58 Hun 347, 11 N. Y. Supp. 871.

345. Michigan rule.—In Michigan, in the absence of an express contract, or one fairly inferable from the nature of the business, the known necessities under which it is carried on, and the established usage on the subject, a common carrier cannot relieve itself from responsibility as such by depositing the goods in its warehouse at the

end of its route. *Black v. Ashley*, 42 *Am. & Eng. R. Cas.* 428, 80 *Mich.* 90, 44 *N. W. Rep.* 1120. *Feige v. Michigan C. R. Co.*, 62 *Mich.* 1, 28 *N. W. Rep.* 685.—REVIEWING *Buckley v. Great Western R. Co.*, 18 *Mich.* 121.

The mere fact that a railroad company possessed a warehousing depot at the end of its route will not raise the legal inference of a right to shift its character of common carrier to warehouseman by immediate deposit in the warehouse, especially if it appear that it was ostensibly employed as carrier only; but it is a question for the jury, upon the facts in evidence, to say whether the company became obliged to act as warehouseman also. *Buckley v. Great Western R. Co.*, 18 *Mich.* 121.

As a general rule, by usage and common custom, railroad carriers may deliver freight at their depots, freight-houses, or stations, and be relieved of the burden of actual delivery at the place of business of the consignee and of their common-law liabilities as common carriers, by notice of the consignee, and reasonable time thereafter to remove them. Persons delivering them goods to carry are supposed, in the absence of special contract, to understand such usage or custom, and to contract with reference to it. *Black v. Ashley*, 42 *Am. & Eng. R. Cas.* 428, 80 *Mich.* 90, 44 *N. W. Rep.* 1120.

346. Liability of Michigan Central Railroad under its charter.—The act to incorporate the Michigan Central Railroad Company, providing that when a certain time has elapsed after notice to consignee of the receipt of property storage may be charged, and that in all cases the company shall be responsible for goods in deposit in any of their depots awaiting delivery, as warehousemen, and not as common carriers, does not exonerate the company from liability as such carriers, in cases where the notice of receipt of property has not been given to the consignee. The language "awaiting delivery" was held to apply to the goods only after the notice given. *Michigan C. R. Co. v. Ward*, 2 *Mich.* 538.

The Michigan Central Railroad Company, under its charter, is liable as warehouseman only, and not as common carrier, for goods transported over its line to Detroit and there deposited in its warehouse awaiting delivery to an intermediate consignee. *Michigan C. R. Co. v. Lantz*, 32 *Mich.* 502,

8 *Am. Ry. Rep.* 74.—ADHERING TO *Michigan C. R. Co. v. Hale*, 6 *Mich.* 243. DISTINGUISHING *Mills v. Michigan C. R. Co.*, 45 *N. Y.* 622; *Michigan C. R. Co. v. Mineral Springs Mfg. Co.*, 16 *Wall. (U. S.)* 318.

Where, by the charter, it was provided that the company may charge and collect a reasonable sum for storage on all property transported by them remaining four days after delivery at their depot; also that the consignee should be notified of the reception four days before storage should be charged, in case the property was not stored at the Detroit depot, and that 24 hours' notice should be given if stored at the Detroit depot; and that the company should be responsible for goods awaiting delivery, as warehousemen, and not as common carriers—*held*, that property on deposit in depots was to be considered as awaiting delivery as soon as it was in condition to be delivered to the consignee when demanded. *Michigan C. R. Co. v. Hale*, 6 *Mich.* 243.—ADHERED TO IN *Michigan C. R. Co. v. Lantz*, 32 *Mich.* 502. RECONCILED IN *Lake Shore & M. S. R. Co. v. Perkins*, 25 *Mich.* 329.

The office of the notice is to fix the right to charge for storage, not to continue the liability of the company as common carriers; if the necessity of the notice to terminate the carriers' liability did not exist without, it was not created by the act, while if it did exist, it is removed by the limitation of the liability to that of warehousemen, when goods are in deposit ready to be delivered, whether such notice is or is not given. *Michigan C. R. Co. v. Hale*, 6 *Mich.* 243.

347. Where goods are held at consignee's request.—Where goods are, pursuant to the directions of the consignee, stored in a warehouse of the carrier, to remain there until they should be called for by a transfer company employed by the plaintiff to deliver the goods to him, the liability of the carrier is reduced to that of an ordinary bailee, and, in case of damage to the goods by fire while they are in the warehouse, the carrier is not liable, in the absence of negligence on its part. *Hartmann v. Louisville & N. R. Co.*, 39 *Mo. App.* 88.

Where a carrier is ready to deliver goods, but on account of the lateness of the hour they are left in the depot overnight, at the request of the consignee, but probably for the convenience of both the consignee and the company's agent, the company has dis-

charged its duty as carrier; and if they are destroyed by fire during the following night, its liability is only that of warehouseman. *Fenner v. Buffalo & S. L. R. Co.*, 44 N. Y. 505; reversing 46 Barb. 103.—FOLLOWED IN *Hedges v. Hudson River R. Co.*, 49 N. Y. 223; *Pelton v. Rensselaer & S. R. Co.*, 54 N. Y. 214. NOT FOLLOWED IN *Leavenworth, L. & G. R. Co. v. Maris*, 16 Kan. 333. REFERRED TO IN *Derosia v. Winona & St. P. R. Co.*, 18 Minn. 133 (Gil. 119).

On the back of the request-note and shipping-receipt given and received by plaintiff on the shipment of goods, and on the freight advice-note, were a number of conditions, one of which was that the company should not be liable for goods left until called for or to order, or warehoused for the convenience of the parties to whom they belonged, and that the warehousing of all goods would be at the owner's risk and expense. On the arrival of the goods they were placed in the warehouse and plaintiff, on the receipt of the freight advice-note, called at the warehouse and obtained permission to leave them there, nothing being said about storage. The goods were subsequently lost. *Held*, that plaintiff could not recover. *Mayer v. Grand Trunk R. Co.*, 31 U. C. C. P. 248.

348. Offer by carrier to deliver.—

When goods sent by a common carrier have arrived at their destination and have been tendered and refused by the consignee, the contract for their carriage has been performed. The carrier may then retain or store the goods for the use of the owner; but if he retain the custody of them, it is as depositary and not as carrier. As such depositary, there being no agreement for compensation, he is liable only for gross negligence. *Kremer v. Southern Exp. Co.*, 6 Coldw. (Tenn.) 356.—APPROVING *Fisk v. Newton*, 1 Den. (N. Y.) 45.

An offer to deliver freight or passenger's baggage, if made at a proper time, discharges the master and owners of a ship or boat from their liability as carriers; and if the freight, etc., remain afterwards in their custody, they hold it as bailees, and are accountable for it according to the terms, express or implied, of such bailment. *Young v. Smith*, 3 Dana (Ky.) 91.

349. Rule requiring removal within a fixed time.—Where a railroad company makes a rule that freight must be taken away within twenty-four hours after

being unloaded, its liability as carrier does not cease where it unloads goods and places them in a warehouse before the expiration of the twenty-four hours, but continues for that length of time, unless the goods are delivered to the owner or some one authorized to receive them. *Angle v. Mississippi & M. R. Co.*, 9 Iowa 487.

If the consignee has knowledge of a regulation and usage of a company that cars must be unloaded within twenty-four hours after notice of their arrival, and that a charge of \$3 per day would be made for cars not so unloaded, he is bound by such regulation, and the company, as warehouseman, has a lien upon the goods for such charges. *Miller v. Mansfield*, 112 Mass. 260.

Where a company keeps posted in its depot a notice that property must be removed within two days after being unloaded from cars, or storage will be charged, and that the liability of the company should only be that of warehouseman, a consignee who asks the privilege of leaving freight in the depot beyond the two days is liable to pay storage charges, according to the public rates of the company, and the company will be liable as a bailee for hire. *Dimmick v. Milwaukee & St. P. R. Co.*, 18 Wis. 471.

Where a company has for a long time kept a printed notice posted in its depot that if goods are not removed in two days after their arrival a charge would be made for storage, proof that a consignee knew of such notice is not necessary to make him liable for a storage charge, where he requests that goods be allowed to remain in the depot. *Dimmick v. Milwaukee & St. P. R. Co.*, 18 Wis. 471.

350. Failure to deliver on demand.*—A carrier had shipped goods to destination and deposited them in its depot at that point. The goods remained in the depot for four days, and were destroyed by fire on the fifth day. On each of the four or five days the consignee's drayman inquired of the carrier's agent for the goods, for the purpose of removing them, and was informed they had not arrived. The fire was not shown to have resulted from the carrier's negligence. *Held*, that the carrier is liable to the consignee for the value of the goods. His liability is, however, that of a warehouseman, not that of a carrier.

* See also *ante*, 91.

negligence consists, not in causing the fire, but in unnecessarily exposing the goods to its ravages. *East Tenn. V. & G. R. Co. v. Kelly*, 55 *Am. & Eng. R. Cas.* 621, 91 *Tenn.* 699, 20 *S. W. Rep.* 312. *Draper v. Delaware & H. Canal Co.*, 42 *Am. & Eng. R. Cas.* 411, 118 *N. Y.* 118, 23 *N. E. Rep.* 131, 27 *N. Y. S. R.* 931; *affirming* 42 *Hun* 654, *mem.*—FOLLOWING *Whitworth v. Erie R. Co.*, 87 *N. Y.* 413.

The carrier's negligence is the proximate cause of the loss, and he is liable as warehouseman for the value of the goods, where they were destroyed by fire not imputable to his negligence, after their deposit in the depot of destination and after the consignee had demanded them and had been erroneously informed by the carrier's agent that they had not arrived. The negligence that caused the loss consisted in withholding the goods and exposing them to the fire. *East Tenn. V. & G. R. Co. v. Kelly*, 55 *Am. & Eng. R. Cas.* 621, 91 *Tenn.* 699, 20 *S. W. Rep.* 312.—DISTINGUISHING *Lamont v. Nashville & C. R. Co.*, 9 *Heisk.* (Tenn.) 58.

After the arrival of goods at the place of destination the consignee called for them, but was told that they had not arrived. Afterward the mistake was discovered and corrected by giving the consignee written notice. The goods were held some two weeks after the notice, and were then destroyed by fire. *Held*, that the consignee had a sufficient time for the removal of the goods after the notice, and that the company was not liable for a loss on the ground of a conversion. *Williams v. Delaware & H. Canal Co.*, 25 *N. Y. S. R.* 518, 53 *Hun* 635, 3 *Silv. Sup. Ct.* 19, 6 *N. Y. Supp.* 36.

351. Where consignee lives at a distance.—Where the consignee of goods does not reside, nor have any known agent at or near the place to which they are consigned, and the carrier does not know where he resides, he may place the goods, on their arrival, in his warehouse, and after a reasonable time, if they are not called for, his liability as a common carrier ceases and becomes that of a warehouseman. *Derosia v. Winona & St. P. R. Co.*, 18 *Minn.* 133 (Gil. 119), 8 *Am. Ry. Rep.* 363.—EXPLAINING *Buckley v. Great Western R. Co.*, 18 *Mich.* 121. FOLLOWING *Moses v. Boston & M. R. Co.*, 32 *N. H.* 523; *Fenner v. Buffalo & S. L. R. Co.*, 44 *N. Y.* 505. NOT FOLLOWING *Norway Plains Co. v. Boston & M. R. Co.*, 1 *Gray* (Mass.) 263; *New Albany & S. R.*

Co. v. Campbell, 12 *Ind.* 55; *Morris & E. R. Co. v. Ayres*, 29 *N. J. L.* 394; *Francis v. Dubuque & S. C. R. Co.*, 25 *Iowa* 60; *Hilliard v. Wilmington & W. R. Co.*, 6 *Jones* (N. Car.) 343; *Chicago & A. R. Co. v. Scott*, 42 *Ill.* 132.—FOLLOWED IN *Pinney v. First Div. St. P. & P. R. Co.*, 19 *Minn.* 251 (Gil. 211).

A carrier is not bound to deliver goods consigned to a point beyond its line and beyond any means of public transportation; but its liability as carrier terminates upon carrying the goods to the nearest station to the consignee's residence and there storing them. But where the goods are sent to the consignee, who refuses to receive them, the carrier's liability is not renewed upon a return of the goods to the warehouse. *Salinger v. Simmons*, 8 *Abb. Pr. N. S. (N. Y.)* 409.

Where the distance on a railroad over which a commodity was carried was very short, and the consignee lived 16 miles from the road, and no agent was present to receive it on its arrival, the depositing of the commodity in the company's warehouse at the point of delivery exonerated it from the liabilities of a common carrier, and it was thenceforth only bound as a warehouseman. *Hilliard v. Wilmington & W. R. Co.*, 6 *Jones* (N. Car.) 343.—FOLLOWED IN *Neal v. Wilmington & W. R. Co.*, 8 *Jones* (N. Car.) 482. NOT FOLLOWED IN *Leavenworth, L. & G. R. Co. v. Maris*, 16 *Kan.* 333; *Derosia v. Winona & St. P. R. Co.*, 18 *Minn.* 133 (Gil. 119). QUOTED IN *Benbow v. North Carolina R. Co.*, *Phil.* (N. Car.) 421; *Chalk v. Charlotte, C. & A. R. Co.*, 9 *Am. & Eng. R. Cas.* 106, 85 *N. Car.* 423.—*Northrop v. Syracuse, B. & N. Y. R. Co.*, 3 *Abb. App. Dec. (N. Y.)* 386, 5 *Abb. Pr. N. S.* 425.

The goods were carried to the station at the place of delivery and placed in the company's shed there used for the purpose of storing goods, where they were subsequently destroyed by fire. The station was some five miles distant from the village where the plaintiff's place of business was. *Held*, that the station was the destination of the goods and not the village, and the shed a warehouse, within the meaning of a condition in the bill of lading terminating the liability of the company when the goods were placed in their warehouse at the destination, and that after the goods were placed there the company's liability was at an end. *Richardson v. Canadian Pac. R. Co.*, 45 *Am. & Eng. R. Cas.* 413, 19 *Ont.* 369.

352. Where goods are "to be left until called for."—A provision in a bill of lading that the railroad will not be responsible for goods left until called for, or warehoused for the convenience of the parties to whom they belong or are consigned, will protect the company only as common carriers, where the goods are promptly carried but allowed to remain an unusual time in a warehouse at a station where it is the custom of the company to deliver freights. It will still be liable as warehousemen. *McCrosson v. Grand Trunk R. Co.*, 23 U. C. C. P. 107.—DISTINGUISHING *Bowie v. Buffalo, B. & G. R. Co.*, 7 U. C. C. P. 191; *O'Neill v. Great Western R. Co.*, 7 U. C. C. P. 203.—DISTINGUISHED IN *Mason v. Grand Trunk R. Co.*, 37 U. C. C. B. 163.

Certain goods were consigned by the defendants' railway to W., addressed to the plaintiff, "to be left till called for." On their arrival at W. they were placed in the station warehouse to await their being called for. Two days afterwards, without fault on the part of the defendants, the warehouse was burned, and the plaintiff's goods were consumed by fire. *Held*, that after the interval of time which the plaintiff had suffered to elapse since the arrival of the goods, the liability of the defendants as common carriers in respect of the goods had ceased, and they had become mere warehousemen, and consequently the defendants were not liable in an action for the loss of the goods, in the absence of any evidence of negligence on their part. *Chapman v. Great Western R. Co.*, 5 Q. B. D. 278, 49 L. J. Q. B. 420, 3 Ry. & C. T. Cas. xi.

353. How delivery may be made at flag stations.—If goods are transported by railroad, consigned to the owner or a third person, and are not called for by the consignee when they arrive at their destination, or within a reasonable time thereafter, and are then deposited by the railroad company in one of its own warehouses, to be kept for the owner or consignee, the company ceases to be liable as a common carrier and becomes liable only as a warehouseman or bailee on deposit; and if the company has no warehouse at that place, it may deposit the goods in the warehouse of a responsible third person, for and on account of the owner or consignee, and thus put an end to its liability as a carrier; but if the company binds itself to de-

liver the goods to its own agent, it becomes liable as a carrier for their transportation, and as a warehouseman for their subsequent safe keeping and delivery; and if its agent deposits the goods in the warehouse of a third person, who by mistake delivers them to a person not authorized to receive them, it is responsible to the owner for them. *Alabama & T. R. R. Co. v. Kidd*, 35 Ala. 209.—APPROVED IN *Gashweiler v. Wabash, St. L. & P. R. Co.*, 25 Am. & Eng. R. Cas. 403, 83 Mo. 112, 53 Am. Rep. 558. DISTINGUISHED IN *Francis v. Dubuque & S. C. R. Co.*, 25 Iowa 60. EXPLAINED IN *Columbus & W. R. Co. v. Ludden*, 89 Ala. 612. FOLLOWED IN *South & N. Ala. R. Co. v. Wood*, 9 Am. & Eng. R. Cas. 419, 66 Ala. 167.

A railroad company is not required by law to keep a warehouse or depot at every station along the line of its road, and may lawfully stipulate, either expressly or by implication, that it will assume no liability as a warehouseman at a "flag station," where it has no depot or agent; and when the consignee is fully advised at the time of shipment that the company has no depot or agent at such station, and it is not shown that the exigencies of its business required that it should have an agent or depot at that place, the liability of the company as a common carrier terminates with the safe delivery of the goods on the side-track at that point, and it assumes no liability as a warehouseman. *South & N. Ala. R. Co. v. Wood*, 9 Am. & Eng. R. Cas. 419, 66 Ala. 167, 41 Am. Rep. 749.

354. Sufficiency of evidence to show negligent loss.—Where a railroad company, after transporting cotton as carriers, unloaded their cars and deposited the cotton in their yard, where it was burned the next evening, the company, without proof as to how the fire occurred, were *held* liable, the jury having found them so, under instructions which regarded them as warehousemen, and liable only for negligence. *Wardlaw v. South Carolina R. Co.*, 11 Rich. (So. Car.) 337.—APPROVED IN *South & N. Ala. R. Co. v. Wood*, 9 Am. & Eng. R. Cas. 419, 66 Ala. 167.

A passing train emitted sparks which ignited cotton on the company's platform, and the fire was communicated to the depot building, and consumed it and its contents, including plaintiff's goods. The engine passed the station at an unusual rate of speed, and when immediately opposite the

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cotton emitted a large quantity of sparks, and the cotton was discovered to be on fire almost immediately thereafter. *Held*, sufficient proof of negligence to charge the company as warehousemen for plaintiff's goods. *Texas & P. R. Co. v. Wever*, 3 *Tex. App. (Civ. Cas.)* 85.

355. Company not suable as carrier after it has become warehouseman.—An action for damages against a railroad company as a common carrier cannot be sustained where the proof shows that, at the time of the loss or injury, the liability as carrier had terminated and the company held the goods merely as warehousemen. *Alabama G. S. R. Co. v. Grabfelder*, 83 *Ala.* 200, 3 *So. Rep.* 432.—FOLLOWING *Kennedy v. Mobile & G. R. Co.*, 74 *Ala.* 430.—*Kennedy v. Mobile & G. R. Co.*, 21 *Am. & Eng. R. Cas.* 145, 74 *Ala.* 430.—FOLLOWED IN *Alabama G. S. R. Co. v. Grabfelder*, 83 *Ala.* 200, 3 *So. Rep.* 432.

356. Burden on company to show that it is only liable as warehouseman.—Where the relation of common carrier is once shown its continuance will be presumed, and the burden of proof will be upon the carrier to show that at the time of loss, without negligence on its part, its liability as insurer had terminated; but when this is done by showing delivery to the consignee, if in the further disposition of the property transported under the contract of the parties, or in the usual course of business, the liability as insurer again attaches, the burden is upon the party relying on such liability to show it. *Peoria & P. U. R. Co. v. United States Rolling Stock Co.*, 136 *Ill.* 643, 27 *N. E. Rep.* 59; reversing 28 *Ill. App.* 79.

357. Where grain is to be unloaded from cars.—Where grain carried by a railroad company is most commonly and conveniently removed directly from the car instead of through a warehouse, the liability of the company as a carrier does not cease and its liability as a warehouseman begin, until the cars are placed in a safe and convenient location for unloading; and the finding of a jury that a car was so placed that it could, but with difficulty, be unloaded, justifies a verdict holding the company liable as a common carrier. *Independence Mills Co. v. Burlington, C. R. & N. R. Co.*, 32 *Am. & Eng. R. Cas.* 456, 72 *Iowa* 535, 34 *N. W. Rep.* 320.

If at the time of the arrival of a car-load
2 D. R. D.—10.

of grain there is in force a prior understanding between a carrier and consignee that all such consignments of grain should, upon their arrival, be placed upon a certain track for the consignee, then it is sufficient for the carrier to so place the grain and notify the consignee thereof, whether such place be a reasonably safe one or not. *Pindell v. St. Louis & H. R. Co.*, 41 *Mo. App.* 84.

358. Where carrier is in habit of delivering to drayman.—Where it is the usage of a dispatch transfer company, upon the request of the consignee, to deliver goods upon their arrival to teamsters not in the employ of the company, and who deliver them to the consignee at his expense, collecting their charges from him, in the absence of such a request the company terminates its liability as a carrier by the storage of the goods in their warehouse. Such a company differs from an express company in that the latter have teams and vehicles by which they receive and deliver goods. *Merchants' Dispatch Transp. Co. v. Hallock*, 64 *Ill.* 284.—DISTINGUISHED IN *Anchor Line v. Knowles*, 66 *Ill.* 150.

359. Where goods are shipped in care of the company.—Where the bill of lading shows that goods were shipped to the owner as consignee, "care of the railroad company," if the goods are transported with the usual expedition, and the owner or his agent is not at the depot designated for the delivery at the time the goods arrive, ready to receive them, the goods may be deposited in a warehouse, and the liability of the company as common carrier ceases. *Mobile & G. R. Co. v. Prewitt*, 46 *Ala.* 63.

360. Rule requiring immediate removal without notice.—A bill of lading for shipment of cotton provided that the company should only be liable as warehousemen after the arrival of cotton at the place of destination and that the consignee should remove it as soon as ready for delivery, but provided for no notice to the consignee of its arrival. *Held*, that such provision was unreasonable and unjust, and would not be enforced. *Louisville & N. R. Co. v. Oden*, 80 *Ala.* 38.

361. Pleadings—Counts charging liability both as carrier and as warehouseman.*—Plaintiff shipped goods at

* Liability of railroad company as carrier and as warehouseman. Single cause of action, see 45 *AM. & ENG. R. CAS.* 422, *abstr.*

two different times to the same place, which were never delivered, the carrier claiming that they had been carried to the place of destination and there destroyed by fire in its depot. *Held*, that it was proper to add counts in each case, charging the company with liability both as carrier and as warehouseman. *Whitney v. Chicago & N. W. R. Co.*, 27 Wis. 327, 5 Am. Ry. Rep. 291.

c. When Liability as Warehouseman Terminates.

362. Upon delivery, actual or constructive.—Where goods arrive at the place of destination and are placed upon the company's platform at the usual place of discharging goods, ready for delivery to the consignee, in good order, and he is notified of their arrival, and pays the freight upon them, the liability of the company as carriers is at an end. If the consignee does not receive the goods, it seems that the carrier must take care of them for a reasonable time; but his liability is that of a warehouseman, and not that of a carrier. But where the consignee has notice of the situation of the goods at the place of delivery, and pays the freight upon them, and afterwards, without neglect on the part of the warehouseman the goods are destroyed, the warehouseman is not liable. *New Albany & S. R. Co. v. Campbell*, 12 Ind. 55.—QUOTING *Hyde v. Trent & M. Nav. Co.*, 5 T. R. 3:9.—NOT FOLLOWED IN *Derosia v. Winona & St. P. R. Co.*, 18 Minn. 133 (Gil. 119).

In an action for damages against a railroad company for the value of goods alleged to have been lost by its negligence, it appeared that after their arrival they were placed on a platform at the depot for the convenience of delivery to consignees, and remained there for nearly two days. Notice of their arrival was given to plaintiff, who paid the freight charges with full knowledge of the place of deposit, but failed to remove them on account of his inability at the time to procure the services of city draymen, and in the afternoon of the second day they were destroyed by fire, together with much of the defendant's property. *Held*: (1) that there was a delivery in law of the goods to plaintiff consignee, which exonerated defendant from liability as a warehouseman; (2) that the fact that the fire originated in a steam cotton-compress,

erected on the company's premises with its permission, but not under its control, did not constitute negligence in defendant, the permission to erect the same not being the proximate cause of the injury. *Chalk v. Charlotte, C. & A. R. Co.*, 9 Am. & Eng. R. Cas. 106, 85 N. Car. 423.—QUOTING *Hilliard v. Wilmington & W. R. Co.*, 6 Jones (N. Car.) 343.

363. What is not a delivery.—The consignee of certain cotton requested a railroad company to place it upon a side-track which passed the platform of a compress company, for the purpose of being unloaded. On the afternoon of the same day the railroad company placed the cars containing the cotton on the side-track, but failed to notify either the consignee or the compress company. Shortly thereafter the cotton was destroyed by fire. *Held*, that under the provisions of the Texas statute, that railroad companies shall continue liable as common carriers until delivery to the consignee at the point of destination, and that if the carrier at the point of destination shall use due diligence to notify the consignee, and goods are not taken by the consignee, but are stored in the depots and warehouses of the carrier, the carrier shall thereafter only be liable as warehouseman, the company remained liable, notwithstanding the fact that it had placed the cotton on a side-track, as directed. *Missouri Pac. R. Co. v. Haynes*, 37 Am. & Eng. R. Cas. 645, 72 Tex. 175, 10 S. W. Rep. 398.

364. Goods may remain in warehouse a reasonable time—Illness of owner.—The plaintiff shipped goods from Indiana to California and paid the freight thereon, the consignment being made to herself. The shipper was taken ill on the way to California, and notified the company that she could not arrive in time to receive the goods on account of sickness, asking that the goods be stored in a fire-proof warehouse. Upon receipt of this letter the company replied that the goods were stored in its warehouse, and held subject to her order. The letter, not being addressed according to the directions given by the plaintiff, was returned to the defendant two months after it was written. The evidence of the plaintiff tended to prove that no notice had ever been given of the arrival of the goods. *Held*, that the court properly refused to instruct the jury that the reasonable time within which

plaintiff should have removed her goods was limited to three months from the date of their arrival. *Wilson v. California C. R. Co.*, 55 *Am. & Eng. R. Cas.* 625, 94 *Cal.* 166, 29 *Pac. Rep.* 861.

365. Failure to deliver renders company liable on original contract to carry.—A failure of a carrier to deliver the goods carried on demand, without lawful excuse, even after the transit has ceased and the goods have been stored in a warehouse at the place of consignment, is a breach of the carrier's original contract, for which suit may be brought upon that contract. *Wilson v. California C. R. Co.*, 55 *Am. & Eng. R. Cas.* 625, 94 *Cal.* 166, 29 *Pac. Rep.* 861.

*d. Duty of Company to Safely Store.**

366. Duty to store, generally.—If a consignee neglects to remove goods in order to relieve himself from responsibility, the carrier must place the goods in a warehouse for and on account of the consignee. So long as he has the custody of the goods a duty devolves upon him to take care of them and preserve them from injury. *Scheu v. Benedict*, 116 *N. Y.* 510; 22 *N. E. Rep.* 1073, 27 *N. Y. S. R.* 526.

Where the consignee of several car-loads of corn, after notice of the arrival of the grain, fails to receive the same or designate any place of delivery, the carrier may not abandon the grain; but it will be required to exercise ordinary and reasonable care for its preservation, as warehouseman. In the exercise of such care the carrier may leave it in the cars or store it in its own warehouse, assuming the liability of bailee or warehouseman therefor. *Gregg v. Illinois C. R. Co.*, 147 *Ill.* 550, 35 *N. E. Rep.* 343.

In such case the carrier may, with the exercise of like degree of care in selecting a responsible and safe depository, store the grain in an elevator or warehouse at the expense and risk of the owner, and thereby discharge itself from further liability. If the grain is stored in a safe warehouse, the carrier will not be held liable for the injury of the same by an unprecedented flood, which could not have been anticipated or guarded against. But even if the injury is the result of negligence on the part of the warehouseman, the carrier will not be liable

therefor. *Gregg v. Illinois C. R. Co.*, 147 *Ill.* 550, 35 *N. E. Rep.* 343.

Sections 3152 to 3157 of *Cal. Code*, the general subject of which is "Unclaimed Property," which do not purport to describe the duties of common carriers, cannot be held to qualify § 2120 of the Code, the subject of which is "Obligations of Carriers," particularly describing and defining the obligations and duties of common carriers. *Wilson v. California C. R. Co.*, 55 *Am. & Eng. R. Cas.* 625, 94 *Cal.* 166, 29 *Pac. Rep.* 861.

367. Duty to provide safe warehouse and to employ careful servants.—It is the duty of a railway company to keep its warehouses in as safe a condition, and provided with such means and appliances, if any, for extinguishing fires, as ordinarily prudent and cautious men would do under like circumstances. *Leland v. Chicago, M. & St. P. R. Co.*, (Iowa) 21 *Am. & Eng. R. Cas.* 108, 23 *N. W. Rep.* 390.

Hence it follows that when the carrier is charged with negligence in failing to provide such buildings, evidence of the character of a freight depot, the materials of which it is composed, its liability to take fire, and facts of like nature, is admissible. *Whitney v. Chicago & N. W. R. Co.*, 27 *Wis.* 327, 5 *Am. Ry. Rep.* 291.

As warehouseman a company is bound to ordinary care and diligence. It must provide a safe building for storage and place it in charge of careful and prudent servants; and if the goods are threatened by fire, it is the duty of the servants to use ordinary diligence to remove them before they are consumed. *Chicago & A. R. Co. v. Scott*, 42 *Ill.* 132.

Where a carrier is acting as warehouseman it is responsible for due care in storing goods in a place of reasonable safety, and is only liable for its own negligence or that of its servants in the course of their employment. It is not charged with negligence of servants in not saving goods from destruction by an accidental fire at night, when such services are not in the ordinary scope of their employment. *Aldrich v. Boston & W. R. Co.*, 100 *Mass.* 31.—DISTINGUISHED IN *Galveston, H. & S. A. R. Co. v. Smith*, 81 *Tex.* 479.

Although the bill of lading is silent on the subject, it is the duty of a common carrier, which becomes a part of its contract,

* See also *ante*, 216, 240.

to provide a place where goods may be safely kept after they have been unloaded from the cars in which shipment is made. *Merchants' D. & T. Co. v. Merriam*, 31 *Am. & Eng. R. Cas.* 78, 111, *Ind.* 5, 11 *N. E. Rep.* 954.

368. C. O. D. goods — Notice to consignor.—A common carrier of C. O. D. goods is only required to carry the goods to the place of destination and notify the consignee. If the consignee does not refuse to accept them, but delays the taking of them away, after the lapse of a reasonable time, the carrier may store them until they are called for; and the carrier need not notify the consignor of the delay. *Weed v. Barney*, 45 *N. Y.* 344. — FOLLOWED IN *Grossman v. Fargo*, 6 *Hun* (N. Y.) 310. REVIEWED IN *Hasse v. American Exp. Co.*, 94 *Mich.* 133.

369. Liability for loss through unprecedented storm.—Where a carrier has provided a safe place for the storage of goods, except as against extraordinary events, it is not liable for a loss of goods while in the warehouse caused by an unprecedented storm and a flood such as had occurred only twice in a generation. *Pearce v. The Thomas Newton*, 41 *Fed. Rep.* 106.

370. Storing powder with other goods.—A fire occurring in defendant company's warehouse where plaintiff's goods were stored, there being a large quantity of powder in the same, if the firemen who resorted to the place for the purpose of extinguishing the fire were, by the presence of the powder in the house, hindered and prevented from saving plaintiff's goods, the powder may be regarded as the proximate cause of the loss. *White v. Colorado C. R. Co.*, 3 *McCrory* (U. S.) 559.

In such a case the question of negligence is not for the jury, and the court may declare that the storing of powder in the same house with plaintiff's goods, such house being located in the city where there was danger from fire, was negligent conduct on the part of the defendant. *White v. Colorado C. R. Co.*, 3 *McCrory* (U. S.) 559.

371. Storage can only be at place of destination.—After a carrier has contracted to carry goods to a designated point he cannot store them at an intermediate point, on the ground that he believes a further carriage unsafe. If there were any reasons for doubting the safety of the method of transportation over the whole

route, the shipper should have been notified of the fact at the time of delivery of the goods to the carrier. *Van Winkle v. Adams Exp. Co.*, 3 *Robt.* (N. Y.) 59.

372. Right to charge for storage.—A railroad company is bound to carry freight safely to the place of destination and there to safely deposit it in their warehouse, and to store it without extra charge until the consignee has a reasonable opportunity to remove it. *Morris & E. R. Co. v. Ayres*, 29 *N. J. L.* 393. — NOT FOLLOWED IN *Derosia v. Winona & St. P. R. Co.*, 18 *Minn.* 133 (Gil. 119). — *Bansemmer v. Toledo & W. R. Co.*, 25 *Ind.* 434. — DISTINGUISHING *Moses v. Boston & M. R. Co.*, 32 *N. H.* 523.

If a depot be used as a warehouse, the company has a right to charge a reasonable compensation, the same as other warehousemen. *Illinois C. R. Co. v. Alexander*, 20 *Ill.* 23.

e. Connecting Carriers.*

373. When initial carrier may store at end of his line.—When a bill of lading shows goods are to be forwarded to a particular place, which is short of their place of destination, and the consignor has been a frequent shipper by the same line, and was in the habit of receiving like bills of lading, it will be presumed he was familiar with its contents, and if promptly carried to the place specified in the contract, and there safely stored, and they are burned without fault on the part of the carrier, no recovery can be had. *Merchants' D. & T. Co. v. Moore*, 88 *Ill.* 136, 21 *Am. Ry. Rep.* 293. — EXPLAINED IN *Erie & W. Transp. Co. v. Dater*, 91 *Ill.* 195.

A railroad received goods to be carried to the end of its line and to be forwarded thence to their destination over another line. The bill of lading limited the company's liability to its line. The goods were carried to the end of the line receiving them and stored in a warehouse, where they were destroyed by fire. *Held*, that the road's liability as a common carrier ended when the goods reached the end of its line. *Armstrong v. Grand Trunk R. Co.*, 18 *New Brun.* 445.

374. When liability as insurer continues until delivery to next carrier.—Where a carrier receives goods for trans-

* See also *ante*, 87, 208, and *post*, 621.

portation over his line, and then to be delivered to another line, he cannot relieve himself of the liability of insurer until he has actually delivered them to the next carrier. If the next carrier is not ready to receive them, and he stores them in a warehouse, the goods will still be considered in transit, and his liability will not be changed to that of warehouseman. That is the case only when the goods have reached their final destination. *Illinois C. R. Co. v. Mitchell*, 68 Ill. 471.—QUOTING *Goold v. Chapin*, 20 N. Y. 259; *Michigan C. R. Co. v. Mineral Springs Mfg. Co.*, 16 Wall. (U. S.) 318.

A railroad company received goods which were to be transported by water beyond its line. It contracted to carry the goods to the end of its line and deliver them "on board." The goods were carried to the end of its line and placed in its depot, where they were soon after destroyed by fire. *Held*, that the words "on board" meant that the goods were to be carried to the end of the railroad and delivered on board some suitable vessel; and therefore the company's liability as common carrier had not terminated at the time of the fire. *Moore v. Michigan C. R. Co.*, 3 Mich. 23.—DISTINGUISHING *Garside v. Trent & M. Nav. Co.*, 4 T. R. 581.

A condition in a bill of lading was that goods addressed to places beyond the defendants' line, and respecting which no direction to the contrary should have been received, would be forwarded by the defendants as opportunity might offer, by public carriers or otherwise, or might be suffered to remain in the defendants' warehouse at the risk of the owner; but that the delivery by the defendants should be considered complete, and their responsibility cease when the other carriers should have received notice that the defendants were prepared to deliver the goods to them; and that the defendants would not be responsible for any loss or detention after arrival at their station nearest the place of consignment. Plaintiff alleged that the goods were delivered to the defendants to be carried from Montreal to Peterborough, subject to this condition (setting it out), amongst others, and averred that the defendants did not forward the goods to Peterborough within a reasonable time, but, on the contrary, detained them at Port Hope, the end of their line, in their warehouse. *Held*, that

defendants were charged as carriers, and were so acting, not as warehousemen. *Mason v. Grand Trunk R. Co.*, 37 U. C. Q. B. 163.—DISTINGUISHING *McCrosson v. Grand Trunk R. Co.*, 23 U. C. C. P. 107.

VII. COMPANY'S LIEN FOR CHARGES.*

1. Generally.

375. Carrier's lien, generally.—A railroad company has a lien upon goods carried for reasonable freight charges, and may hold them until the charges are paid. *Galena & C. U. R. Co. v. Rae*, 18 Ill. 488.

The carrier has a lien upon the goods for freight and for expenses necessarily incurred in preserving them, which continues fifteen days after their delivery to the consignee, if the goods remain in his possession so long. *Mississippi Valley Transp. Co. v. Fosdick, Man. (La.)* 3.

To justify a lien upon goods for their freight the relation of debtor and creditor must exist between their owner and the carrier, so that an action at law might be maintained for the payment of the debt sought to be enforced by the lien. *Fitch v. Newberry*, 1 Dougl. (Mich.) 1.

A common carrier receiving goods in the ordinary course of business and in the proper line of transit has a lien for the freight and charges paid, although the goods may have suffered damage before they reached him, while in the hands of some preceding carrier. *Bowman v. Hilton*, 11 Ohio 303.

A carrier's lien must be exercised subject to the obligation of keeping the goods so as reasonably to allow the consignee to take possession of them on payment of the charge. *Great Western R. Co. v. Crouch*, 3 H. & N. 183, 4 Jur. N. S. 457, 27 L. J. Ex. 345.

If the failure to deliver the goods on demand of the consignee is not placed on the ground of a lien for charges, or the non-payment thereof, the carrier cannot set up such lien or non-payment in defense of a subsequent action for the loss of goods. *Louisville & N. R. Co. v. McGuire*, 79 Ala. 395.

376. Salvage charge.—Where goods are shipped by water to be delivered to the consignee upon payment of "freight and charges," salvage paid by the carrier in recovering a sunken cargo is "charges."

* Carrier's lien for freight, see notes, 9 AM. & ENG. R. CAS. 45, 3 Id. 425, 4 L. R. A. 376.

within the meaning of the bill of lading, and constitutes a lien upon the goods, as well as the ordinary freight charges. *Chicago & S. W. R. Co. v. Northwestern Union Packet Co.*, 38 Iowa 377.

377. Demurrage charge.—The injury, inconvenience, and expense which a carrier may suffer by reason of the consignee not unloading goods from cars within a reasonable time constitute a claim in the nature of demurrage, but do not give the carrier a lien upon the goods, such as he has for freight charges. *Crommelin v. New York & H. R. Co.*, 1 Abb. App. Dec. (N. Y.) 472, 4 Keyes 90. *East Tenn., V. & G. R. Co. v. Hunt*, 15 Lea (Tenn.) 261.

The right to demurrage does not attach to carriers by railroads. If it exists at all as a legal right it is confined to the maritime law, and only exists as to carriers by sea-going vessels, and even then it is believed to exist alone by contract. *Chicago & N. W. R. Co. v. Jenkins*, 9 Am. & Eng. R. Cas. 113, 103 Ill. 588.—DISAPPROVED IN *Miller v. Georgia R. & B. Co.*, 88 Ga. 563.

378. Lien on government goods.—A carrier has a lien for freight charges on the property of the general government carried, and may hold it as against a replevin suit instituted by the government to recover it without paying charges. *Union Pac. R. Co. v. United States*, 2 Wyom. 170.

379. Lien for customs duties advanced.—A railroad company who takes up imported goods and advances the government tariff duties thereon, and carries them to the consignee, has a lien on the goods for such duties advanced. *Guesnard v. Louisville & N. R. Co.*, 23 Am. & Eng. R. Cas. 691, 76 Ala. 453.

380. Lien under English statutes.—Under Railways Clauses Consolidation Act 1845 (8 & 9 Vict. c. 20), § 97, a company cannot detain wagons for tolls due, when such wagons do not belong to persons from whom tolls were due, or when the tolls were not due for goods carried in the wagons. *Manchester, S. & L. R. Co. v. North C. Wagon Co.*, 13 App. Cas. 554, 6 Ry. & C. T.

* See also *ante*, 244.

Right of company to make demurrage charge for detention of cars, see note, 22 L. R. A. 530.

Right to impose demurrage charges for detention of cars, see 50 AM. & ENG. R. CAS. 88, *abstr.*

Right of railroad companies to impose demurrage charges for detention of cars, see AM. & ENG. R. CAS. 335, *abstr.*

Cas. lxix.; affirming 35 Ch. D. 191, which reversed 32 Ch. D. 477.

A railway company claimed, under the Railways Clauses Consolidation Act 1845 (8 & 9 Vict. c. 20), § 97, to detain wagons belonging to the respondent for tolls due from the B. Co. for the carriage of goods in the wagons. *Held*, that the claim could not be sustained under the earlier or the later part of section 97; not under the later, because the wagons did not belong to the persons from whom the tolls were due; not under the earlier, because that part of the section does not entitle a railway company to detain wagons for tolls due only in respect of the goods carried in such wagons. *Manchester, S. & L. R. Co. v. North Cent. Wagon Co.*, 13 App. Cas. 554, 6 Ry. & C. T. Cas. lxix.; affirming 35 Ch. D. 191, which reversed 32 Ch. D. 477.

The 8 & 9 Vict. c. 20, § 97, gives no lien upon goods for tolls or charges due to the company for other goods previously conveyed, but only for tolls previously due for the use of the line by persons conveying goods in their own carriages. *Wallis v. London & S. W. R. Co.*, L. R. 5 Ex. 62, 39 L. J. Ex. 57, 18 W. R. 347, 21 L. T. 675.

The plaintiff consigned certain goods for carriage by the defendants to the consignee's address. The consignment note, which was signed by the plaintiff, contained a condition that "all goods delivered to the company will be received and held by them subject to a general lien for money due to them, whether for carriage of such goods or for other charges. *Held*, that the lien continued so long as the company held the goods, and was in no way affected by the refusal of the consignee to accept the goods after they had arrived at their destination. *Westfield v. Great Western R. Co.*, 52 L. J. Q. B. D. 276, 4 Ry. & C. T. Cas. xvi.

A railway company being a creditor of a company wound up under the Companies Act, but carrying on business by the official liquidator, cannot exercise a general lien on the company's goods for the whole amount due it, by virtue of an agreement made between it and the company previous to the winding up. *Wiltshire Iron Co. v. Great Western R. Co.*, 40 L. J. Q. B. 43, L. R. 6 Q. B. 101, 19 W. R. 177; affirmed in 40 L. J. Q. B. 308, L. R. 6 Q. B. 776, 19 W. R. 935. *Ex parte Great Western R. Co.*, L. R. 22 Ch. D. 470, 52 L. J. Ch. D. 734, 48 L. T. 196, 31 W. R. 419, 4 Ry. & C. T. Cas. xvi.

381. The implied promise to pay charges.—When goods are carried under a bill of lading by which they are to be delivered to a consignee, "he paying the freight therefor," if he accepts the goods the law implies a promise that he will pay the freight, or if he accepts the goods, knowing that the carrier looks to him for the charges, he thereby impliedly agrees to pay the charges. *Old Colony R. Co. v. Wilder*, 21 *Am. & Eng. R. Cas.* 41, 137 *Mass.* 536.

But where a party orders goods at a certain fixed price delivered, there is no implied promise to pay the charges by acceptance of the goods, where they are delivered without any demand by the carrier for the amount of the charges, and without any notice that the carrier looked to him for them, though the goods had been shipped marked "collect freight at other end;" and the consignee will not be liable for the charges unless there is express promise to pay them. *Old Colony R. Co. v. Wilder*, 21 *Am. & Eng. R. Cas.* 41, 137 *Mass.* 536.

382. No lien on goods received from a wrong-doer.—A carrier receiving goods from a tortious holder has no lien on them against the owner, but a carrier receiving goods from one who, by the owner's act, has been clothed with an apparent authority, has a lien on them against such owner. *Vaughan v. Providence & W. R. Co.*, 9 *Am. & Eng. R. Cas.* 41, 13 *R. I.* 578. *Robinson v. Baker*, 5 *Cush. (Mass.)* 137.—FOLLOWED IN *Clark v. Lowell & L. R. Co.*, 9 *Gray (Mass.)* 231.

A common carrier, receiving goods from a wrong-doer, has no lien thereon against the rightful owner, even for freight which he has paid to a previous carrier, by whom the owner had directed them to be carried. *Stevens v. Boston & W. R. Corp.*, 8 *Gray (Mass.)* 262.

A common carrier receiving property from a person not authorized to direct its shipment has no lien for his services and no right to retain the property. *Pingree v. Detroit, L. & N. R. Co.*, 66 *Mich.* 143, 9 *West. Rep.* 703, 33 *N. W. Rep.* 298.—QUOTED IN *Kohn v. Richmond & D. R. Co.*, 37 *So. Car.* 1.

383. Superiority of lien.—The lien of the carrier for charges for carriage of the specific articles is prior to the rights of the vendor, and the carrier may insist upon retaining possession until those charges are paid. And an officer holding process against the vendee may lawfully advance

these charges to the carrier on taking possession of the goods, and having so advanced them is substituted to all the carrier's rights of possession as security therefor. *Rucker v. Donovan*, 13 *Kan.* 251.

The lien of the carrier and warehouseman for keeping the property is superior to that of a pledgee who had procured the property to be transported and stored. *Cooley v. Minnesota Transfer R. Co.*, 55 *Am. & Eng. R. Cas.* 616, 53 *Minn.* 327, 55 *N. W. Rep.* 141.

Where a carrier of freight for hire stores the goods in a warehouse at the port of destination, the charges of the warehouse-keeper for storage forms a privilege on the goods superior in rank to that of the carrier for the freight. *Powers v. Sixty Tons of Marble*, 21 *La. Ann.* 402.

Where goods have been shipped, the ship-owner has a lien for freight, expenses, and charges, and for his liability upon outstanding bills of lading; and a sheriff cannot by virtue of an attachment or other process against the shipper take the goods without first giving indemnity, as provided by the New York act of 1841, ch. 242. If the sheriff seize the goods without furnishing the indemnity the ship-owner is entitled to recover the full value of the goods in an action for the unlawful taking. *Campbell v. Conner*, 70 *N. Y.* 424.

384. Lien of last carrier—Prepayment.—A second carrier receiving goods from the initial carrier, with notice that the shipper has paid the freight charges in advance for a through transportation, has no lien on the goods for its share of the charges. *Marsh v. Union Pac. R. Co.*, 6 *Am. & Eng. R. Cas.* 359, 3 *McCrary (U. S.)* 236, 9 *Fed. Rep.* 873.

Where goods are shipped to pass over two roads, the lien of the second road for freight charges is not defeated because the agent of the first marks the goods "freight charges paid through," where only a portion of the charges were paid, and where the agent had no authority to contract for the second road, and no agreement or arrangement of any kind existed between the two roads in reference to shipments of freights. *Wolf v. Hough*, 22 *Kan.* 659.

Cotton was forwarded from Louisiana to be delivered in Providence, R. I., "rates guaranteed to Providence." By the error of some intermediate carrier the destination, Providence, was changed to Chicago

Mass., whence, by the owner's direction, the P. & W. R. Co., after paying charges, brought it to Providence. The owner refused to refund to the P. & W. R. Co. its charges for freight paid and replevied the cotton. *Held*, that the P. & W. R. Co. had a lien on the cotton for its freight and charges for back freight paid. *Vaughan v. Providence & W. R. Co.*, 9 Am. & Eng. R. Cas. 41, 13 R. I. 578.

A railroad company received goods to be carried over its own and connecting lines, and, without the knowledge of the connecting lines, guaranteed a through freight rate, which was less than the aggregate amount of the freight rates of each line separately at usual rates, but expressly stipulated that its liability as carrier should not extend beyond its own line. *Held*: (1) not a through contract; (2) that the second carrier, and all thereafter, might charge the usual rates, and where each succeeding carrier paid the charges to the next preceding one, the last carrier would have a lien on the goods for the whole of the charges; (3) but the shipper might sue the first carrier on the guaranty for any charges he might have to pay above the guaranteed rate. *Schneider v. Evans*, 25 Wis. 241.

385. No lien for individual debt.

—A common carrier cannot seize goods for a debt due himself individually and wholly unconnected with the shipment, while they are in transit, and for the safe carriage and delivery of which he has given a bill of lading. He cannot protect his private interests at the expense of his public duty as a carrier. *Pharr v. Collins*, 35 La. Ann. 939, 48 Am. Rep. 251.

The carrier is in some sort a public officer, invested with power, burdened by duty, and held to responsibility. He cannot by his own act prevent himself from doing his duty. He cannot place an obstacle in the way of performing his contract, and then plead that obstacle as an excuse for not performing it. *Pharr v. Collins*, 35 La. Ann. 939, 48 Am. Rep. 251.

386. Where agent of shipper exceeds his authority in contracting for charges.—A carrier of goods received from a firm of commission merchants in San Francisco certain wheat belonging to the plaintiff for transportation to Europe. The wheat was received under a contract with the firm in their own name, but in the course of a business which the carrier knew

or had reason to believe was conducted by them merely as agents. The plaintiff had consigned the wheat to the firm with special instructions as to its transportation, and in delivering the same to the carrier under the contract referred to, they exceeded their authority. The firm failed, and on inquiry subsequently made in regard to the wheat, the plaintiff ascertained the terms and conditions of the contract with the carrier, and thereupon demanded the wheat, which the carrier refused to deliver, repudiating the plaintiff as the owner, and claiming a lien upon the wheat for charges arising under the contract. As to a large portion of these charges, the firm had no authority to bind the plaintiff, and no payment or tender was made by him. In an action of replevin to recover the wheat—*held*, that the carrier was put upon inquiry as to the agency and authority of the firm, that the plaintiff was not bound by the contract, and that no payment or tender was required before commencing the action. *Hayes v. Campbell*, 63 Cal. 143.

387. Lien for general balance.*

A stipulation in a bill of lading that the carrier shall be entitled to retain the goods as security for a general balance due to them by the consignor is invalid as against the right of the consignee to obtain delivery of the goods. *Bacharach v. Chester Freight Line*, 42 Am. & Eng. R. Cas. 362, 133 Pa. St. 414, 19 Atl. Rep. 409.

A railway company, on service of a writ of *saisie-arret*, made a declaration claiming a privilege on the proceeds of goods belonging to the defendant for a balance of freight due, according to a printed condition on certain receipt-notes, the goods having been sold by consent of the defendant, after his insolvency, for the benefit of whom it might concern. *Held*, that proof of the defendant having received many receipt-notes containing the condition referred to, and that such receipt-notes had been used by the company for years, and had not been objected to by the defendant, did not constitute an agreement that the company should have general lien. *Fitzpatrick v. Cusack*, 12 Low. Can. 306.

388. Where the goods are replevied.—As a rule, a common carrier is entitled to a lien for freight upon goods

* Lien of carrier for general balance, see note, 42 AM. & ENG. R. CAS. 364.

carried, which extends to all the freight upon the goods throughout their transportation, which may be advanced by the last carrier; but a delivery of the goods to the consignee without exacting payment of the freight is a waiver of the lien; but when the consignee offers to pay the freight really due, the refusal of the carrier to deliver them is a breach of the contract, and he may maintain assumpsit, or detinue, or trover for their conversion, without a formal tender or payment of the real amount of freight charges in the court. *Long v. Mobile & M. R. Co.*, 51 Ala. 512.

Where goods are shipped by rail, the company, having obtained possession lawfully, will have the right to hold them until the freight actually due is paid or tendered, and a demand is made. If too much freight is charged the owner should tender the proper amount before bringing replevin. The tender is too late after the suit is commenced. *Ohio & M. R. Co. v. Noe*, 77 Ill. 513.

Where a common carrier became liable to the owner of goods for damage, which he sustained by the fault of the carrier in their transportation, to an amount larger than the carrier's charge for the freight, and the carrier refused to deliver them upon being demanded, until the freight charge was paid—*held*, that, as the carrier's lien was only co-extensive with the right to claim and recover freight, his detention was unlawful, and the owner could maintain replevin therefor. The question as to the carrier's right to freight and of his liability for damage can as well be tried in this action as in any other mode of suit and procedure. *Dyer v. Grand Trunk R. Co.*, 42 Vt. 441.—*REVIEWING Cutting v. Grand Trunk R. Co.*, 13 Allen (Mass.) 381; *Boston & M. R. Co. v. Brown*, 15 Gray (Mass.) 223.

The goods in question were bought by the plaintiff in Vermont of a dealer in Detroit, who, to make out a car-load, put in about forty-three dollars' worth more than the plaintiff had ordered and sent the money to pay for; and the defendants voluntarily advanced that amount when they took the goods, without the knowledge or request of the plaintiff. The defendants claimed freight for the whole, and for the money advanced, and the plaintiff replevied the whole without repudiating the acts of the defendants in advancing said amount. *Held*, that the conduct of the parties was a

ratification by them of the transaction as an authorized purchase by the plaintiff, and an authorized payment on his account by the defendants; and the replevin is maintainable. *Dyer v. Grand Trunk R. Co.*, 42 Vt. 441.

2. How Lien is Lost—Enforcement.

a. How Lost.

389. By voluntary delivery.—The lien of a common carrier for freight or transportation of property is lost by the voluntary surrender of the possession. *Wingard v. Banning*, 39 Cal. 543. *Gregg v. Illinois C. R. Co.*, 147 Ill. 550, 35 N. E. Rep. 343. *Reineman v. Covington, C. & B. R. Co.*, 51 Iowa 338, 1 N. W. Rep. 619.

Whether the lien is waived or not by a delivery does not depend upon the intention of the carrier, or of his agent by whom the delivery is made, if it be not communicated to the consignee and agreed to by him. *Bigelow v. Heaton*, 4 Den. (N. Y.) 496.

The general lien of a carrier, arising by virtue of special contract, continues so long as it holds the goods, and is in no way affected by the refusal of the consignee to accept them. *Westfield v. Great Western R. Co.*, 52 L. J. Q. B. 276.

A railroad delivered to E. certain goods which were consigned to him, and received from him the freight therefor. The goods were received in good faith by E., who had ordered them from the consignors. It appeared that they were sent to E., subject to the order of R., who demanded them of the company. The company then brought the replevin. *Held*, that by surrendering the goods to E. the lien of the company was released, and they could not resume possession of the property, and that the action of replevin could not be maintained. *Lake Shore & M. S. R. Co. v. Ellsey*, 85 Pa. St. 283, 18 Am. Ry. Rep. 413.

Plaintiff employed one B. to pack some furniture and send it to him by defendant's railway. B. did so, and received his charges for packing from defendants, who were authorized by him to collect them. *Held*, that the defendants could legally retain the goods for these charges as well as for their freight, and that B.'s lien was not lost by delivering the goods to defendants for carriage subject to it, or by accepting the charges from defendants. *Hayward v. Grand Trunk R. Co.*, 32 U. C. Q. B. 392.

300. By diverting goods from designated route.*—The lien of a common carrier on goods transported depends on the contract with the owner. Ordinarily the law implies such lien, and it will be held that, in delivering goods to be carried, the owner assents to the condition that the carrier may retain possession of the goods until his reasonable charges have been paid, although nothing may be said on the subject. But when goods are sent, not according to the contract with the owner but by some other route, there is no lien for freight money; nor in case of prepayment of the freight upon contract for through rate. *Marsh v. Union Pac. R. Co.*, 6 Am. & Eng. R. Cas. 359, 3 *McCrary (U. S.)* 236, 9 *Fed. Rep.* 873.—NOT FOLLOWED IN *Crossan v. New York & N. E. R. Co.*, 40 Am. & Eng. R. Cas. 136, 149 *Mass.* 196.

If goods were shipped over a connecting line of roads, and there were two routes by which the terminal point could be reached, one of which was designated by direction of the consignee, who was also the owner, but they were, in fact, sent to the terminal point by the other route, if the road so wrongly receiving them knew of the direction as to their shipment when it received them, its transportation of the goods would be voluntary; it would have no right to charge freight for transportation, would have no lien on the goods for such charges, and could not retain possession for the purpose of collecting them. *Bird v. Georgia R. Co.*, 27 Am. & Eng. R. Cas. 39, 72 *Ga.* 655. *Denver & R. G. R. Co. v. Hill*, 40 Am. & Eng. R. Cas. 145, 13 *Colo.* 35, 4 *L. R. A.* 376, 2 *Denver Leg. News* 225, 21 *Pac. Rep.* 914.

301. Other acts amounting to a waiver of lien.—A common carrier waives his right to detain goods for the freight if his refusal to deliver is on the ground that they are not in his possession at the place where a demand is duly made. *Adams Exp. Co. v. Harris*, 40 Am. & Eng. R. Cas. 151, 120 *Ind.* 73, 21 *N. E. Rep.* 340.

If a bailee refuses to deliver the goods except to the consignee or person holding the transportation receipt, but asserts no lien for storage paid by him, he cannot afterwards set up that claim to defeat an action by the owner, but must be held to have waived it. *Leigh v. Mobile & O. R. Co.*, 58 *Ala.* 165.

The lien of a common carrier on goods for freight charges is forfeited by suing out an attachment and causing it to be levied on the same property. *Wingard v. Banning*, 39 *Cal.* 543.

302. Effect of part delivery.—The whole lien of a carrier for freight charges attaches to each and every part of the goods subject to it. If not discharged or waived it remains attached to whatever part of the property may remain in the possession of the carrier. A delivery of part of the property does not in itself discharge the lien either in the whole or *pro tanto*. It releases the part delivered from the lien, but does not discharge the part remaining, unless it was the intention of the parties to do so, which is ordinarily a question of fact for the jury. *New Haven & N. Co. v. Campbell*, 128 *Mass.* 104, 35 *Am. Rep.* 360.—DISTINGUISHED IN *New York & N. E. R. Co. v. Sanders*, 16 Am. & Eng. R. Cas. 280, 134 *Mass.* 53.—*Chicago & S. W. R. Co. v. Northwestern Union Packet Co.*, 38 *Iowa* 377. *Boggs v. Martin*, 13 *B. Mon. (Ky.)* 239. *Philadelphia & R. Co. v. Dows*, 15 *Phila. (Pa.)* 101.—APPLYING *Fuller v. Bradley*, 25 *Pa. St.* 120.

A railroad company does not lose its lien on the whole quantity of coal carried by allowing the owner to unload it from cars and place it in bins on the lands of the company and by allowing him to carry away and dispose of a part of it. It may at any time prevent a further removal of the coal remaining until the charges on the whole lot are paid. *Lane v. Old Colony & F. R. Co.*, 14 *Gray (Mass.)* 143.

303. Where delivery is procured by fraud.—The lien of a common carrier is extinguished by the unqualified delivery of the property to the consignee; but the lien may be retained after delivery by the agreement of the parties. *Sembla*. Or if the delivery be procured by the fraud of the consignee, as if he fraudulently and falsely promise to pay the freight when the goods are received, the lien continues and the carrier may bring replevin. *Bigelow v. Heaton*, 4 *Den. (N. Y.)* 496, 6 *Hill* 43.

304. Lien not lost by warehousing the goods.—Where a carrier has the right to warehouse goods by reason of the consignee not taking them up promptly, he does not lose his lien for freights by depositing them with a storekeeper, subject to such lien; neither does he lose his lien by

* See also *ante*, 165-167.

depositing them in his own name instead of the owner, subject to the lien. *Western Transp. Co. v. Barber*, 56 N. Y. 544.

The carrier's change of character into that of an agent, to keep the goods for the buyer, is not inconsistent with his right to retain the goods in his custody till his lien for freight is satisfied. *Hall v. Diamond*, 63 N. H. 565, 3 Atl. Rep. 423.

If a carrier wishes to preserve his lien on uncalled-for goods for unpaid freight charges, he should store them in his own name; but he will not be liable for the default of the warehouseman if he has acted with reasonable care in selecting him. *Gregg v. Illinois C. R. Co.*, 47 Ill. App. 590.

A railway company as a common carrier of freight, such as corn in bulk, is not required to keep the same in its cars and upon its side-tracks for an indefinite time, to the detriment of its other business. The law imposes no such duty. If the railway company has a lien on the grain for carriage, it may store the same in its own name and thus retain its lien. *Gregg v. Illinois C. R. Co.*, 147 Ill. 550, 35 N. E. Rep. 343.

Where a terminal railway company deposits the freight with a warehouseman, at the place of destination, in its own name, it will thereby preserve its lien on the goods for its advances and charges, and the warehouseman will hold the property for the benefit of both the carrier and the owner. *Gregg v. Illinois C. R. Co.*, 147 Ill. 550, 35 N. E. Rep. 343.

305. Lien not defeated by stoppage in transitu.—If the buyer of goods is insolvent at the time of the purchase, and his insolvency is not then known to the vendor, or if he becomes insolvent after the purchase, the vendor has the right of stoppage while the goods are in the hands of a carrier, in transit or in store, at the end of the journey, no actual delivery having been made to the purchaser, and no intervening rights having attached; but the exercise of the right of stoppage *in transitu* does not displace the carrier's lien for freight. *Crass v. Memphis & C. R. Co.*, 55 Am. & Eng. R. Cas. 659, 96 Ala. 447, 11 So. Rep. 480.

b. Enforcement of Lien.*

306. By bill in equity.—The lien of a common carrier for freight upon goods car-

ried exists independent of any statute, and the remedy in equity for its enforcement is not affected by the statute (Code, § 1182) providing an additional remedy. *Crass v. Memphis & C. R. Co.*, 55 Am. & Eng. R. Cas. 659, 96 Ala. 447, 11 So. Rep. 480.

307. By action at law.—A common carrier contracts to deliver a crop of wheat at an agreed price per bushel. A large proportion of the crop is delivered in good order; but from the unavoidable effects of a storm a small part is delivered in a damaged condition, and another small portion is lost. In an action by the carrier for the freight, he is entitled to recover under the common *indebitatus* count the agreed price for the whole quantity so delivered or lost. *Galt v. Archer*, 7 Gratt. (Va.) 307.

308. By sale of goods under English statute.—A railway company has no right to seize and sell goods for tolls due it without complying with the statute requiring the persons seizing the goods to have their names annexed to the list of tolls, and that the goods shall be appraised. *North v. London & N. W. R. Co.*, 14 C. B. N. S. 132, 9 Jur. N. S. 896, 32 L. J. C. P. 156, 11 W. R. 624, 8 L. T. 246.

A demand for the sum actually due the carrier is a condition precedent to the exercise of the statutory right to sell the goods. *Field v. Newport, A. & H. R. Co.*, 3 H. & N. 409, 27 L. J. Ex. 396.

Where the sum claimed by a railway company for sending back the return cars of a shipper is not a toll which the company is empowered to take, the sale by the company of the shipper's carriages and goods to satisfy the amount due for tolls is unlawful. *Field v. Newport, A. & H. R. Co.*, 3 H. & N. 409, 27 L. J. Ex. 396.

309. Sale under various state statutes.—Ala. Code, §§ 1884, 1885, provides that if freight is not paid on perishable goods for sixty days, or upon non-perishable goods for ninety days, the carrier may advertise and sell the same "after thirty days' notice." *Held*, that the sale may be made at any time after the sixty or ninety days, as the case may be, provided that the proper thirty days' notice has been given; i.e., the carrier is not bound to wait until the full expiration of the sixty or ninety days before advertising the goods. *Western R. Co. v. Rembert*, 50 Ala. 25.

Under Colorado statute a common carrier cannot sell perishable goods to satisfy

* Enforcement of carrier's lien, see note, 16 AM. & ENG. R. CAS. 280.

freight charges thereon without giving the owner or consignee at least twenty-four hours' notice. *Martin v. McLaughlin*, 9 Colo. 153, 10 Pac. Rep. 806.

Where a common carrier seeks to foreclose a lien on property for freight charges, under Ga. Code, § 1991, it is necessary that the affidavit of foreclosure should show affirmatively that demand for payment was made after the charges became due; and for want of such allegation the proceedings are promptly dismissed. *Central R. & B. Co. v. Sawyer*, 78 Ga. 784, 3 S. E. Rep. 629. —DISTINGUISHING *Wright v. Phillips*, 46 Ga. 197.

VIII. SHIPPING CONTRACTS—RULES, NOTICES, Etc.

1. Generally.

a. Construction of Contracts.*

400. How contract determined—Merger of oral agreement or negotiation in writing.—All prior oral negotiations between a shipper and a common carrier are merged in the written contract of shipment, and the former cannot admit the execution of the contract and also claim that he did not read it or know its contents, where no mistake, fraud, imposition or deceit is charged to have occurred. *McFadden v. Missouri Pac. R. Co.*, 30 Am. & Eng. R. Cas. 17, 92 Mo. 343, 10 West. Rep. 372, 4 S. W. Rep. 689.

Under a verbal contract between plaintiffs and defendants, a railroad, defendants agreed to carry certain petroleum oil in covered cars, and on the faith of its being so carried it was delivered to defendants, but it was carried in open cars, and a large quantity was thus lost. On the delivery of the oil to defendants, plaintiffs signed "Request note," which said nothing about covered cars, and under which the goods were stated to be sent, subject to certain terms and conditions indorsed thereon. *Held*, that the verbal contract in no way varied or contradicted the writing, and must be incorporated with it, so that the whole contract must be read as for carriage in covered cars. *Fitzgerald v. Grand Trunk R. Co.*, 27 U. C. C. P. 528.

A consignor purposely omitted the consignee's name from goods shipped, contrary to the terms of the shipping receipt, but was promised by the company's agent at the

place of shipment that the agent at the place of destination should be ordered not to deliver the goods till directed; but they were delivered before directions were given to the consignee, who failed without paying for them. *Held*, in an action by the shipper for the negligent delivery, that the contract between the parties did not depend entirely on the verbal agreement with the agent, but was to be ascertained by the jury both from the shipping receipt and the verbal agreement. *Union R. & T. Co. v. Riegel*, 73 Pa. St. 72.

Where a railroad company is sued for its breach of a verbal agreement to receive and ship freight on a certain day, a subsequent written contract between the same parties, for the transportation of the same freight, which does not contain any release of defendant's liability already incurred, or waive any right of plaintiff already accrued, is not admissible in evidence to show a merger of the prior verbal agreement. *Harrison v. Missouri Pac. R. Co.*, 7 Am. & Eng. R. Cas. 382, 74 Mo. 364, 41 Am. Rep. 318.—FOLLOWED IN *Hoskins v. Missouri Pac. R. Co.*, 19 Mo. App. 315. QUOTED IN *White v. Missouri Pac. R. Co.*, 19 Mo. App. 400.

An association of roads known as the "Red Line" received goods from plaintiff, and contracted orally to carry them through in refrigerator cars. Soon after the goods had been shipped a bill of lading was delivered to plaintiff, which omitted the words "through" and "refrigerator cars," and when the company's agent had his attention called to it he said it made no difference; that the cars would go through all right. *Held*, that the verbal contract was not merged in the bill of lading; that the company was liable according to the oral contract. *Shiff v. New York C. & H. R. R. Co.*, 16 Hun (N. Y.) 278.

401. Oral evidence to vary written agreement.—The general rule that parol evidence is inadmissible to add to or vary the terms of a written contract applies to bills of lading. So where a freight bill was signed by certain parties as agents, but there was nothing on its face to show that it was the contract of a railroad company—*held*, that parol evidence was not admissible to show that it was the contract of such company. *Dixon v. Columbus & I. R. Co.*, 4 Biss. (U. S.) 137.

It there was a written contract to deliver the goods to the consignees, this contract

* Rights of carrier and shipper controlled by contract, see note, 3 L. R. A. 344.

would not be rendered liable to be varied by parol proof by the fact that the receipt was found in the same paper. *Western & A. R. Co. v. McEwee*, 6 Heisk. (Tenn.) 208.

402. How contract construed as between shipper and carrier.—It is error to instruct a jury that as contracts of common carriers are in general drawn up by them they should be construed most strictly against them. *Louisville & N. R. Co. v. Touart*, 55 Am. & Eng. R. Cas. 600, 97 Ala. 514, 11 So. Rep. 756.

403. Lex loci contractus.*—A contract of shipment must be construed according to the law of the state where it is made. *Merchants' Dispatch Transp. Co. v. Furthmann*, 47 Ill. App. 561.

Where goods are delivered to a carrier in another state, the contract to be performed there, the laws of that state will govern as to the construction of the contract, and will determine the extent of the carrier's undertaking, and, so far as they are the common or unwritten law, may be proved by the testimony of competent witnesses. *Milwaukee & St. P. R. Co. v. Smith*, 74 Ill. 197.

A contract made in Iowa for the transportation of freights to a point in Illinois, being entire, and to be partly performed in Iowa, must be construed according to the law of the state where made. *McDaniel v. Chicago & N. W. R. Co.*, 24 Iowa 412.—FOLLOWED IN *Hazel v. Chicago, M. & St. P. R. Co.*, 82 Iowa 477. REVIEWED IN *Hartmann v. Louisville & N. R. Co.*, 39 Mo. App. 88; *Talbott v. Merchants' Despatch Transp. Co.*, 4 Iowa 247.

Under the above rule of construction a provision in a contract restricting the carrier's liability, which is prohibited by Iowa act of 1866, ch. 113, is void, though it might not be under the laws of Illinois. *McDaniel v. Chicago & N. W. R. Co.*, 24 Iowa 412.

404. Lex fori.—If the law of the place, where a contract signed only by the carrier is made for the carriage of goods, requires evidence other than the mere receipt by the shipper to show his assent to the terms, and the law of the place where the suit is brought presumes conclusively such assent, from acceptance without dissent, the question of assent is a question of evidence, and is to be determined by the law of the place where

the suit is brought. *Hoadley v. Northern Transp. Co.*, 115 Mass. 304.

When a contract is made by a common carrier in one state to transport goods from that state into another, and the goods are lost, the rights of the parties are governed by the law of the state in which the loss happens and suit is brought. *Gray v. Jackson*, 51 N. H. 9.

405. Receipt is not conclusive.—In an action against a common carrier, the libellant makes a *prima facie* case on the production of the receipt of the carrier, "received in good order." But these words do not constitute an agreement; they are a mere recital, and may be contradicted by the carrier. *Seller v. Steamship Pacific*, 1 Oreg. 409.

Certain bars and bundles of iron came by ship from Glasgow to Montreal, consigned to the plaintiff. His agent gave to defendants' agent an order to get it from the ship, and afterwards received from the latter a receipt specifying the number of bars and bundles and the gross weight, but with a printed notice at the top of it that "rates and weights entered in receipts or shipping bills will not be acknowledged." All the iron received by defendants for the plaintiff was delivered at Guelph, but there was a very considerable deficiency in the weight. So far as appeared the iron had not been weighed either on being taken from the ship or afterwards. Held, that defendants were not estopped by their statement of weight in the receipt, and were not liable to the plaintiff. *Horseman v. Grand Trunk R. Co.*, 31 U. C. Q. B. 535.

406. When rights of parties determined by special contract—Subsequent bill of lading.—If there be a special contract, such contract, if legal, will govern; and if the evidence as to the terms of the contract be conflicting, and the jury find for the plaintiff, this court will not interfere, no error of law having been committed by the presiding judge. *Central R. & B. Co. v. Anderson*, 58 Ga. 393, 16 Am. Ry. Rep. 85.

A receipt given to a drayman on the receipt of goods by a carrier, containing conditions, in the absence of proof of any other contract is binding on the shipper, though he did not know its terms; but it is not evidence of the contract where it is surrendered and a bill of lading issued. *Merchants' Dispatch Transp. Co. v. Furthmann*, 47 Ill. App. 561.

* Validity of stipulations limiting carrier's liability, determined according to *lex loci*, see note, 49 AM. & ENG. R. CAS. 80.

Where the evidence warrants a finding that the merchandise transported was delivered to and accepted by the carriers under a special contract, and there is no conclusive evidence that the consignor consented to accept bills of lading in place of such contract, the carrier's liability is fixed by such special contract, and cannot be abrogated or altered by the subsequent signing and mailing of bills of lading by the carriers, which did not reach the consignor (who was also the consignee) until after the loss occurred. *Swift v. Pacific Mail Steamship Co.*, 30 Am. & Eng. R. Cas. 105, 106 N. Y. 206, 12 N. E. Rep. 583, 8 N. Y. S. R. 602; affirming 36 Hun 643, mem.

Where a shipper has entered into a special verbal agreement with the carrier, he may rightfully assume that such agreement is embodied in a receipt given by the carrier, or at least that the receipt contains nothing contrary to it. It is in the nature of a direct fraud or cheat for the company or its agents, after such verbal agreement, to insert a contract of an entirely different character in the written receipt and present it to the shipper without directing his attention expressly to it and procuring his assent. And it is no defense for the company to show that the shipper should have been more diligent and watchful, and should have detected the fraud. *Strohn v. Detroit & M. R. Co.*, 21 Wis. 554.

Where a common carrier, upon the delivery of merchandise for transportation, issued to the consignor a shipping receipt which stated that the bill of lading would be issued upon application at a place designated therein, and that the merchandise would be transported subject to the conditions expressed in the bill of lading—held, that the bill of lading and not the shipping receipt embodied the contract of the parties, and that the consignee would be bound by the conditions expressed in such bill of lading. *Wilde v. Merchants' Despatch Transp. Co.*, 47 Iowa 272.—DISTINGUISHING *Bostwick v. Baltimore & O. R. Co.*, 45 N. Y. 712.

407. What amounts to a special contract.—Where a shipper applies to the local freight agent of a railroad company to get the rates of freight upon a proposed shipment of a certain amount of grain to a given point, and the agent, acting by authority, gives him the rate, and he agrees to ship at that rate, and then goes to the master of trains of the company and makes an arrange-

ment with him for the requisite number of cars per week for the purpose of making such shipment, this amounts to a special contract on the part of the company to make the shipment at the rates named by the freight agent, and to furnish the cars in the manner agreed upon by the shipper and master of trains. *Toledo, W. & W. R. Co. v. Roberts*, 71 Ill. 540.

408. After making a special contract shipper may assume that his goods will be carried.—Where one delivers goods upon the line of a railroad in pursuance of a contract with the company for their transportation, he may rely upon the fulfilment of the contract, without attempting to obtain other modes of transportation, until he receives notice of the refusal or inability of the carrier to execute its contract. *Louisville, N. A. & C. R. Co. v. Flanagan*, 32 Am. & Eng. R. Cas. 532, 113 Ind. 488, 12 West. Rep. 190, 14 N. E. Rep. 370.

409. Validity of contract to carry as much grain as shipper "may desire."—A contract binding a carrier to transport as many car-loads of grain as the shipper may desire transported is not ineffective for the reason that the shipper is under no obligation to ship any definite or designated quantity of grain. Possibly such a contract may be revoked, but if acts are done in performance of it, it is, at all events, valid as to those acts, for until there is an effective revocation the contract remains in force. *Cleveland, C., C. & I. R. Co. v. Closser*, 45 Am. & Eng. R. Cas. 275, 126 Ind. 348, 26 N. E. Rep. 159.

410. Waiver of breach of special contract.—Plaintiffs agreed with defendant (a railroad company) for the transportation of all plaintiffs' lead for one year at a fixed rate of freight. During the year plaintiffs shipped some lead by another road, and the president of the railroad company, hearing of it, charged plaintiffs with having committed a breach of contract. Plaintiffs answered that there was no contract, to which defendant's president replied that defendant, on its part, would so understand the matter in the future. Shortly thereafter (on the 11th day of the month) defendant notified plaintiffs that from and after the 15th they would be required to pay a new and increased rate of freight. In the interval between the 11th and the 15th plaintiffs shipped several car-loads of lead

over defendant's road at the old rate. This was also the rate at the time charged to all shippers. In an action upon the contract, defendant having pleaded the foregoing breach, and plaintiffs having replied waiver of the breach, the court instructed the jury, in substance, that if they believed the shipments made between the 11th and 15th were transported by defendant under the contract, and not in its capacity of common carrier, they would find that the breach had been waived. *Held*, correct. *Riggins v. Missouri River, Ft. S. & G. R. Co.*, 9 Am. & Eng. R. Cas. 242, 73 Mo. 598.

411. Right of carrier to stipulate for benefit of insurance.—A carrier may stipulate in his contract of shipment for the benefit of any insurance that may have been effected upon the goods to be transported. The effect of such stipulation, where previously thereto the shipper has obtained a policy providing that the insurer shall be subrogated to the claim of the insured against the carrier, is to invalidate the contract of insurance and defeat a recovery by the insured on the insurance. *Missouri Pac. R. Co. v. International M. Ins. Co.*, 84 Tex. 149, 19 S. W. Rep. 459.

A refusal to give the carrier the benefit of an insurance already secured is in effect but a refusal to insure for the benefit of the carrier, and the carrier cannot insist upon the right thereto as a condition on which he shall receive and transport freight. *Insurance Co. of N. A. v. Easton*, 37 Am. & Eng. R. Cas. 671, 73 Tex. 167, 11 S. W. Rep. 180.

It is not a just and reasonable condition within section 7 of the Railway and Canal Traffic Act, that the company shall not be responsible for goods carried unless their value is declared and they are insured, the rate of insurance being fixed at 10 per cent. of the declared value. *Peek v. North Staffordshire R. Co.*, 10 H. L. Cas. 473, 9 Jur. N. S. 914, 32 L. J. Q. B. 241, 11 W. R. 1023, 8 L. T. 768.—CONSIDERED IN Manchester, S. & L. R. Co. v. Brown, L. R. 8 App. Cas. 703, 53 L. J. Q. B. 124, 50 L. T. 281, 32 W. R. 207. FOLLOWED IN *Ashendon v. London, B. & S. C. R. Co.*, L. R. 5 Ex. D. 190, 42 L. T. 586, 28 W. R. 511, 44 J. P. 203.

412. What amounts to a continuing offer to transport.—An agreement in writing by a carrier to transport, from one place to another, merchandise for A. at a certain rate of freight, for a specified time,

is a continuing offer, and is binding on the carrier whenever, during the time specified, A. tenders the merchandise; and the failure to transport the merchandise so tendered is a breach of the contract, for which an action can be maintained. *Harvey v. Connecticut & P. R. R. Co.*, 124 Mass. 421, 18 Am. Ry. Rep. 9.

413. Contract to deliver goods at a specified time, with conditions.—

Where a bill of lading contains an agreement on the part of the carrier to transport goods to the place of destination within any prescribed or limited time, without any exceptions or qualifications, the duty to carry in that time is absolute and unconditional, and will not be deemed to be modified or controlled by a subsequent stipulation that if the goods are not delivered within the stipulated time a certain deduction shall be made from the freight charges. *Harmony v. Bingham*, 1 Duer (N. Y.) 209.

Covenants to deliver goods within a certain time, and, in case of a later delivery, to make a certain deduction from the price of transportation, are not alternative, since they give no election not to deliver the goods at all. The second covenant only fixes the measure of damages for the violation of the first. *Harmony v. Bingham*, 1 Duer (N. Y.) 209.

Where one contracted with the freight agent of a railroad company for the transportation of goods upon a particular day and train, it is no evidence of a subsequent rescission of such contract that he was subsequently informed by another person "in the employ of the company" that the goods could not be sent by that train if the cars should be full, it not appearing that such person was a freight agent of the company. *Curtis v. Chicago & N. W. R. Co.*, 18 Wis. 312.

414. Acceptance of quoted rates

—**How terminated.**—An acceptance, without qualifications, of the rate mentioned in an offer made to the owner of logs, that if he will furnish cars and load them, and chain the logs, if necessary, the railroad company making it will transport the logs at a certain rate, constitutes an acceptance of all the conditions of such offer, and makes a complete contract for transportation of the logs. *Lawrence v. Milwaukee, L. S. & W. R. Co.*, 84 Wis. 427, 54 N. W. Rep. 797.

After previous correspondence a carrier wrote to a shipper giving rates for carrying

flour from a canal to various places. In a subsequent letter he quoted prices, "to continue in force till close of navigation, unless notice to the contrary." The shipper at once replied accepting these terms. *Held*: (1) that the contract was to be ascertained from the whole of the correspondence; (2) that it only stood as an open proposition, which became a contract upon delivery of flour to the carrier; (3) that the carrier might terminate it at any time by giving notice; (4) and after giving such notice the carrier was only liable to carry such flour at the specified rates as had already been delivered; (5) that twelve days' notice was reasonable, without regard to the amount of grain or flour that the shipper might have on hand, or where it might be. *Thayer v. Burchard*, 99 *Mass.* 508.

Persons contemplating a through shipment of considerable grain wrote to the general freight agent of a road for rates, who quoted them, including charges on a connecting packet line from a certain landing. Some ten days thereafter, and without any acceptance of the rate, the parties shipped from another landing, and took a bill of lading from one not authorized to represent the company. *Held*, as there was no acceptance of the rates quoted by the general freight agent, the shippers had no contract with the company. *Robinson v. St. Louis, K. C. & N. R. Co.*, 11 *Am. & Eng. R. Cas.* 31, 75 *Mo.* 494.

415. Right of company to collect full rates after quoting a lower rate by mistake.—The plaintiff asked the freight cashier of a railroad company at its freight office in W. what the freight rate was from there to B. The cashier, who did not know, and whose duties did not require him to know, asked the way-bill clerk in the same office, but the clerk, by reason of the noise of a passing train, failed to hear the question correctly and understood him to ask the rate to M., a place not so distant, and gave him the rate at thirteen cents per hundredweight, instead of twenty-one cents, the correct rate to B. The cashier then figured up the amount and stated to the plaintiff that it would be \$9.75, which the plaintiff paid and delivered the goods to the railroad company for transportation, and requested that they be forwarded immediately. The regular rate was \$15.75, which was a reasonable price, and the plaintiff would have paid it if it had been

stated as the price. After the plaintiff had left the clerk discovered his mistake and endeavored to find him, but he had left town, and not knowing how to communicate with him, he sent on the goods to B. with instructions to the station agent there to collect the additional \$6. The mistake was fully explained to the plaintiff there, but he refused to pay it and demanded the goods, which the agent refused to deliver without the additional payment, and the plaintiff afterwards brought suit for them. *Held*: (1) that as the freight cashier passed on the plaintiff's inquiry to the way-bill clerk, who answered it as he understood it, it was the same as if the inquiry had been made directly to the clerk by the plaintiff; (2) that, regarding the clerk as representing the company in the transaction, the minds of the parties, by reason of the mistake as to the destination of the goods, had not met upon the question of the freight rate to be charged; (3) that their minds not having met, there was no contract; (4) that there having been no contract, the defendant had a right to charge a reasonable price for the service rendered, and to hold the goods until it was paid. *Rowland v. New York, N. H. & H. R. Co.*, 49 *Am. & Eng. R. Cas.* 61, 61 *Conn.* 103, 23 *Atl. Rep.* 755.

416. Power of consignor to bind consignee by terms of shipment.—A contract of affreightment made by the consignor for the consignee is binding upon the latter, and in the absence of fraud or mistake he will be conclusively presumed to know its stipulations. *Robinson v. Merchants' Despatch Transp. Co.*, 45 *Iowa* 470.

The consignor of goods has implied authority from consignee to stipulate as to terms of transportation. *Ryan v. Missouri, K. & T. R. Co.*, 23 *Am. & Eng. R. Cas.* 703, 65 *Tex.* 13.

The carrier is authorized to act upon this presumption in contracting with the agent, and need not inquire into his authority to make a particular shipment. *Ryan v. Missouri, K. & T. R. Co.*, 23 *Am. & Eng. R. Cas.* 703, 65 *Tex.* 13.

417. Meaning of the words "contents and value unknown" when used in bill of lading.—Where a bill of lading used was a general blank form for shipping all sorts of freight, and contained in parenthesis the words "contents and value unknown," evidently intended to

apply to packages therein mentioned, the contents of which were concealed from view—*held*, that the words could not apply to corn in bulk loaded into a car from an elevator. *Tibbitts v. Rock Island & P. R. Co.*, 49 Ill. App. 567.

418. Construction of particular contracts.—The plaintiffs, in accordance with their usual custom, sent to the defendant railroad company, by which they made a certain shipment, a "dry ticket," filled up by the plaintiffs, to be signed as a receipt for the goods by the proper officer of the freight department of the railroad company, containing a description of the goods, together with the name of the consignee and the destination of the goods. The ticket also provided that the goods should be forwarded, "subject to conditions of company's regular bill of lading." The bill of lading was in a form which gave the railroad company the option of forwarding goods by any route, from its terminus to the destination beyond its line. The usual route between the terminus of the receiving railroad and the designated destination was by water, which was the route by which the goods were sent. The goods were never delivered to the consignee. In an action to recover their value—*held*: (1) that the sending of the "dry ticket" constituted a contract between the shippers and the receiving railroad company for the transmission of the goods in the ordinary way, i.e., by rail and water, and not all by rail; (2) that the sending of such "dry ticket," which contained no designation of an all-rail route, would be a revocation of a distinct agreement for an all-rail route, claimed by the shippers to have been made by telephone, admitting such agreement to have been made, which was denied by the railroad company; (3) that if the railroad company delivered the goods at its terminus to a responsible carrier by steamer for the designated destination, in the way it was accustomed to ship goods, the railroad company's liability under its contract with the shippers was ended. *Hostetter v. Baltimore & O. R. Co.*, (Pa.) 32 Am. & Eng. R. Cas. 549, 11 Atl. Rep. 609.

A memorandum of agreement was written in the following form: "Lead from B. to St. L. at 22½ per 100. All lead shipped by C. & R. to be forwarded by M. R., F. S. & G. R. R. at above rates from January 1st, 1873, to January 1st, 1874, and above rates

2 D. R. D.—11.

guaranteed for same time." *Held*, that the import of the memorandum was that the railroad company was to transport and C. & R. were to deliver to the company for transportation, at 22½ cents per 100 pounds, all lead shipped by C. & R. within the year 1873 to St. L.; that C. & R. did not bind themselves to ship any lead; but they did bind themselves to ship over the road of this company any lead they should ship to St. L., and that this was sufficient consideration for the company's guarantee of rates. *Riggins v. Missouri River, Ft. S. & G. R. Co.*, 9 Am. & Eng. R. Cas. 242, 73 Mo. 598. —DISTINGUISHING *Chicago & G. W. R. Co. v. Dane*, 43 N. Y. 240.

Defendant contracted to transport on account of plaintiffs, "on board Steamship Minnesota or Nevada, for Liverpool, three hundred bales of cotton." The cotton was then on its way from Mobile to New York, and the time of its arrival was uncertain. The Minnesota was advertised to sail October 27th, the Nevada a week later. The cotton was delivered at defendant's pier on October 26th; at that time defendant had a full cargo for the Minnesota, accepted and ready for loading: the cotton was therefore sent by the Nevada, and arrived at Liverpool a week after the Minnesota. Meanwhile the price of cotton had fallen. In an action to recover damages for alleged breach of the contract—*held*, the agreement was, in substance, that if plaintiffs should deliver the cotton in reasonable time for loading it on board the Minnesota before its sailing day, it should be carried on it, otherwise upon the Nevada; but that the cotton was not delivered within such reasonable time; that defendant was not required to reject other freight to reserve room for the cotton, and so take the chance of being compelled to sail without a full cargo in case of its non-arrival, but had the right to accept what was offered to make sure of a full cargo, and was only required to carry the cotton on the first steamer if it was delivered on its pier before a sufficient cargo, accepted and ready for loading, was delivered; also, that defendant was not required to notify plaintiffs, on arrival of the cotton, that it could not go upon the Minnesota. *Fowler v. Liverpool & G. W. Steam Co.*, 9 Am. & Eng. R. Cas. 235, 87 N. Y. 190.

On arrival of the cotton upon the pier, defendant's agent gave receipts for it, each of which purported to be "memorandum of

cargo on board steamship Minnesota." It appeared that these were intended simply as acknowledgments of delivery of the property, to be surrendered on delivery of the bills of lading, which constituted the contract of shipment. Bills of lading by the Minnesota were refused. *Held*, that the memorandum receipts did not vary the contract or change the rights of the parties. *Fowler v. Liverpool & G. W. Steam Co.*, 9 Am. & Eng. R. Cas. 235, 87 N. Y. 190.

*b. Rules, Notices, Etc.**

419. In general.—A carrier may adopt and enforce reasonable rules and regulations. *Norfolk & W. R. Co. v. Adams*, (Va.) 56 Am. & Eng. R. Cas. 330, 18 S. E. Rep. 673.

The question of the reasonableness of a regulation of a company is one of law, or fact, or of mixed law and fact, according to the circumstances of each particular case. *Christian v. First Div. St. P. & P. R. Co.*, 20 Minn. 21 (Gil. 12).

420. General notices — Posting same about stations.—General notices in relation to the liabilities of common carriers are of no avail, unless they are just and reasonable in themselves, reduced to the form of a special stipulation signed by the party sending the goods, or else so brought home to his knowledge as to show his assent thereto. *Southern Exp. Co. v. Crook*, 44 Ala. 468.

A rule or custom adopted by a railroad company concerning its contracts with its patrons for the transportation of grain cannot operate upon those of its patrons who have no knowledge of the existence of such rule, and such persons will not be legally bound thereby. *Atchison & N. R. Co. v. Miller*, 18 Am. & Eng. R. Cas. 545, 16 Neb. 661, 21 N. W. Rep. 451.

A pamphlet hanging in a railroad company's office, containing rules and rates, is not of itself sufficient notice of its contents to a shipper who contracts about the carrying of freight, and the rate to be paid, without reference to the fact that there are printed rules on the subject, of the existence of which the shipper is ignorant; and he will not be held to have constructive notice of the rules, even though the interstate commerce law required them to be

posted. *Coupland v. Housatonic R. Co.*, 55 Am. & Eng. R. Cas. 380, 61 Conn. 531, 23 Atl. Rep. 870.

Where a shipper of goods undertakes to prove a contract of shipment by the company's tariff rates as posted in its stations, which vary what would otherwise be the legal obligations of the carrier, they are bound by any provisions therein favorable to the carrier. *Burroughs v. Norwich & W. R. Co.*, 100 Mass. 26.—APPROVED IN *Michigan C. R. Co. v. Myrick*, 9 Am. & Eng. R. Cas. 25, 107 U. S. 102.

421. Rule imposing a demurrage charge if goods not unloaded in a fixed time.—It is competent for a common carrier, whose customers at their option have the privilege of unloading for themselves the vehicles in which their freights are shipped, to adopt and enforce a reasonable regulation as to the time within which the vehicles may be unloaded free of any expense for storage, and to fix a reasonable rate per day at which storage will thereafter be charged for the use of such vehicles so long as they remain unloaded. *Miller v. Georgia R. & B. Co.*, 50 Am. & Eng. R. Cas. 79, 88 Ga. 563, 15 S. E. Rep. 316.—DISAPPROVING *Chicago & N. W. R. Co. v. Jenkins*, 103 Ill. 588. DISTINGUISHING *Burlington & M. R. R. Co. v. Chicago Lumber Co.*, 15 Neb. 391.

A rate of one dollar per day for each railroad car thus devoted to the use of storing freight is not necessarily unreasonable because cars are different sizes and vary in capacity, nor because a fraction of a day is charged for as a whole day, nor because the customary rate of storage in warehouses or elevators is much lower; nor is it, as a matter of law, unreasonable for any cause. *Miller v. Georgia R. & B. Co.*, 50 Am. & Eng. R. Cas. 79, 88 Ga. 563, 15 S. E. Rep. 316.

A particular common carrier, though a corporation, makes a regulation its own by adopting it and acting upon it, irrespective of the source from whence it is derived; and therefore, that it was promulgated by a person or board of persons representing a combination of such carriers, would make no difference. *Miller v. Georgia R. & B. Co.*, 50 Am. & Eng. R. Cas. 79, 88 Ga. 563, 15 S. E. Rep. 316.

As between the carriers and customers who have notice of the regulation before shipments are made, the regulation is oper-

* Rule of company not to deliver grain in bulk to a particular elevator, see note, 41 AM. DEC. 485.

ative whether indicated upon bills of lading or not, and whether the shipments are made to the order of the consignor with the customary direction to notify the customer, or directly to the customer himself. *Miller v. Georgia R. & B. Co.*, 50 *Am. & Eng. R. Cas.* 79, 88 *Ga.* 563, 15 *S. E. Rep.* 316.

In construing the phraseology of a regulation expressed in this language: "It being understood that said car or cars are to be placed and remain accessible to the consignee for the purpose of unloading during the period in which held free of demurrage, and that when the period of such demurrage charge commences they are to remain accessible to the consignee for unloading purposes," the course and exigencies of business are necessarily to be regarded; and hence the cars, after their arrival at destination, though not kept accessible at every moment of time, are to be treated as being and remaining accessible if the carrier is always ready to render them so within the shortest practicable time, not longer than a few hours, after being notified that the customer is ready to unload. *Miller v. Georgia R. & B. Co.*, 50 *Am. & Eng. R. Cas.* 79, 88 *Ga.* 563, 15 *S. E. Rep.* 316.

A rule of a railroad company making a charge to consignee of one dollar per day per car for every such car remaining unloaded after notice of arrival to consignee and after the lapse of three days, is reasonable and valid, such a rule being for the protection and benefit of the public and to secure prompt movement of freight cars, as well as for the protection and benefit of the carrier. *Norfolk & W. R. Co. v. Adams*, (Va.) 56 *Am. & Eng. R. Cas.* 330, 18 *S. E. Rep.* 673.

Such a rule does not come within the purview of sections 1202-3 of the Code of Virginia, of 1887, which sections provide that no charge other than that provided by law shall be made for transportation, storage, or delivery of freight, nor do such sections invalidate the rule. (Lacy and Hinton, JJ., dissenting.) *Norfolk & W. R. Co. v. Adams*, (Va.) 56 *Am. & Eng. R. Cas.* 330, 18 *S. E. Rep.* 673.

422. Rule requiring notice of claim for damages to be given.—The question whether a rule of a carrier requiring notice of damage to freight to be given within 36 hours after its delivery is reasonable or not, is for the jury. *Texas &*

P. R. Co. v. Adams, 78 *Tex.* 372, 14 *S. W. Rep.* 666.

A stipulation in a transportation contract that the shipper shall give notice of any claim for damages before the property conveyed is removed from the place of destination, has no application to a removal by the carrier, but covers only a removal by the shipper or owner. *Baker v. Missouri Pac. R. Co.*, 34 *Mo. App.* 98.

Failure to present a claim in writing at the express office which issued the receipt for goods, in accordance with a condition contained in the receipt, is no defense to a claim for damages for negligence by that office in not sending forward the goods, there being no necessity of notifying that office of a claim of which it was fully cognizant. *Baltimore & O. Exp. Co. v. Cooper*, 40 *Am. & Eng. R. Cas.* 97, 66 *Miss.* 558, 6 *So. Rep.* 327.

423. Waiver of notice.—Where a written contract with a carrier required that the carrier should be notified in writing of the extent of damage sustained by freight *in transitu* before suing therefor, and there was evidence on the trial tending to show that compliance with this stipulation was waived by the carrier, whose agent, after examining into the alleged injury, agreed to pay a fixed sum in satisfaction of such damage, a verdict against the carrier for such agreed sum was not disturbed. *International & G. N. R. Co. v. Underwood*, 21 *Am. & Eng. R. Cas.* 143, 62 *Tex.* 21.

424. When rule does not apply.—To an action for the non-delivery of goods delivered to defendants to be carried, defendants set up that they duly carried and delivered the goods to plaintiff, but that he did not, as required by one of the terms of special contracts entered into between the parties, give defendants within thirty-six hours thereafter notice of any damage or loss. *Held*, that the defense failed, as the evidence showed that the goods were never carried or delivered as alleged. *Steele v. Grand Trunk R. Co.*, 31 *U. C. C. P.* 260.

425. Validity of rule tending to create a monopoly.—A company in Georgia, who owned a road between Savannah and Macon and various branches and connecting lines, made a rule that no freights from Brunswick in competition with Savannah would be received at local stations unless charges were prepaid and shipments delivered at warehouse by drays, as local

business, when regular local tariff rates from Macon would be assessed. *Held*, that such rule was in violation of the act of 1874, prohibiting monopolies, and a shipper injured by such rule might maintain an action. *Logan v. Central R. Co.*, 74 Ga. 684.

While the competing railroad company might sue for damages to its general business, the shipper who is damaged by the wrongful requirement of unshipping, draying, and reshipping, and the consequent waste, delay, and injury, has a right of action against the railroad company causing the same. *Logan v. Central R. Co.*, 74 Ga. 684.

426. No custom valid unless consistent with charter.—A railroad company can establish no custom inconsistent with the spirit and object of its charter. It can make such rules and contracts as it pleases, not inconsistent with its duties as a common carrier; and any general language used in its charter, in respect to its powers in that regard, must be construed with that limitation. *Chicago & N. W. R. Co. v. People ex rel.*, 56 Ill. 365.

427. Rules regulating agents—Delivery of freights—Slander by agents.—Rules of a railroad company prescribing the duties of its agents, not promulgated as notice to the public of the powers and authority of such agents but merely intended as private instructions to the company's employes, are not admissible in evidence in behalf of the company against a plaintiff not shown to have contracted with reference thereto nor to have had any knowledge thereof. *Central R. & B. Co. v. Skellie*, 90 Ga. 694, 16 S. E. Rep. 657.

A railway company has the right to require persons hauling freight from its depot to receive the same on the platform from its servants and not to enter the warehouse for the purpose of checking off the freight; and also to require that persons doing business with the company shall transact the same over the counter, and not enter behind it. Such regulations are reasonable. *Donovan v. Texas & P. R. Co.*, 29 Am. & Eng. R. Cas. 320, 64 Tex. 519.

It is the duty of agents of a railway company to enforce the regulations of the company, but not to give reasons why such regulations were made; and if, in giving such reasons, they use actionable language, they, and not the company, will be liable.

Donovan v. Texas & P. R. Co., 29 Am. & Eng. R. Cas. 320, 64 Tex. 519.

428. Rule requiring consignee to receipt for goods—Right of examination.—Where a railroad company have freight in their warehouse in good condition, ready for delivery, they are not bound to take a receipt for each portion as it is taken away, but they may require a receipt for the whole before any part thereof is removed. *Morris & E. R. Co. v. Ayres*, 29 N. J. L. 393.

A regulation of a railroad requiring the consignee of grain to receipt for it while in a bin in the company's elevator, and before he has had an opportunity to weigh or measure it, will be held, as a conclusion of law, unreasonable and void. *Christian v. First Div. St. P. & P. R. Co.*, 20 Minn. 21 (Gil. 12).

429. Regulation requiring prepayment of charges.—A common carrier may demand prepayment of freight charges before shipment to any station, and from one shipper, though not required of others. It should appear, however, that a plaintiff had notice of such regulation. *Randall v. Richmond & D. R. Co.*, 49 Am. & Eng. R. Cas. 74, 108 N. Car. 612, 13 S. E. Rep. 137.

2. Limiting Company's Liability.†

a. Generally.

430. General power to limit liability.§—Common carriers may by special contract limit the extent of their responsibility for the safety of goods delivered to them to be carried. *Bingham v. Rogers*, 6 Watts & S. (Pa.) 495.—FOLLOWED IN

* See also *ante*, 218.

† See also *ante*, 42, 120, 290; *post*, 715.

‡ Power of common carrier to limit liability by notice or special contract. see notes, 32 AM. DEC. 468; 42 *Id.* 498.

Common-law liability of carriers of goods may be limited by general notice, see note, 5 AM. ST. REP. 720.

Carrier's liability may be limited by express contract, see note, 5 AM. ST. REP. 725. See also *post*, 665-690.

§ Carrier may restrict its common-law liability, see notes, 3 L. R. A. 425; 82 AM. DEC. 379.

Common carrier may limit or restrict liability by contract, see notes, 3 L. R. A. 343; 6 *Id.* 849; 7 *Id.* 214; 10 *Id.* 419; 12 *Id.* 799.

Right of common carrier to limit its liability by special contract, see note, 13 L. R. A. 518.

Power of carrier to stipulate for exemption from liability, see notes, 3 AM. & ENG. R. CAS. 272; 9 *Id.* 110.

Laing v. Colder, 8 Pa. St. 479.—*Thayer v. St. Louis, A. & T. H. R. Co.*, 22 Ind. 26. *Fitzgerald v. Grand Trunk R. Co.*, 4 Ont. App. 601; affirming 28 U. C. C. P. 586.—QUOTING *McManus v. Lancashire & Y. R. Co.*, 4 H. & N. 327.

It is competent for a carrier and shipper to limit or modify the common-law liability of the former by contract not in conflict with any statute of the state, with respect to the character in which the carrier should hold the goods shipped, when placed in its warehouse awaiting delivery. *Feige v. Michigan C. R. Co.*, 62 Mich. 1, 28 N. W. Rep. 685.

At common law, a common carrier is an insurer of the goods which he undertakes to carry; and a contract of exemption from liability as insurer, for loss by fire, etc., must, like other contracts, be founded upon some consideration. *Taylor v. Little Rock, M. R. & T. R. Co.*, 18 Am. & Eng. R. Cas. 590, 39 Ark. 148.

431. When road is under military control.*—Where a railroad is very largely under the control of the military power of the government, requiring it to give preference to government freights, it may refuse to accept freights from private shippers, or accept them under a qualified liability; but if it does not do so, but accepts other goods without any limitation, it is liable for a loss that occurs through a delay in shipping. *Illinois C. R. Co. v. Schwartz*, 13 Ill. App. 490.

432. General notice or printed conditions on receipts not in themselves a special limitation.†—A common carrier cannot limit its liability by an unsigned notice printed on the back of a receipt as part of it, and which was taken by a shipper without dissent. *Michigan C. R. Co. v. Mineral Springs Mfg. Co.*, 16 Wall. (U. S.) 318.—DISTINGUISHED IN *Deming v. Norfolk & W. R. Co.*, 16 Am. & Eng. R. Cas. 232, 21 Fed. Rep. 25; *Southern Exp. Co. v. Armstead*, 50 Ala. 350. FOLLOWED IN *Phoenix Ins. Co. v. Erie & W. Transp. Co.*, 10 Biss. (U. S.) 18; *The Majestic*, 56 Fed. Rep. 244. QUOTED IN *Ormsby v. Union Pac. R. Co.*, 2 McCrary (U. S.) 48, 4 Fed. Rep. 706; *Phifer v. Carolina C. R. Co.*, 89 N. Car. 311, 45 Am. Rep. 687.

The mere acceptance by a shipper of a

receipt with an entry on it limiting the liability of the carrier for losses by fire, navigation, etc., will not constitute an express contract, under Ga. Rev. Code, § 204. Such entry is not a notice relating to the consideration for risk. *Southern Exp. Co. v. Newby*, 36 Ga. 635.

Notice that all boxes and parcels will be at the risk of the owners does not relieve a common carrier from responsibility, though brought home to the knowledge of the owners of the goods. *Clark v. Faxon*, 21 Wend. (N. Y.) 153. *Blumenthal v. Brainard*, 38 Vt. 402.—FOLLOWING *Kimball v. Rutland & B. R. Co.*, 26 Vt. 247.

In an action against a common carrier for the value of goods lost in his custody, evidence that often, but not invariably, he had given to the plaintiffs receipts containing a printed clause limiting his liability for goods transported by him, and that in this instance, after receiving the goods, he gave to a servant of the plaintiff a receipt therefor, containing such a printed clause; but that over part of this clause in this receipt a stamp was so pasted as to render it unintelligible, and that until after the loss neither the plaintiff nor any of his agents or servants had actual knowledge of such a clause in this or any of the other receipts, is not sufficient to warrant a finding that the plaintiff assented to any limitation of the defendant's liability. *Perry v. Thompson*, 98 Mass. 249.

433. The shipper must know of and assent to the limitation.—Common carriers may reasonably restrict their common-law liability by notice brought home to the owner of goods before or at the time of delivery to them, if such notice is expressly or impliedly assented to by the owner. *Fillebrown v. Grand Trunk R. Co.*, 55 Me. 462.—DISTINGUISHED IN *Grace v. Adams*, 100 Mass. 505.

Such notice, given to a person who was simply directed by the owner to deliver the goods to the carrier, is not sufficient to bind the owner, in the absence of all knowledge of and assent to such notice on the part of the latter. *Fillebrown v. Grand Trunk R. Co.*, 55 Me. 462.

A carrier cannot discharge itself from duties which the law has annexed to the employment by notice alone to the shipper. The shipper must assent to it to make it effectual, but it is otherwise in respect to those duties designed simply to insure good faith and fair dealing. There, a notice is

* See also *ante*, 41.

† Exemption from liability for negligence by printed notices, etc., see note, 5 Am. St. Rep. 726.

sufficient. *Erie R. Co. v. Wilcox*, 84 Ill. 239, 16 Am. Ry. Rep. 457.

If a carrier seeks exemption from any common-law liabilities incident to its general employment, the contract must be assented to with a view to release the responsibilities imposed; and when the exemption is established, the carrier, in case of loss, will only be responsible on account of actual negligence or wilful misconduct. The rule is the same in respect to goods shipped to a point beyond the carrier's own line. *Erie R. Co. v. Wilcox*, 84 Ill. 239, 16 Am. Ry. Rep. 457.

A common carrier can only limit or restrict his liability by agreement, and when the carrier gives a receipt for goods to be shipped, containing a restriction of his liability, it must appear that the shipper was aware of such restriction and expressly agreed to it, or he must accept the receipt under such circumstances as clearly show his assent to the restriction. *Merchants' Despatch Transp. Co. v. Joesting*, 89 Ill. 152. —QUOTED IN *Brown v. Louisville & N. R. Co.*, 36 Ill. App. 140.

The fact that the merchants of whom goods were purchased knew of such limitation of liability when they shipped the goods, is not sufficient to lessen the common-law liability without proof of authority from the owner to make such contract with the carrier. *Merchants' Despatch Transp. Co. v. Joesting*, 89 Ill. 152.

Where a railroad company claims exemption from liability for the loss of property on the ground that a reduced freight rate was given in consideration that the company assumed no responsibility for loss or damage, proof of this fact alone is not sufficient, but to release it from liability it is necessary to show that the shipper had notice or actual knowledge of the terms of the contract at the time or before the shipment, and that they were assented to by him. *Baltimore & O. R. Co. v. Brady*, 32 Md. 333.

On the trial of a suit by the court alone against a common carrier for loss of goods shipped, where the proof shows that the shipper had no knowledge of a clause in the receipt exempting the carrier from liability for loss by fire, and that the shipper never assented to such clause, there is no error in receiving in evidence the part of the receipt acknowledging the receipt of the goods and agreeing to carry the same and to reject the exemption clause. Otherwise if the trial is

before a jury. *Merchants' Despatch Transp. Co. v. Theilbar*, 86 Ill. 71.

Where the defendants, who were common carriers, had printed upon their bills of freight tariff and their receipts a notice "that all goods and merchandise will be at risk of the owners while in the storehouses of the company"—held, that in the absence of proof that the owners of goods delivered to the defendants for carriage, assented to this notice as qualifying or affecting the defendant's duties or obligations as common carriers in respect to said goods, such notice would have no effect to prevent the defendants from being liable for a loss of the goods, if the facts in other respects were such as to make them liable, though the owners had knowledge of such notice when the goods were delivered to the defendants. *Blumenthal v. Brainerd*, 38 Vt. 402.

434. Taking receipt containing limitations prima-facie evidence of assent.—Proof that a shipper took a receipt from a carrier containing provisions restricting the carrier's liability is only *prima-facie* evidence of his assent to such limitations; and it is therefore open to explanation or contradiction by parol evidence. *Strohn v. Detroit & M. R. Co.*, 21 Wis. 554. —FOLLOWING *Boorman v. American Exp. Co.*, 21 Wis. 154.

Possession by a shipper of a carrier's receipt for the property, containing special terms, is at least *prima-facie* evidence of his assent to them, and in most cases may be conclusive. *Morrison v. Phillips & C. Constr. Co.*, 44 Wis. 405, 19 Am. Ry. Rep. 312.

A party shipped goods, to be carried by water as well as by land, and received a bill of lading containing a provision that the carrier should not be liable for loss or damage by fire or other casualty while in transit or at depots or landing at the point of delivery, and the goods were safely carried to their destination and stored in a suitable warehouse, where they were destroyed by fire on the night of the next day, without any fault on the part of the carrier. Held, that as there was no question made as to the knowledge of the shipper of the provision in the bill of lading, it would be inferred that he received it with knowledge of its contents and agreed to its terms, and consequently the carrier was not liable. *Anchor Line v. Knowles*, 66 Ill. 150. —DISTINGUISHING *Merchants' Despatch Transp. Co. v. Hallock*, 64 Ill. 284.

In such a case, if the duty of the carrier to give notice of the arrival of goods be conceded, under the contract, yet where the goods were landed and stored on Sunday, and destroyed by fire before notice could be given on the following Monday, no liability could attach on account of failing to give notice of their arrival to the consignee. *Anchor Line v. Knowles*, 66 Ill. 150.

435. Question of knowledge and assent for jury.—Whether a shipper had notice or knowledge of limitation of liability and assented thereto, was a question of fact properly submitted to the jury. *Baltimore & O. R. Co. v. Brady*, 32 Md. 333.

It is a question for the jury whether a railway company has delivered to a shipper of goods a ticket limiting its common-law liability as a carrier; but it is not necessary to leave to the jury the question whether or not such ticket had been read over or explained to him. *Pulmer v. Grand Junction R. Co.*, 4 M. & W. 749, 7 D. P. C. 232, 3 Jur. 559.

436. A consideration is necessary.—Where a bill of lading is issued in another state for the transportation of goods into Illinois, exempting the carrier from liability for loss by fire, unless there be proof that this limitation is without consideration, it will be assumed that a special rate was given in consideration that the company be relieved from such loss. *Brown v. Louisville & N. R. Co.*, 36 Ill. App. 140.

When a shipper of freight waives his privilege to demand of a common carrier the transportation of freight under the strict requirements of the common law, and for a valuable consideration (the payment of less than the usual tariff charges) allows the company to assume the relation of a carrier under special contract, such contract, in the absence of an allegation of fraud or imposition, must be interpreted according to the ordinary rules, and its provisions enforced, unless they are unreasonable and unjust. *Selby v. Wilmington & W. R. Co.*, 113 N. Car. 588, 18 S. E. Rep. 88.

437. Must be freely and fairly made.*—A common carrier cannot limit his common-law liability by a special contract in writing with a shipper unless it is

freely and fairly made; and the carrier cannot exact, as a condition precedent for carrying stock or goods, that the shipper must sign a contract in writing limiting or changing the common-law liability. If the carrier has two rates or charges for carrying stock or goods—one if carried under the old common-law liability and the other if carried under a special contract—the shipper must have real freedom of choice in making his selection. *Atchison, T. & S. F. R. Co. v. Dill*, 48 Kan. 210, 29 Pac. Rep. 148.

Public policy imposes on common carriers a constructive liability peculiarly stringent, and they will not be permitted to limit that liability by special contracts unless they are fairly made, without duress, imposture, or delusion, and are fully understood by the other party, and are clearly proved. *Adams Exp. Co. v. Nock*, 2 Duv. (Ky.) 562.

Where a shipper objects to signing a special contract releasing the company from liability, on the ground that he cannot see to read it, and signs only upon the assurance of the clerk that it was of no consequence and a mere matter of form, the jury are warranted in finding that the goods were not delivered to be carried under the special contract. *Simons v. Great Western R. Co.*, 2 C. B. N. S. 620.

438. Need not be signed by shipper.—If a shipper takes a receipt for his goods from the carrier limiting the liability of the carrier, with a full knowledge on the part of the shipper of such conditions, and intending to assent to the restrictions contained in them, it becomes his contract as fully as if he had signed it. *Illinois C. R. Co. v. Frankenberg*, 54 Ill. 88.—DISAPPROVED IN *Michigan C. R. Co. v. Myrick*, 9 Am. & Eng. R. Cas. 25, 107 U. S. 102. FOLLOWED IN *Anchor Line v. Dater*, 68 Ill. 369. NOT FOLLOWED IN *Hoadley v. Northern Transp. Co.*, 115 Mass. 304.

A special contract to carry goods, though not signed by the consignor, is binding upon a railway company, as it is not within section 7 of the R. & C. Tr. Act 1854, which provides that no special contract shall be binding upon the party unless signed by him or the person delivering the goods to be carried. *Baxendale v. Great Eastern R. Co.*, L. R. 4 Q. B. 244, 38 L. J. Q. B. 137, 10 B. & S. 212, 3 Ry. & C. T. Cas. xxv.

Contracts are not "special contracts,"

*Stipulation which companies may not extort from shippers, and effect of such stipulations, if extorted, see note, 13 AM. ST. REP. 782.

within the meaning of section 1261, Dak. C. C., providing that "the obligations of a common carrier * * * may be limited by special contract," unless they are signed by the consignor or consignee. *Hartwell v. Northern Pac. Exp. Co.*, 37 Am. & Eng. R. Cas. 635, 5 Dak. 463, 41 N. W. Rep. 732, 3 L. R. A. 342.

439. Special limitation not implied from former course of dealing.—

Where goods have been delivered to a carrier, but are destroyed in its warehouse before shipment, and before any bill of lading or receipt has been given, the carrier will not be relieved from its common-law liability because it was in the habit, which was known to the plaintiff, of giving shippers receipts limiting its liability against losses by such causes as destroyed the goods in question. *London & L. F. Ins. Co. v. Rome, W. & O. R. Co.*, 23 N. Y. Supp. 231, 68 Hun 598, 52 N. Y. S. R. 581.—REVIEWING *Dorr v. New Jersey Steam Nav. Co.*, 11 N. Y. 485; *Blossom v. Dodd*, 43 N. Y. 264; *Madan v. Sherard*, 73 N. Y. 330; *Reed v. Fargo*, 7 N. Y. Supp. 185.

440. Cannot be created by bill of lading given after shipment or loss.—

A stipulation limiting the liability of common carriers, contained in a receipt for goods given by them to the sender of the goods, on his request, after the goods were lost, does not affect the sender's rights, nor are they affected by the fact that he had been recently their freight agent, and the receipts given by him as such contained the same stipulation. *Gott v. Dinsmore*, 111 Mass. 45.

A shipper who has parted with the control of his goods to a carrier under a verbal agreement for their transportation is not deprived of any of his common-law rights by subsequently receiving a bill of lading containing special conditions and limitations to which his attention was not called, and through inadvertence had not come to his knowledge or notice. So held, where cotton was shipped without any written agreement, but afterward a receipt was sent to the shipper exempting the carrier from liability for loss by fire. *Lamb v. Camden & A. R. Co.*, 4 Daly (N. Y.) 483.—DISTINGUISHING *Nelson v. Hudson River R. Co.*, 48 N. Y. 498. FOLLOWING *Bostwick v. Baltimore & O. R. Co.*, 45 N. Y. 712.

A portion of goods to be shipped were delivered to the carrier's agent with an

understanding that the balance should be delivered as soon as the company gave notice that it had cars for shipment. Upon delivery of the balance the shipper signed a receipt containing conditions limiting the company's liability. Afterward he ascertained that part of the goods were lost before the balance was delivered and before the receipt was signed. Held, that such receipt, so far as it attempted to limit the carrier's liability, could not affect goods delivered prior thereto and accepted by the company as common carriers, and would be held to refer only to the future liability of the company as to the carriage of the goods. *Detroit & M. R. Co. v. Adams*, 15 Mich. 458.

441. Agency — Contracts made with shipper's drayman — Ratification.—

Evidence that it was the usual course of business for a shipper of goods to send his boxes, etc., to a carrier by a teamster, and for the carrier to deliver to the teamster a bill of lading for each shipment, which bill was in a form containing an exception of loss by fire, and was brought by the teamster to the shipper and retained, warrants the finding that there was a special and mutual contract between the shipper and the carrier, limiting the liability of the latter. *Van Schaack v. Northern Transp. Co.*, 3 Biss. (U. S.) 394. *Nelson v. Hudson River R. Co.*, 48 N. Y. 498, 2 Am. Ry. Rep. 305.

In such case the burden is upon the plaintiffs to show that they were not barred by the bill of lading. *Van Schaack v. Northern Transp. Co.*, 3 Biss. (U. S.) 394.

Where the drayman of the shipper, on the delivery of a package, takes a receipt from the freight clerk of the ship containing the words "not accountable for contents," this of itself does not constitute such an agreement; it is a mere *ex-parte* proposition on the part of the carrier after the receipt of the package; and to exonerate the carrier there must be direct or unequivocal evidence of the assent of the shipper. *Seller v. Steamship Pacific*, 1 Oreg. 409.

One who ships his own goods consigned to a person who has a special contract with the carrier for the carriage of goods at reduced rates, at the owner's risk, and afterwards accounts with his consignee for the freight charges paid by the latter on the goods at the reduced rates, will not be held to have ratified the contract as one for the

carriage of such goods at his risk, unless it appears that he had notice of such contract. *White v. Goodrich Transp. Co.*, 46 Wis. 493, 21 Am. Ry. Rep. 398.

442. When carrier's agent may sign shipper's name.—Under section 7 of the Railway and Canal Traffic Act, requiring special contracts to be signed, a signature of a special contract by a railway agent employed by the consignor to deliver, and by the company to receive, the goods is sufficient. *Aldridge v. Great Western R. Co.*, 15 C. B. N. S. 582, 33 L. J. C. P. 161.

443. Power of consignor to bind consignee by terms of shipment.—It is always presumed, in the absence of anything to the contrary, that a consignor has authority to contract with the carrier as to the terms of shipment, so as to bind the consignee; and in making such contracts the carrier need not inquire into the consignor's authority. *McMillan v. Michigan S. & N. I. R. Co.*, 16 Mich. 79.

The power of an agent (as in the case of a shipper sending goods to a purchaser) to bind the owner of goods by an agreement to limit the carrier's liability, will be presumed. And while it has been held that a common carrier cannot stipulate against liability for damages resulting from and occasioned by his negligence, it has also been held that he can, by special contract with the shipper, limit his liability. *Craycroft v. Atchison, T. & S. F. R. Co.*, 18 Mo. App. 487.—QUOTING *York Mfg. Co. v. Illinois C. R. Co.*, 3 Wall. (U. S.) 113.

It seems that ordinarily a person authorized to deliver and delivering the property of another to a common carrier for shipment, may be treated by the latter as having authority to stipulate for and accept the terms of affreightment, and as against the carrier the owner is bound by them. *Jennings v. Grand Trunk R. Co.*, 49 Am. & Eng. R. Cas. 98, 127 N. Y. 438, 28 N. E. Rep. 394, 40 N. Y. S. R. 318; *affirming* 52 Hun 227, 23 N. Y. S. R. 15, 5 N. Y. Supp. 140.

Persons authorized by the owners to ship goods for them are authorized, so far as the carrier is concerned, to make contracts with the carrier; and if in doing so they exceed their authority by consenting to limitations of the carrier's liability, the carrier cannot be made to suffer thereby; neither is it required to investigate the authority of such persons. *Moriarty v. Harnden's Exp. Co.*, 1 Daly (N. Y.) 227.

444. Concealing true value of goods.*—Common carriers may limit their liability as insurers, but cannot relieve themselves from liability for negligence or fraud to a specified sum. But if a shipper, for the purpose of getting a reduced rate on his goods, misrepresents their value to the carrier, this is a fraud which will preclude his recovery for their loss at a greater valuation. *Rosenfeld v. Peoria, D. & E. R. Co.*, 21 Am. & Eng. R. Cas. 87, 103 Ind. 121, 53 Am. Rep. 500, 2 N. E. Rep. 344.—APPROVED IN *Louisville & N. R. Co. v. Wynn*, 45 Am. & Eng. R. Cas. 312, 88 Tenn. 320, 14 S. W. Rep. 311.

If a shipper voluntarily represents and agrees that the goods delivered to a common carrier are of a certain value, and the carrier is thereby induced to grant him a reduced rate of compensation for the carriage, such shipper is bound by his representation and agreement. *Graves v. Lake Shore & M. S. R. Co.*, 16 Am. & Eng. R. Cas. 108, 137 Mass. 33, 50 Am. Rep. 282.

Where the receipt or contract contains a stipulation that the company is not to be held liable for any loss or damage, except as forwarders only, nor for any loss or damage of any box, package, or thing for over \$50, unless the just and true value thereof is stated in such receipt, and where the receipt fails to show any value of the box or goods shipped, the receipt or contract, if fairly and voluntarily entered into, will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight it received when the loss or injury to the box or goods carried results only from slight, common, or ordinary negligence on the part of the carrier, its agents, or servants. *Pacific Exp. Co. v. Foley*, 46 Am. & Eng. R. Cas. 680, 46 Kan. 457, 26 Pac. Rep. 665.—COMMENTING ON *Kallman v. United States Exp. Co.*, 3 Kan. 205. DISAPPROVING *Louisville & N. R. Co. v. Wynn*, 88 Tenn. 320, 14 S. W. Rep. 311. DISTINGUISHING *Kansas City, St. J. & C. B. R. Co. v. Simpson*, 30 Kan. 645; *Western Union Tel. Co. v. Crall*, 38 Kan. 679; *New York C. R. Co. v. Lockwood*, 17 Wall. (U. S.) 357; *Hart v. Pennsylvania R. Co.*, 112 U. S. 332. REVIEWING *Oppenheimer v. United States Exp. Co.*, 69 Ill. 62; *Durgin v. American Exp. Co.*, (N. H.) 20

* See also *ante*, 199-203; *post*, 518.

Atl. Rep. 328, 9 L. R. A. 453; *Orange County Bank v. Brown*, 9 Wend. (N. Y.) 85.

The liability of a common carrier in transporting a family portrait contained in a wooden case is not governed by a provision in the contract of shipment that "specie, drafts, bank bills, and other articles of great intrinsic or representative value, will only be taken upon a representation of their value, and by a special agreement assented to by the superintendent." *Green v. Boston & L. R. Co.*, 128 Mass. 221, 35 Am. Rep. 370.

The fact that the loss of goods is temporary and not permanent does not deprive a carrier of the protection afforded by the Carriers' Act, 11 Geo. 4, and 1 Wm. 4, c. 68, § 1; nor can the owner of goods which ought to have been and were not declared pursuant to that act recover damages for the consequences of the loss of them as distinguished from the loss itself. *Millen v. Brasch*, L. R. 10 Q. B. D. 142, 52 L. J. Q. B. D. 127, 47 L. T. 685, 31 W. R. 190, 47 J. P. 180; reversing L. R. 8 Q. B. D. 35, 51 L. J. Q. B. D. 166, 45 L. T. 653, 46 J. P. 183.

Under the Carriers' Act, 11 Geo. 4, and 1 Wm. 4, c. 68, § 1, protecting the carrier from liability for the loss of goods exceeding £10 in value, where the value has not been declared, the word "value" means the value to the consignor, which is the price the consignee has contracted to pay; and where this price exceeds £10 there can be no recovery. *Blankensee v. London & N. W. R. Co.*, 45 L. T. 761.

Where owners of goods themselves furnish the blank receipt which the carrier's agents sign, it having been taken from a book containing blank printed receipts which they had previously obtained from the carriers, it was held, that such owners must be presumed to have known the contents of the receipt and to have assented to it; and the blank left in the receipt, for the value of the goods, not being filled, and the referee finding that neither the carrier nor their agent who received and receipted the package had any knowledge that its value exceeded \$50, or any notice or reason so to believe, although the receipt contained a provision that unless the value of the package was specified therein the carriers should not be liable to an amount exceeding \$50, it was further held that the referee correctly decided that the package was received to

be carried according to the terms of the receipt and upon the contract of which the receipt was the evidence; and that the defendants were not, therefore, liable in any event beyond the sum of \$50, if the loss fell within the contract and was covered by it. *Westcott v. Fargo*, 63 Barb. (N. Y.) 349.

445. Proving a common-law liability by advertisements and circulars.—Where a common carrier is sued for a violation of its common-law duty to safely carry goods, it is competent for the plaintiff to prove advertisements and circulars of the carrier, agreeing to insure the safe delivery of goods, without any exception for inevitable accidents; and upon proof of such advertisements and circulars it will be presumed that customers have been induced to offer goods for shipment by them, and it is not necessary to prove personal knowledge of such advertisements or circulars. *Morrison v. Davis*, 20 Pa. St. 171.—NOT FOLLOWED IN *Condit v. Grand Trunk R. Co.*, 54 N. Y. 500. REVIEWED IN *Lamont v. Nashville & C. R. Co.*, 9 Heisk. (Tenn.) 58.

446. Limitation as to perishable goods does not include corn.—In an action against a company to recover for injury to a quantity of corn, occasioned by delay in the transportation, defendants cannot claim exemption from liability under a clause in the bill of lading which releases them from loss on perishable property. Mature, merchantable corn cannot be regarded as of that character. *Illinois C. R. Co. v. McClellan*, 54 Ill. 58.

447. Imperfectly marked goods.*—That the contract of carriage exempted the carrier from liability for wrong carriage or wrong delivery of goods marked with initials or numbers, or imperfectly marked, and that the goods in question were marked, not with the name of the consignees, but simply with a number in lieu thereof, does not excuse the carrier from liability, it appearing that the name of the consignees, as well as the number, was on the bill of lading, and that the carrier refused to deliver the goods to them and did not deliver them to any one. *Richmond & D. R. Co. v. Benson*, 86 Ga. 203, 12 S. E. Rep. 357.

A condition that the company will not be responsible for the loss, detention, or damage of any package insufficiently packed, is

* See also *ante*, 190-193.

unreasonable. *Simons v. Great Western R. Co.*, 18 C. B. 805, 26 L. J. C. P. 25.—QUESTIONED IN *Garton v. Bristol & E. R. Co.*, 1 B. & S. 112, 7 Jur. N. S. 1234, 30 L. J. Q. B. 273, 9 W. R. 734.

448. Carrying goods of a combustible nature.—Defendants received at P. two car-loads of coal oil to be carried to London. The shipping-notes stated, "The G. W. R. will please receive the undermentioned property, to be sent subject to their tariff and under the conditions stated above and on the other side," one of which conditions was that defendants would not be liable for the loss or damage to goods of a combustible nature. One of the cars never arrived, and defendants could give no account of it; the other reached London and was damaged there, as was supposed, and all the oil in it lost. *Held*, that defendants were liable, for the condition related only to risk of carriage. *Fitzgerald v. Great Western R. Co.*, 39 U. C. Q. B. 525.—FOLLOWING *Harris v. Great Western R. Co.*, L. R. 1 Q. B. D. 515.

449. When company not liable as common carrier—When question of negligence for jury.—One who has never assumed or offered to carry chattels of a certain class, except upon special terms exempting him from all the important duties and liabilities of a carrier, cannot be classed among carriers of property of that kind, or be made amenable in the character of a common carrier as to such property. *Lake Shore & M. S. R. Co. v. Perkins*, 25 Mich. 329, 5 Am. Ry. Rep. 249.

A complaint alleged that plaintiff had shipped cattle over several connecting roads, one of which was defendant's; that the shipments were made on through bills of lading and at agreed and through rates, and that the cattle were damaged by the negligence of defendant. *Held*, that the action was founded upon the contract as evidenced by the bill of lading, and it was not an action based upon the carrier's common-law liability. *Texas & P. R. Co. v. Wheat*, 2 Tex. App. (Civ. Cas.) 146.

In an action for neglecting to forward goods shipped under a special contract, where the conditions are reasonable and the contract was a special contract within section 7 of the Railway and Canal Traffic Act, and consequently the company did not receive the goods as a common carrier, a nonsuit

is proper. *White v. Great Western R. Co.*, 2 C. B. N. S. 7, 26 L. J. C. P. 158.

On a special condition by a railway company not to be answerable for the trains or boats not starting or arriving at specified times, the boats starting, "wind, weather, and tide permitting," it was held a question for the jury, on the goods missing their market through delay, whether the defendants had been guilty of negligence. *Hawes v. South Eastern R. Co.*, 54 L. J. Q. B. 174, 52 L. T. 514, 5 Ry. & C. T. Cas. xi.

450. How contracts granting limitations construed—Burden of proof.—Restrictions upon the common-law liability of a common carrier, for his benefit, inserted in a receipt drawn up by himself and signed by him alone, for goods intrusted to him for transportation, are to be construed most strongly against the common carrier. *Hooper v. Wells*, 27 Cal. 11.—QUOTING *Wells v. Steam Nav. Co.*, 8 N. Y. 375; *Alexander v. Greene*, 7 Hill (N. Y.) 544; *Schieffelin v. Harvey*, 6 Johns. (N. Y.) 180; *New Jersey S. Nav. Co. v. Merchants' Bank*, 6 How. (U. S.) 344.

A contract between a railroad company and the shipper of goods, limiting the common-law liability of the company as a carrier, will have no greater operation given to it than the language used plainly shows the parties must have intended that it should have. A special contract of this character construed and held not to exempt the company for a total loss of the goods by fire while in the warehouse of the company, at an intermediate station on the line of transportation. *Menzell v. Chicago & N. W. R. Co.*, 1 Dill. (U. S.) 531.

Where goods are lost while in the hands of a common carrier the burden is on him to show that he used due care, and if he relies on a contract limiting his common-law liability, the exemptions must be specific and certain, and nothing left to implication or inference. *New Jersey S. Nav. Co. v. Merchants' Bank*, 6 How. (U. S.) 344.—DISTINGUISHED IN *American Transp. Co. v. Moore*, 5 Mich. 368. QUOTED IN *Hooper v. Wells*, 27 Cal. 11.

451. Carriers by water—Limitations by.—Where a vessel undertakes to safely carry goods, "unavoidable dangers of river navigation excepted," a loss through a collision with another boat through the negligence of such other boat, and without

fault on the part of the defendant boat, is within the exception, and the owners are not liable. *Hayes v. Kennedy*, 2 *Pittsb. (Pa.)* 262.

The plaintiff brought an action against the defendants, a steamboat company, for damage by a peril of the sea to goods delivered to them for transportation, declaring against them as common carriers, and for the purpose of showing the receipt of the goods by the defendants, offered in evidence a bill of lading signed by them, in which was a provision that the company should not be responsible for damage to the goods from any perils or accidents not resulting from their negligence or that of their agents. *Held*: (1) that the exemption stipulated for was lawful and valid; (2) that there was a fatal variance between the declaration and the proof; (3) that the defendants had not waived all objection to the evidence on this ground by not objecting to it when it was offered, inasmuch as it was admissible for the purpose of showing that the defendants had received the goods, and that they had a right to call upon the court to instruct the jury that, by reason of the variance, there could be no recovery upon the declaration. *Camp v. Hartford & N. Y. Steamboat Co.*, 43 *Conn.* 333. — DISTINGUISHED IN *Coupland v. Housatonic R. Co.*, 61 *Conn.* 531.

452. Evidence that shipper was allowed alternative rates with or without limitations.—Where there is a controversy as to whether the carrier offered or was ready to ship under any other than the special contract limiting value, it is error to reject evidence offered on his behalf, tending to show that shippers were allowed choice of contract under which to ship, and to show the instructions given by carrier to his agents for their guidance when shipper rejected the special contract. *Louisville & N. R. Co. v. Sovell*, 49 *Am. & Eng. R. Cas.* 166, 90 *Tenn.* 17, 15 *S. W. Rep.* 837.

b. Carrier Cannot Contract Against its Own Negligence.*

453. General rule.—A common car-

* Right of carrier to limit common-law liability in the absence of negligence, see note, 18 *L. R. A.* 527.

Limitation of amount of liability does not apply in cases of negligence, see notes, 16 *Am. & Eng. R. Cas.* 164; 18 *Id.* 612.

Power of common carrier to contract against liability for negligence, see notes, 10 *Am. Rep.* 366; 14 *L. R. A.* 433.

rier, by special contract with the owner of goods intrusted to him, may so far restrict his common-law liability as to exonerate himself from losses arising from causes over which he had no control, and to which his own fault or negligence in no way contributed, but cannot, by such stipulation, relieve himself from responsibility for losses caused by his own negligence or want of care and skill. *Graham v. Davis*, 4 *Ohio St.* 362.—QUOTED IN *Michigan S. & N. I. R. Co. v. Heaton*, 37 *Ind.* 448.—*Purcell v. Southern Exp. Co.*, 34 *Ga.* 315. *Bartlett v. Pittsburgh, C. & St. L. R. Co.*, 18 *Am. & Eng. R. Cas.* 549, 94 *Ind.* 281. *Mason v. Richmond & D. R. Co.*, 53 *Am. & Eng. R. Cas.* 183, 111 *N. Car.* 482, 16 *S. E. Rep.* 698. *Grogan v. Adams Exp. Co.*, 30 *Am. & Eng. R. Cas.* 9, 114 *Pa. St.* 523, 7 *Atl. Rep.* 134. —DISAPPROVING *Hart v. Pennsylvania R. Co.*, 112 *U. S.* 331.—FOLLOWED IN *Weiler v. Pennsylvania R. Co.*, 42 *Am. & Eng. R. Cas.* 390, 134 *Pa. St.* 310.—*Buck v. Pennsylvania R. Co.*, 150 *Pa. St.* 170, 24 *Atl. Rep.* 678. *Louisville & N. R. Co. v. Sovell*, 49 *Am. & Eng. R. Cas.* 166, 90 *Tenn.* 17, 15 *S. W. Rep.* 837.

Such a contract is void as against public policy. *Indianapolis, P. & C. R. Co. v. Allen*, 31 *Ind.* 394.—DISAPPROVING *Camden & A. R. Co. v. Baldauf*, 16 *Pa. St.* 67; *New Jersey S. Nav. Co. v. Merchants' Bank*, 6 *How. (U. S.)* 344; *Gould v. Hill*, 2 *Hill (N. Y.)* 623; *Laing v. Colder*, 8 *Pa. St.* 479; *Atwood v. Reliance Transp. Co.*, 9 *Watts (Pa.)* 87. DISTINGUISHING *Lee v. Marsh*, 43 *Barb. (N. Y.)* 102. FOLLOWING *Michigan S. & N. I. R. Co. v. Heaton*, 37 *Ind.* 397, note.

Where goods are received for transportation under a contract exempting the carrier from liability for a loss by fire, it will not be liable for such loss in the absence of proof of negligence. *New Orleans Mut. Ins. Co. v. New Orleans J. & G. N. R. Co.*, 20 *La. Ann.* 302. *Armstrong v. Grand Trunk R. Co.*, 18 *New Brun.* 445.—FOLLOWING *Pemberton v. New York C. R. Co.*, 104 *Mass.* 144; *Bristol & E. R. Co. v. Collins*, 7 *H. L. Cas.* 194.

A provision in a bill of lading exempting the carrier from liability for a loss by fire will not relieve it, if the loss occurs by a fire which is the result of its own negligence. *Scruggs v. Baltimore & O. R. Co.*, 5 *McCrary (U. S.)* 590, 18 *Fed. Rep.* 318.—FOLLOWED IN *Eells v. St. Louis, K. & N. W. R. Co.*, 52 *Fed. Rep.* 903.

Under section 1261 of Dak. Civ. Code, which provides that the obligations of a common carrier may be limited by special contract, a shipper may release the carrier from all liability except for negligence, and the liability may be limited to five dollars for each hundredweight of goods. *Hazel v. Chicago, M. & St. P. R. Co.*, 49 Am. & Eng. R. Cas. 76, 82 Iowa 477, 48 N. W. Rep. 926.—DISTINGUISHING *Hartwell v. Northern Pac. Exp. Co.*, 5 Dak. 463, 41 N. W. Rep. 732.

A railroad company may, by express contract or notice brought home to the employer, relieve itself from its liability as insurer of freight, or for money or valuable articles liable to be stolen or damaged, unless apprised of their character and value, or for articles liable to rapid decay, or for live animals liable to get unruly from fright, and to injure themselves in that state, when such articles or animals become injured without the fault or negligence of the company or its agent. *Virginia & T. R. Co. v. Sayers*, 26 Gratt. (Va.) 328.

454. Illustrations of above rule.—A special contract of a common carrier, that he shall not be liable for breakage, operates only to relieve him from his liability as insurer, and leaves him responsible for ordinary negligence as any other bailee for hire. *Missouri Valley R. Co. v. Caldwell*, 8 Kan. 244, 5 Am. Ry. Rep. 287.

If a railroad company undertakes the transportation of cotton, with the special exception of liability on account of loss by fire, and the cotton is destroyed by fire while on the route, and it be shown that the loss was not attributable to the fault of the company, then and in that case the owner cannot recover the damages from the company which the loss of the cotton has caused him. *Levy v. Pontchartrain R. Co.*, 23 La. Ann. 477. *Stedman v. Western Transp. Co.*, 48 Barb. (N. Y.) 97.

A common carrier of fluids, under a contract providing that they shall be at owner's risk of loss from leakage, will not be relieved from liability for a loss by leakage which results from the carrier's negligence. *Thompson v. Chicago & N. W. R. Co.*, 27 Iowa 561.

A. delivered certain trees to a railroad company for carriage, and received a long printed shipping contract which he signed. This contract contained numerous provisions exempting the company from the

extraordinary liabilities of carriers, and also from liability "for damage occasioned by delays from any cause or change of weather." Held, that the terms of the shipping contract were not effectual to exempt the company from liability for a loss occurring through an unreasonable detention occasioned by the company's negligence. *Nicholas v. New York C. & H. R. R. Co.*, 9 Am. & Eng. R. Cas. 103, 89 N. Y. 370.—QUOTING *New Jersey S. Nav. Co. v. Merchants' Bank*, 6 How. (U. S.) 344; *Alexander v. Greene*, 7 Hill (N. Y.) 533; *Wells v. Steam Nav. Co.*, 8 N. Y. 375.—DISTINGUISHED IN *Wilson v. New York C. & H. R. R. Co.*, 21 Am. & Eng. R. Cas. 148, 97 N. Y. 87.

455. Cannot contract against its own or its servant's negligence.*—While a common carrier may by special contract limit his common-law liability as insurer of goods carried by him, he cannot limit his liability so as to exempt himself from loss or damage occasioned by his own or his servant's negligence. *Witting v. St. Louis & S. F. R. Co.*, 45 Am. & Eng. R. Cas. 369, 101 Mo. 631, 14 S. W. Rep. 743.—APPLIED IN *Heck v. Missouri Pac. R. Co.*, 51 Mo. App. 532.—*Alabama G. S. R. Co. v. Thomas*, 89 Ala. 294, 7 So. Rep. 762. *Merchants' D. & T. Co. v. Cornforth*, 3 Colo. 280.—APPLYING *New York C. R. Co. v. Lockwood*, 17 Wall. (U. S.) 357. QUOTING *Wyld v. Pickford*, 8 M. & W. 443; *Wing v. New York & E. R. Co.*, 1 Hilt. (N. Y.) 241.—*Erie R. Co. v. Wilcox*, 84 Ill. 239, 16 Am. Ry. Rep. 457. *Illinois C. R. Co. v. Jonte*, 13 Ill. App. 424.—QUOTED IN *Chicago, R. I. & P. R. Co. v. Harmon*, 17 Ill. App. 640.—*Louisville & N. R. Co. v. Brownlee*, 14 Bush (Ky.) 590.—QUOTING *Dorr v. New Jersey S. Nav. Co.*, 4 Sandf. (N. Y.) 136.—*School District v. Boston, H. & E. R. Co.*, 102 Mass. 552. *Virginia & T. R. Co. v. Sayers*, 26 Gratt. (Va.) 328.

A common carrier cannot, by contract, relieve itself from liability for the loss of goods delivered to it for transportation, which has been occasioned by its own negligence or that of its agents or servants, or where such negligence has, in any degree, contributed to such loss. A common carrier can no more stipulate for a slight degree of negligence than for gross negligence. *Michigan S. & N. T. R. Co. v. Heaton*, 37

* Carrier cannot stipulate for exemption from liability for negligence of itself, its servants or agents, see note, 6 L. R. A. 854.

Ind. 448, 3 *Am. Ry. Rep.* 363.—EXPLAINING *New Jersey S. Nav. Co. v. Merchants' Bank*, 6 *How.* (U. S.) 344. QUOTING *Steamboat New World v. King*, 16 *How.* (U. S.) 469; *Graham v. Davis*, 4 *Ohio St.* 362.—FOLLOWED IN *Indianapolis, P. & C. R. Co. v. Allen*, 31 *Ind.* 394.

456. Cannot contract against fraud or gross negligence.—Common carriers in the business of receiving and forwarding goods may limit their liability by express contract or qualified acceptance, so as to be liable only according to the terms of the contract or acceptance; but they cannot in this way shield themselves from the consequences of fraud, gross negligence, or want of care. *Kallman v. United States Exp. Co.*, 3 *Kan.* 205.—NOT FOLLOWED IN *Shriver v. Sioux City & St. P. R. Co.*, 24 *Minn.* 506.

Public policy will not permit common carriers, by special contracts for carrying freight, to limit their responsibility for damages to injuries caused by the fraud or gross negligence of their agents or servants. *Rhodes v. Louisville & N. R. Co.*, 9 *Bush* (Ky.) 688.—FOLLOWING *Louisville, C. & L. R. Co. v. Hedger*, 9 *Bush* (Ky.) 645.—QUOTED IN *St. Louis, I. M. & S. R. Co. v. Lesser*, 46 *Ark.* 236.

A common carrier is liable for injuries to freight caused by its negligence, notwithstanding, by a special contract with the shipper, it has stipulated against liability except for injuries caused by fraud or gross negligence. *Johnson v. Alabama & V. R. Co.*, 69 *Miss.* 191, 11 *So. Rep.* 104.

457. Rule of the Federal courts.—In the federal courts the rule of law is, that a common carrier may limit his common-law liability by an express agreement, so far as the law makes him an insurer, but not for the negligence of himself or his servants; but nothing short of an express stipulation will constitute such an agreement. It must not depend upon implication or inference, or conflicting and doubtful evidence. Mere notice to the shipper is not sufficient. *Seller v. Steamship Pacific*, 1 *Oreg.* 409.—FOLLOWING *New Jersey S. Nav. Co. v. Merchants' Bank*, 6 *How.* (U. S.) 344.

458. Special limitation does not relieve carrier from due care.—The ordinary bailee for hire, or private carrier, is liable only for neglect of ordinary care; but the common carrier is held to a differ-

ent and higher degree of diligence. And while he may limit his liability by contract, still he is required to use reasonable diligence. *Levering v. Union T. & I. Co.*, 42 *Mo.* 88.

In every case where a party delivers to a common carrier goods to be transported to a particular place for a certain sum, if there be any facts in the case which would relieve the carrier from the responsibility of a common carrier, as by special contract, or notice, or concealment of the value of the article by the shipper, still there is an implied contract on the part of the carrier to take due care of the property. Such special contract, notice, or concealment only changes the extent of the obligation of the carrier, but does not free him from all responsibility. *Kuter v. Michigan C. R. Co.*, 1 *Biss.* (U. S.) 35.

He cannot stipulate for less risk than that he shall answer for accidents and casualties which care and prudence could not provide against. Care and prudence must be measured by the character of the employment and business. The want of these is negligence. It is a duty incident to the public employment, in which the railroads are engaged, to carry cotton. They must load it in cars suitable to its protection from fire, and use all other usual precautions. If they fail to do this, and the cotton is burned, it is negligence. *Mobile & O. R. Co. v. Weiner*, 49 *Miss.* 725.—FOLLOWED IN *New Orleans, St. L. & C. R. Co. v. Faler*, 9 *Am. & Eng. R. Cas.* 96, 58 *Miss.* 911; *Chicago, St. L. & N. O. R. Co. v. Moss*, 21 *Am. & Eng. R. Cas.* 98, 60 *Miss.* 1003.

When a common carrier contracts for exemption from liability for injury from fire he is bound to exercise ordinary diligence to prevent such injury; that is, such care and diligence as a reasonable, prudent, and honest man would exercise in respect to his own concerns under all the circumstances of the particular case; and if he uses this diligence he is not guilty of culpable negligence and not liable for the loss. *Little Rock, M. R. & T. R. Co. v. Talbot*, 47 *Ark.* 97, 14 *S. W. Rep.* 471.—QUOTING AND APPLYING *Morrison v. Davis*, 20 *Pa. St.* 171; *Louisville & N. R. Co. v. Brownlee*, 14 *Bush* (Ky.) 590. REVIEWING AND QUOTING *Wyld v. Pickford*, 8 *M. & W.* 443; *Nugent v. Smith*, 17 *Moaks*, 343; *Memphis & C. R. Co. v. Reeves*, 10 *Wall.* (U. S.) 190.

He is still held to due care and diligence

as to the kind and quality of cars, the running and management of trains, the proper precautions against fire, etc., having reference to the season of the year, the character of the property, the country through which it was to be carried, and the nature of the transit. *Woodward v. Illinois C. R. Co.*, 1 Biss. (U. S.) 447.

Though the property catches fire without the negligence of the carrier, if his agents do not make all proper and necessary efforts to save it, he is still responsible for all that might have been saved, and for any portion saved the carrier is responsible, no matter what afterwards becomes of it. *Woodward v. Illinois C. R. Co.*, 1 Biss. (U. S.) 447.

The measure of damages is the value of the property at the contracted destination, at the time when it should have arrived there, deducting freight. The jury may also allow additional damages by way of interest. *Woodward v. Illinois C. R. Co.*, 1 Biss. (U. S.) 447.

A company stipulating with the consignor against liability for loss by fire is required to use the safest approved motive-power, with the best appliances in use, to arrest the escape of sparks of fire, and cars so constructed as to afford the greatest protection to the goods received for transportation. *New Orleans, St. L. & C. R. Co. v. Faler*, 9 Am. & Eng. R. Cas. 96, 58 Miss. 911.—FOLLOWED IN Chicago, St. L. & N. O. R. Co. v. Moss, 21 Am. & Eng. R. Cas. 98, 60 Miss. 1003.

450. Goods shipped at "owner's risk."—A common carrier is bound to exercise reasonable care and prudence in the transportation of property, and is liable for loss resulting from a failure in this respect, although by his contract the transportation is "at the owner's risk." *Canfield v. Baltimore & O. R. Co.*, 16 Am. & Eng. R. Cas. 152, 93 N. Y. 532, 45 Am. Rep. 268.

A contract whereby goods are to be carried "at owner's risk" does not absolve the company from liability for the consequences of negligent delay, although the goods are to be carried at a reduced rate. *D'Arc v. London & N. W. R. Co.*, L. R. 9 C. P. 325, 22 W. R. 919, 30 L. T. 763.

At most this will only protect him against loss occurring from the ordinary and known risks of transportation. *Nashville & C. R. Co. v. Jackson*, 6 Heisk. (Tenn.) 271, 12 Am.

* Shipment of goods at "owner's risk," see note, 18 Am. & Eng. R. Cas. 621.

Ry. Rep. 54.—FOLLOWED IN Louisville & N. R. Co. v. Wynn, 45 Am. & Eng. R. Cas. 312, 88 Tenn. 320, 14 S. W. Rep. 311.

So where goods are delivered to a carrier, and the evidence shows an unusual delay by reason of insufficient facilities for carrying, causing an accumulation of freight, and that some of the goods were stolen while in the hands of the carrier, it is error to charge the jury that they cannot find for plaintiff except upon the presumption that the property had been stolen or lost while in the company's possession, and such loss must be found to be attributable to the delay in transportation. *Canfield v. Baltimore & O. R. Co.*, 16 Am. & Eng. R. Cas. 152, 93 N. Y. 532, 45 Am. Rep. 268.

When compensation is demanded of a railroad company for damages to goods transported, and the demand is refused, on the ground that the goods were carried at the "owner's risk," this is a circumstance from which the jury may infer a waiver of all other grounds of defense, and an admission that the goods were damaged while in possession of the carrier. *South & N. Ala. R. Co. v. Wilson*, 27 Am. & Eng. R. Cas. 41, 78 Ala. 587.

460. Contributory negligence of shipper—When carrier's negligence for jury.—Where plaintiff has agreed to cover cotton with a tarpaulin and to send a man along to put out fires, the railroad is not bound to abandon the contract or give notice to the plaintiff before carrying it out, upon his failure to perform his part of the contract, but may transport the goods as agreed without incurring liability for their loss caused by plaintiff's breach of contract. *Purcell v. Southern Exp. Co.*, 34 Ga. 315.

Under an express contract for the shipment of cotton, whereby the shipper is to send a man along to protect it from fire, though the carrier will be liable for negligence, it is a question to be submitted to the jury whether the destruction of the goods was caused by negligence of the road or in consequence of the failure of plaintiff to send the man as agreed. *Southern Exp. Co. v. Purcell*, 37 Ga. 103.

461. Limiting liability to amount less than true value of goods.—A

* Validity of stipulations limiting carrier's liability to particular amount. Agreed valuations, see notes, 45 Am. & Eng. R. Cas. 319; 21 Id. 91; 18 Id. 613.

Power of common carrier to limit liability, in

common carrier cannot avoid payment of full damages to property which he has undertaken to transport by showing a special contract limiting in advance his liability to an amount less than the real loss sustained by the shipper. *Chicago, St. L. & N. O. R. Co. v. Abels*, 21 *Am. & Eng. R. Cas.* 105, 60 *Miss.* 1017.

A common carrier cannot stipulate for immunity from liability for goods lost or injured through the negligence or bad faith of his own servants, nor limit his liability to a fixed sum, irrespective of the value of the goods; a clause limiting his liability to "\$5.00 per 100 lbs.," without regard to the value of the goods, is both unreasonable and arbitrary, and is not binding on the shipper. *Georgia Pac. R. Co. v. Hughart*, 90 *Ala.* 36, 8 *So. Rep.* 62.—APPROVING *Alabama G. S. R. Co. v. Little*, 71 *Ala.* 611. DISTINGUISHING *South & N. Ala. R. Co. v. Henlein*, 56 *Ala.* 368; *Central R. Co. v. Smitha*, 35 *Ala.* 47.

Under a bill of lading providing that "in consideration of rates inserted it is agreed that in case of loss or damage the same shall be adjusted at a valuation of twenty dollars per barrel," the company was not exempted from paying the full value of the goods where the loss was by its own negligence. *Alabama G. S. R. Co. v. Little*, 12 *Am. & Eng. R. Cas.* 37, 71 *Ala.* 611.

The words "liquor carried at val. \$20 per bbl." stamped upon the face of a receipt, if they can be construed into a contract to limit the liability of the carrier to the sum of \$20 in case of loss, must be so construed as to limit such liability only in case of loss without fault of the carrier. *Black v. Goodrich Transp. Co.*, 55 *Wis.* 319, 13 *N. W. Rep.* 244, 42 *Am. Rep.* 713.

462. Limiting damages to market value at time and place of shipment.—While it is not competent for a common carrier to contract against liability for damages for its own negligence, it is competent for it to enter into a special contract with the shipper, providing that the standard of damages should be the value of the goods shipped at the place and time of shipment. But such a contract will be restrained by in-

case of loss or injury, to amount less than real injury, see note, 23 *AM. ST. REP.* 593.

Effect upon carrier's liability of statements in bill of lading as to value of goods, see note, 30 *AM. & ENG. R. CAS.* 12.

Carrier's power to limit amount of liability in cases of negligence, see note, 14 *L. R. A.* 433.

terpretation merely to fix the market value by the standard of which any general damages should be measured. *Rogan v. Wabash R. Co.*, 51 *Mo. App.* 665.—REVIEWING *McFadden v. Missouri Pac. R. Co.*, 92 *Mo.* 343; *Brown v. Wabash, St. L. & P. R. Co.*, 18 *Mo. App.* 568.

463. Is carrying cotton on open cars negligence per se?—Whether the special contract of a railroad company with a shipper for the carriage of cotton on open or flat cars is a contract against the negligence of the carrier, on the theory that such mode of transporting cotton is *per se* negligence, and may on that ground be avoided by the shipper who sustains a loss of cotton thus being transported, *quære*. *Chicago, St. L. & N. O. R. Co. v. Moss*, 21 *Am. & Eng. R. Cas.* 98, 60 *Miss.* 1003.

464. Exemption from negligence of captain and crew of a vessel.—A special contract for the carriage of goods partly by railway and partly by sea, exempting the company from liability for the negligence of the captain and crew of the steamer, is unreasonable and void under section 7 of the Railway and Canal Traffic Act (through the operation of 31 & 32 Vict. c. 119, § 16, and 34 & 35 Vict. c. 78, § 12). *Moore v. Midland R. Co.*, 9 *Ir. R. C. L.* 20. See *Moore v. Midland R. Co.*, 8 *Ir. R. C. L.* 232.

465. If exemptions exist, mere proof of loss does not raise presumption of negligence.—A common carrier may, by special contract, limit his common-law liability as an insurer for damages not occasioned by his own negligence. Fire which does not occur through the carrier's fault is a casualty against which he may exonerate himself from responsibility by contract with the shipper. Whether or not the carrier was guilty of negligence is a fact for the jury. Negligence cannot be inferred from the mere fact that the fire occurred while the goods were in the carrier's possession and in transit, when there is a contract exempting the carrier from liability as an insurer. *Indianapolis, D. & W. R. Co. v. Forsythe*, 4 *Ind. App.* 326, 29 *N. E. Rep.* 1138.

Where a railroad company, being unprovided with the means of arresting sparks ("spark-arresters") gave notice that it would transport cotton at half rates, in case it were relieved from risk as to fire, and thereupon an agent of the owner (who, besides,

had a special understanding with the company to the same effect as regards fire risks) shipped cotton upon the road at half rates—held, that bare proof of destruction by fire whilst being transported by the company would not entitle the owner to recover damages for such loss. *Smith v. North Carolina R. Co.*, 64 N. Car. 235.

406. Failing to account for goods raises a presumption of negligence.—Where goods are lost or injured while in the custody of a carrier, under a special contract, and he gives no account of how it occurs, a presumption of negligence arises, and he will be liable for the full value of the goods. *American Exp. Co. v. Sands*, 55 Pa. St. 140.

In action brought for the non-delivery of sawn lumber delivered to defendants, a railway, to be carried, defendants pleaded a condition indorsed on the shipping bill: "That the company will not be responsible for any deficiency in weight or measure of grain, in bags or in bulk, nor for the loss or deficiency in the weight or measure of grain, in bags or in bulk, nor for loss or deficiency in the weight, number, or measure of lumber, coal, or iron of any kind carried by the car-load." The evidence showed that the lumber was loaded at P. and that a portion of it was not delivered at R. There was no evidence as to how the loss occurred. Held: (1) that by the statute 42 Vict. c. 9, § 25, 4, defendants were precluded from setting up the indorsed condition when a loss is charged as happening through their own negligence; (2) that in the absence of evidence, the non-delivery might be assumed to have arisen from misdelivery to some other person, or from the actual use of the property by defendants for their own purposes, in which cases the condition would be no protection. *Henry v. Canadian Pac. R. Co.*, 1 Man. 210.

407. Burden is on carrier to show a limited liability.—The burden of proof of showing a contract by which the common-law liability of the carrier is limited is upon the carrier, which must be proven, like any other fact, by pertinent evidence. *Western Transp. Co. v. Newhall*, 24 Ill. 466.

408. Burden is on carrier to show a loss within the excepted cause.—A common carrier is bound to make safe delivery of all goods intrusted to its carriage, unless lost by the act of God or the public enemy, but he may exempt himself

by special contract, except for negligence. And the burden of proof is on the carrier to show a loss from an excepted cause. *Wallingford v. Columbia & G. R. Co.*, 30 Am. & Eng. R. Cas. 40, 26 So. Car. 258, 2 S. E. Rep. 19.—**DISTINGUISHING** *Glenn v. Columbia & G. R. Co.*, 21 So. Car. 466.—**APPLIED IN** *Slater v. South Carolina R. Co.*, 29 So. Car. 96, 6 S. E. Rep. 936.—*Baltimore & O. R. Co. v. Brady*, 32 Md. 333. *Shriver v. Sioux City & St. P. R. Co.*, 24 Minn. 506.—**FOLLOWING** *Swindler v. Hillard*, 2 Rich. (So. Car.) 286; *Baker v. Brinson*, 9 Rich. (So. Car.) 201; *Davidson v. Graham*, 2 Ohio St. 131; *Graham v. Davis*, 4 Ohio St. 362; *Whitesides v. Russell*, 8 Watts & S. (Pa.) 44. **NOT FOLLOWING** *Harris v. Packwood*, 3 Taunt. 264; *Marsh v. Horne*, 5 B. & C. 322; *French v. Buffalo, N. Y. & E. R. Co.*, 4 Keyes (N. Y.) 108; *Sager v. Portsmouth, S. & P. & E. R. Co.*, 31 Me. 228; *Kallman v. United States Exp. Co.*, 3 Kan. 205.—**FOLLOWED IN** *Hull v. Chicago, St. P., M. & O. R. Co.*, 40 Am. & Eng. R. Cas. 104, 41 Minn. 510, 5 L. R. A. 587, 43 N. W. Rep. 391.

The burden is on him, not only to establish the special agreement limiting such liability, but also to show that the loss falls within the terms of such agreement, and that it was occasioned without fault or neglect on his part. *Gaines v. Union T. & I. Co.*, 28 Ohio St. 418, 14 Am. Ky. Rep. 158.—**FOLLOWING** *Union Exp. Co. v. Graham*, 26 Ohio St. 595; *United States Exp. Co. v. Backman*, 28 Ohio St. 144.—*Southern Exp. Co. v. Moon*, 39 Miss. 822.—**QUOTED IN** *Kirby v. Adams Exp. Co.*, 2 Mo. App. 369.

Goods were shipped from New York for a point in Wisconsin, to be carried to Buffalo, N. Y., by rail and thence by vessel on the lakes, the owner assuming the risk of lake navigation. The goods were twelve or thirteen days in reaching Buffalo, the usual time being three days, and were destroyed by a wreck soon after the lake voyage commenced. The shipment was in November, when the dangers of lake navigation by approaching cold weather increased rapidly. Held, that the unreasonable delay in shipping to Buffalo was *prima facie* evidence of negligence, casting the burden of proof upon the carrier to show that the loss was within the terms of the contract. *Fatvey v. Northern Transp. Co.*, 15 Wis. 129.—**EXPLAINED IN** *Detroit & M. R. Co. v. Farmers' Bank*, 20 Wis. 122.

469. Burden on carrier to establish contract, and to show that loss was within excepted cause.—If a carrier claims that goods were shipped under a special contract, excepting other risks and perils than those excepted at common law, it is for him to establish the contract and show that the risk or loss was excepted by such contract. *Witting v. St. Louis & S. F. R. Co.*, 28 Mo. App. 103.—QUOTING *Read v. St. Louis, K. C. & N. R. Co.*, 60 Mo. 206.—QUOTED IN *Terre Haute & L. R. Co. v. Sherwood*, 132 Ind. 129. REVIEWED IN *Flynn v. St. Louis & S. F. R. Co.*, 43 Mo. App. 424.

470. Carrier must show that loss was within excepted cause, and without negligence.—Where a common carrier limits his liability by special contract, the onus is on him of showing not only that the cause of the loss is within the terms of the exception, but also that there was no negligence. *Baker v. Brinson*, 9 *Rich. (So. Car.)* 201.—FOLLOWED IN *Shriver v. Sioux City & St. P. R. Co.*, 24 Minn. 506.

A common carrier relying on an exemption from liability for loss by fire of goods delivered to it for carriage must show that the goods were destroyed by fire and that such loss was without fault on its part; and where the proof shows that the goods were delivered to the carrier, 16 and 40 hours before their destruction, and fails to show that it could not have forwarded them before the fire, the plaintiff is entitled to recover. *Louisville & N. R. Co. v. Touart*, 97 *Ala.* 514, 11 *So. Rep.* 756.

In an action against a carrier upon a bill of lading containing an exception of the dangers of the river navigation and inevitable accidents, after the non-delivery of the goods is shown the burden of proof is upon the carrier to show not only a loss within the terms of the exception, but also that proper care and skill were exercised to prevent it. *Graham v. Davis*, 4 *Ohio St.* 362.—NOT FOLLOWED IN *Witting v. St. Louis & S. F. R. Co.*, 101 Mo. 638.

471. Carrier must show due care, or lack of negligence.—Where by special contract the liability of a common carrier of goods is limited to loss or injury through his negligence, the carrier must, to excuse himself, after loss or injury is proved, show that it occurred from some cause other than his negligence. He must show there was no negligence on his

part. *Hull v. Chicago, St. P., M. & O. R. Co.*, 40 *Am. & Eng. R. Cas.* 104, 41 *Minn.* 510, 5 *L. R. A.* 587, 43 *N. W. Rep.* 391.—FOLLOWING *Shriver v. Sioux City & St. P. R. Co.*, 24 *Minn.* 506.—QUOTED IN *Terre Haute & L. R. Co. v. Sherwood*, 132 *Ind.* 129.—*Ketchum v. American Merchants' Union Exp. Co.*, 52 *Mo.* 390.—FOLLOWING *Levering v. Union T. & I. Co.*, 42 *Mo.* 88; *Wolf v. American Exp. Co.*, 43 *Mo.* 421.—FOLLOWED IN *Lupe v. Atlantic & P. R. Co.*, 3 *Mo. App.* 77. OVERRULED IN *Witting v. St. Louis & S. F. R. Co.*, 101 *Mo.* 638.—*Drew v. Red Line Transit Co.*, 3 *Mo. App.* 495.—DISTINGUISHING *Owens v. Hannibal & St. J. R. Co.*, 58 *Mo.* 386. FOLLOWING *Kirby v. Adams Exp. Co.*, 2 *Mo. App.* 369. RECONCILING *Read v. St. Louis, K. C. & N. R. Co.*, 60 *Mo.* 199.—*Union Exp. Co. v. Graham*, 26 *Ohio St.* 595.—FOLLOWED IN *United States Exp. Co. v. Backman*, 28 *Ohio St.* 144; *Gaines v. Union T. & I. Co.*, 28 *Ohio St.* 418; *Baltimore & O. R. Co. v. Campbell*, 36 *Ohio St.* 647. NOT FOLLOWED IN *Witting v. St. Louis & S. F. R. Co.*, 101 *Mo.* 638.

The duty of the carrier to prove the absence of negligence on his part arises from the terms of the contract from the character of his occupation, and from the rule of evidence requiring the facts to be proven by that party in whose knowledge they peculiarly lie. *Chicago, St. L. & N. O. R. Co. v. Moss*, 21 *Am. & Eng. R. Cas.* 98, 60 *Miss.* 1003.—QUOTING *Lamb v. Camden & A. R. Co.*, 46 *N. Y.* 271; *York Mfg. Co. v. Illinois C. R. Co.*, 3 *Wall. (U. S.)* 107.—NOT FOLLOWED IN *Witting v. St. Louis & S. F. R. Co.*, 101 *Mo.* 638.

Although the contract of affreightment contains a clause relieving the carrier from loss by fire, he is not thereby exempted from the use of proper care for the safety of the goods while in his possession to be forwarded. It is his duty to keep them, while in his hands awaiting reshipment, in a safe and proper place; and the burden of proof is on him to show that he has done so, although the fire originated, without his fault, in adjacent property over which he had no control, and although he made all reasonable efforts after it originated to prevent it from extending to the goods destroyed. *Erie R. Co. v. Lockwood*, 28 *Ohio St.* 388, 14 *Am. Ry. Rep.* 143.—FOLLOWING *Gaines v. Union T. & I. Co.*, 28 *Ohio St.* 418.

Fire cannot be considered, in itself, an

unavoidable danger; and in case of loss from that cause, the defendant is bound to show the origin or cause of the fire, to bring himself within the exception; otherwise the presumption is, it might have been avoided by proper care. *Union Mut. Ins. Co. v. Indianapolis & C. R. Co.*, 1 *Disney (Ohio)* 480.

A certain number of bales of cotton were delivered to a railroad company for transportation and a receipt given, in the nature of a bill of lading, which had stamped upon it the words "at owner's risk of fire." The cotton was destroyed by fire in the course of its transit in one of the company's cars. In an action to recover the value of the cotton—*heid*, that the burden of proof was on the company to show that the cotton was not lost by reason of any want of care, skill, and diligence on its part; and if the loss was occasioned by the negligence of the company's agents, or was burned by reason of the insufficiency of the car, in not being close and tight, then the company was liable. *Levering v. Union T. & I. Co.*, 42 *Mo.* 88.—*OVERRULED* in *Witting v. St. Louis & S. F. R. Co.*, 101 *Mo.* 638.

472. When plaintiff must affirmatively show negligence on part of carrier.—When, by contract, a common carrier is exempted from liability for loss occurring by fire, the owner of goods lost by fire in the transit must affirmatively prove that the loss was the result of negligence of the carrier or his agents, before he can recover. *Little Rock, M. R. & T. R. Co. v. Corcoran*, 18 *Am. & Eng. R. Cas.* 602, 40 *Ark.* 375.—*FOLLOWING* *Little Rock, M. R. & T. R. Co. v. Talbot*, 39 *Ark.* 523.—*Little Rock, M. R. & T. R. Co. v. Talbot*, 18 *Am. & Eng. R. Cas.* 598, 39 *Ark.* 523.—*FOLLOWED* in *Little Rock, M. R. & T. R. Co. v. Corcoran*, 18 *Am. & Eng. R. Cas.* 602, 40 *Ark.* 375; *Witting v. St. Louis & S. F. R. Co.*, 101 *Mo.* 638.—*Sager v. Portsmouth, S. & P. & E. R. Co.*, 31 *Me.* 228. *Witting v. St. Louis & S. F. R. Co.*, 28 *Mo. App.* 103.—*FOLLOWING* *Heil v. St. Louis, I. M. & S. R. Co.*, 16 *Mo. App.* 363. *QUOTING* *Read v. St. Louis, K. C. & N. R. Co.*, 60 *Mo.* 206. *REVIEWING* *Davis v. Wabash, St. L. & P. R. Co.*, 89 *Mo.* 340; *Farnham v. Camden & A. R. Co.*, 55 *Pa. St.* 53; *American Exp. Co. v. Perkins*, 42 *Ill.* 461; *Dorr v. New Jersey S. Nav. Co.*, 11 *N. Y.* 483; *Nelson v. Hudson River R. Co.*, 48 *N. Y.* 498; *Kiff v. Atchison, T. & S. F. R. Co.*, 32 *Kan.* 263.

Where there is proof of the fact of the injury and the manner of its occurrence in circumstances which did not import negligence on the part of the carrier, there is no liability of the carrier, whose contract was for a limited liability only, except upon proof of negligence as an inducing cause of the injury; and the burden of making such proof is upon the plaintiff. *Buck v. Pennsylvania R. Co.*, 150 *Pa. St.* 170, 24 *Atl. Rep.* 678.

473. After loss is shown to be within excepted cause, burden is shifted to plaintiff to show negligence.—Where a common carrier is sued for the loss of goods, it is sufficient for plaintiff in the first instance to prove a delivery to the carrier and a loss. If the carrier then sets up a special contract, limiting its liability, the burden is on it to prove that the loss occurred through causes from which it was relieved by the contract; but the carrier is not required to prove affirmatively that it was not guilty of negligence. Proof of negligence must come from the plaintiff; but it is sufficient to show negligence to prove that the loss would not have occurred by the exercise of reasonable skill and care. *Read v. St. Louis, K. C. & N. R. Co.*, 60 *Mo.* 199, 9 *Am. Ry. Rep.* 201.—*FOLLOWED* in *Witting v. St. Louis & S. F. R. Co.*, 101 *Mo.* 638. *QUOTED* in *Witting v. St. Louis & S. F. R. Co.*, 28 *Mo. App.* 103.—*Mitchell v. United States Exp. Co.*, 46 *Iowa* 214. *Witting v. St. Louis & S. F. R. Co.*, 45 *Am. & Eng. R. Cas.* 369, 101 *Mo.* 631, 14 *S. W. Rep.* 743.—*APPROVING* *Read v. St. Louis, K. C. & N. R. Co.*, 60 *Mo.* 199. *FOLLOWING* *Lamb v. Camden & A. R. & T. Co.*, 46 *N. Y.* 271; *Whitworth v. Erie R. Co.*, 87 *N. Y.* 413; *Farnham v. Camden & A. R. Co.*, 55 *Pa. St.* 53; *Patterson v. Clyde*, 67 *Pa. St.* 500; *Little Rock, M. R. & T. R. Co. v. Talbot*, 39 *Ark.* 526; *Memphis & C. R. Co. v. Reeves*, 10 *Wall. (U. S.)* 176. *NOT FOLLOWING* *Brown v. Adams Exp. Co.*, 15 *W. Va.* 812; *Berry v. Cooper*, 28 *Ga.* 543; *Chicago, St. L. & N. O. R. Co. v. Moss*, 60 *Miss.* 1003, 45 *Am. Rep.* 428; *Graham v. Davis*, 4 *Ohio St.* 362; *Union Exp. Co. v. Graham*, 26 *Ohio St.* 595. *OVER-RULING* *Levering v. Union T. & I. Co.*, 42 *Mo.* 89; *Ketchum v. American Merchants' Union Exp. Co.*, 52 *Mo.* 390.—*REVIEWED* in *Hance v. Pacific Exp. Co.*, 48 *Mo. App.* 179.—*Heil v. St. Louis, I. M. & S. R. Co.*, 16 *Mo. App.* 363. *Texas & P. R. Co. v. Morse*, 1 *Tex. App. (Civ. Cas.)* 179.

Goods which were carried under a bill of lading limiting the carrier's liability were carried to the place of destination and put in a shed on the carrier's wharf, where four watchmen were employed. While there, a fire, from an unknown cause, broke out in a steamboat lying near the wharf, while the boat was fully manned, which destroyed the goods in the shed. *Held*, that this proof, coming from the company, was sufficient to *prima facie* relieve it from negligence, and to cast the burden on the plaintiff to show negligence. *Farnham v. Camden & A. R. Co.*, 55 Pa. St. 53.—FOLLOWED IN *Witting v. St. Louis & S. F. R. Co.*, 101 Mo. 638; *Colton v. Cleveland & P. R. Co.*, 67 Pa. St. 211. QUOTED IN *Virginia & T. R. Co. v. Sayers*, 26 Gratt. (Va.) 328. REVIEWED IN *Witting v. St. Louis & S. F. R. Co.*, 28 Mo. App. 103.

c. Authorities Holding that Carrier May Contract Against Negligence.

474. General rule in England and the United States.*—It is well settled that common carriers may stipulate for a less degree of responsibility than the common law imposes; and courts differ now only as to the extent to which, under such stipulations, public policy will allow the stringency of the ancient rule to be relaxed. *Camp v. Hartford & N. Y. Steamboat Co.*, 43 Conn. 333.

The English courts hold that carriers may stipulate for entire exemption from responsibility, even for their own negligence. *Camp v. Hartford & N. Y. Steamboat Co.*, 43 Conn. 333.

The American courts generally hold, in view of the disadvantage under which the consignor generally deals with the carrier, that they will reserve the right to pass upon the reasonableness of the particular contract as made, and will not allow the carrier to exempt himself by special contract from the consequences of his own negligence or that of his agents. *Camp v. Hartford & N. Y. Steamboat Co.*, 43 Conn. 333.

The carrier and shipper may, by contract, limit the common-law liability of the carrier in everything not trenching on the requirements of a just public policy; and in some jurisdictions these special contracts may

extend to exemptions of the carrier and servants from their own negligence; but in Missouri a stipulation of exemption for negligence is void as against public policy. *Potts v. Wabash, St. L. & P. R. Co.*, 17 Mo. App. 394.

By Va. Code 1887, § 1296, no agreement to exempt a common carrier from liability for injury or loss occasioned by his own neglect or misconduct shall be valid; yet the weight of authority favors the proposition that a carrier may, by special agreement, fairly made in consideration of a reduced rate of transportation, limit his liability to a certain amount, less than the value of the property, in case of loss or damage occurring through his negligence. *Richmond & D. R. Co. v. Payne*, 42 Am. & Eng. R. Cas. 366, 86 Va. 481, 10 S. E. Rep. 749.

The English rule that, in cases of contract of shipment "at the owner's risk," in general terms, the question of diligence and neglect is out of the case, and that the carrier or bailee is wholly absolved from all responsibility whatever, is held to be contrary to that prevailing in American courts, and it is, therefore, error in the court to refuse to instruct the jury that, if they believed the contracts for transporting goods were special contracts, the plaintiff could only recover under such special contracts; and that if they believed the goods were lost by fire, and that the carrier or its agents and servants exercised ordinary care and diligence in transporting them, the defendant was not liable; and that if they believed the goods were shipped and transported under special contracts, and that they were lost by fire, and that the carrier, its agents, and servants exercised such care as a prudent man would, as to his own goods, in protecting them from unforeseen accident, which diligence and care could not guard against, the plaintiff could not recover. *Baltimore & O. R. Co. v. Rathbone*, 1 W. Va. 87.

475. New York rule—No exemption by general terms.—A carrier may by special contract exempt itself from responsibility for a loss occurring through the fault, negligence, or wilful and criminal acts of its servants, agents, and officers other than its directors; but it cannot do so by any mere general words in its usual printed bills of lading or receipts. *Knell v. United States & B. Steamship Co.*, 1 J. & S. (N. Y.) 423. *Ghormley v. Dinsmore*, 19 J. & S. (N.

*Power of common carriers to limit their common-law liability. Authorities arranged by states, see note, 35 AM. & ENG. R. CAS. 672.

Y.) 196.—**FOLLOWING** *Magnin v. Dinsmore*, 56 N. Y. 168; *Mynard v. Syracuse, B. & N. Y. R. Co.*, 71 N. Y. 180; which overrule *Belger v. Dinsmore*, 51 N. Y. 166.—*Prentice v. Decker*, 49 Barb. (N. Y.) 21.

Where goods are received by a carrier to be transported "at owner's risk," it is not liable for a loss or injury unless it occurs through gross negligence. It is not enough to charge the carrier to prove a delivery of the goods to it and a loss by a railroad accident, without showing what causes led to the accident. *French v. Buffalo & E. R. Co.*, 2 Abb. App. Dec. (N. Y.) 196, 4 Keyes 108.—**APPLIED IN** *McCaffrey v. Twenty-third St. R. Co.*, 47 Hun (N. Y.) 404.

470. Illustrations of New York rule.—Certain quince trees intended for transplanting, were shipped with a provision in the contract to the effect that the carrier should not be liable for damage to perishable property occasioned by delays from any cause, or change of weather, or loss or injury by fire, water, heat, or cold. *Held*, that the carrier was not liable for damage to the trees caused by freezing, though the freezing occurred through its own negligence. *Nicholas v. New York C. & H. R. Co.*, 4 Hun (N. Y.) 327, 6 T. & C. 606.—**APPLYING** *Cragin v. New York C. R. Co.*, 51 N. Y. 61.

Goods were delivered to a transportation company and carried to the end of a railroad, where they were to be delivered to a connecting carrier by water. They were placed in a suitable warehouse and remained some eight days, when they were destroyed by fire. The usual course of business was to send a boat to such place for goods once a week, or once every two weeks. There was no agreement that the goods should be forwarded at once, or within any given time. *Held*, that the delay was not unreasonable, and the carrier, having limited its liability, was not liable. *Stedman v. Western Transp. Co.*, 48 Barb. (N. Y.) 97.—**DISTINGUISHING** *Michaels v. New York C. R. Co.*, 30 N. Y. 564.

477. When New York rule applied in suit in another state.—A contract for the carriage of goods which contains a stipulation releasing the carrier from liability for damages resulting from his negligence will be enforced in an action in Pennsylvania according to the law of New York, if it was made, was to be performed, and the alleged breach occurred, in

New York. *Forepaugh v. Delaware, L. & W. R. Co.*, 40 Am. & Eng. R. Cas. 78, 128 Pa. St. 217, 18 Atl. Rep. 503.

Decisions of the courts of one state upon the commercial or any other branch of the common law prevailing therein are as binding upon the courts of another state as are decisions based upon statutes, and the distinction drawn by the United States courts between the two classes of decisions is untenable. *Forepaugh v. Delaware, L. & W. R. Co.*, 40 Am. & Eng. R. Cas. 78, 128 Pa. St. 217, 18 Atl. Rep. 503.

478. Illinois rule.—Common carriers may contract for exemption from responsibility for all negligence except that which is gross. *Chicago, B. & N. R. Co. v. Hawk*, 42 Ill. App. 322.

479. English rule.—A fish merchant delivered fish to a railway company to carry upon a signed contract relieving the company as to all fish delivered by him "from all liability for loss or damage by delay in transit, or from whatever other cause arising," in consideration of the rates being one fifth lower than where no such undertaking was granted, the contract to endure for five years. The servants of the company accepted the fish, although from pressure of business they could not carry it in time for the intended market, and the fish lost the market. *Held*, that upon the facts the merchant had a *bona-fide* option to send fish at a reasonable rate, with liability on the company as common carriers, or at the lower rate upon the terms of the contract; that the contract was in point of fact just and reasonable, within the Railway and Canal Traffic Act 1854 (17 & 18 Vict. c. 31), § 7, and covered the delay, and that the company were not liable for the loss. *Manchester, S. & L. R. Co. v. Brown*, 16 Am. & Eng. R. Cas. 174, L. R. 8 H. L. Cas. 703; reversing L. R. 10 Q. B. D. 250; affirming 6 Am. & Eng. R. Cas. 481, L. R. 9 Q. B. D. 230. *Simons v. Great Western R. Co.*, 18 C. B. 805, 26 L. J. C. P. 25.—**QUESTIONED IN** *Garton v. Bristol & E. R. Co.*, 1 B. & S. 112, 7 Jur. N. S. 1234, 30 L. J. Q. B. 273, 9 W. R. 734.—*Beal v. South Devon R. Co.*, 3 H. & C. 337, 12 W. R. 1115, 11 L. T. 184; affirming 5 H. & N. 875, 29 L. J. Ex. 441, 8 W. R. 651. *Lewis v. Great Western R. Co.*, L. R. 3 Q. B. D. 195, 47 L. J. Q. B. D. 131, 37 L. T. 774, 26 W. R. 255, 15 Am. Ry. Rep. 601.

Where a company enters into a *bona-fide*

contract to carry at a reduced rate, upon condition that it shall be responsible only for wilful misconduct, in an action for injury to the goods carried the plaintiff must prove that the injury was caused by actual wilful misconduct. *Great Western R. Co. v. Glenister*, 22 W. R. 72, 29 L. T. 422.

Where a railway company carries at alternative rates, the higher rate at its own risk and the lower rate at the owner's risk, except from liability arising from the wilful misconduct of the company's servants, an injury is not caused by such misconduct where the company's servants pack cheeses in such a manner that during their transit they are damaged, if the servants did not know that damage would result from the manner in which the cheeses were packed. *Lewis v. Great Western R. Co.*, L. R. 3 Q. B. D. 195, 47 L. J. Q. B. D. 131, 37 L. T. 774, 26 W. R. 255, 15 Am. Ry. Rep. 601.

A railway company is not relieved from liability for delay in delivering goods, although they were carried by special contract under the lower rate of charge, "solely at the risk of the sender, with the exception that the company shall be responsible for any wilful act or wilful default of the company or their servants, if proved, or for fraud or theft of their servants, and for collisions of trains conveying the goods within the company's limits. *Goldsmith v. Great Eastern R. Co.*, 44 L. T. 181, 29 W. R. 651. — DISTINGUISHED IN *Stevens v. Great Western R. Co.*, 52 L. T. 324.

480. Canadian rule.—Where a railway company received certain plate glass to be carried for the plaintiff, who signed a paper, partly written and partly printed, requesting them to receive it upon the conditions indorsed, which provided that they would not be responsible for damage done to any china, glass, etc., etc., delivered to them for carriage, and defendants gave a receipt with the same conditions upon it—*held*, that such delivery and acceptance formed a special contract, which was valid at common law, and exempted defendants from injury to the goods, even though caused by gross negligence. *Hamilton v. Grand Trunk R. Co.*, 23 U. C. Q. B. 600.—QUOTING *Lyon v. Mells*, 5 East 438; *Carr v. Lancashire & Y. R. Co.*, 7 Ex. 707. RE-VIEWING *Austin v. Manchester, S. & L. R. Co.*, 10 C. B. 454; *Great Northern R. Co. v. Morville*, 16 Jur. 528.—FOLLOWED IN *Spettigue v. Great Western R. Co.*, 15 U. C.

C. P. 315.—*Spettigue v. Great Western R. Co.*, 15 U. C. C. P. 315.—FOLLOWING *Hamilton v. Grand Trunk R. Co.*, 23 U. C. Q. B. 600.

"The Railway Act 1868," 31 Vict. c. 68 D, § 20, sub-sec. 4, as amended by 34 Vict. c. 43, § 5 D, is not, by virtue of section 7 of the latter act, providing that the property of the companies shall not be exempt from acts of negligence, made applicable to the *Great Western R. Co.*; and therefore they were not deprived of any protection afforded by one of their special conditions, which stated that fruit was to be carried only at the risk of the owners, and that they would not be liable for injury occasioned by frost, although the jury found that the fruit in question, which was being carried by them, became frozen owing to their negligence. *Scott v. Great Western R. Co.*, 23 U. C. C. P. 182.—DISTINGUISHED IN *Scarlett v. Great Western R. Co.*, 41 U. C. Q. B. 211.

d. Jurisdictions Where no Exemptions are Allowed.

481. Under Texas statute.*—The liability of a common carrier to make compensation for goods or property lost by it extends at common law not only to the duty imposed upon it by law to safely transport the goods, but also to its responsibility to make reparation by way of damages in favor of the owner of the property to the full extent allowed by law in such cases. Any agreement that diminishes or destroys its liability in either of these respects would be contrary to public policy. Contract limiting damages for loss to the value at the place of shipment is void. *Galveston, H. & S. A. R. Co. v. Ball*, 80 Tex. 602, 16 S. W. Rep. 441.

An action will lie against a common carrier for the non-delivery of property at its destination, although partially injured, and that by act of God. Such defense, if the property had been tendered or delivered, would only have gone in mitigation of damages. *Houston & T. C. R. Co. v. Harn*, 44 Tex. 628.

A common carrier by contract, in cases not governed by the statutes of this state forbidding it, may stipulate against liability from loss by fire when made with the condition the law attaches to it, which is that the carrier under such a contract will not be

* See also *ante*, 14.

liable for a loss occurring through the excepted clause, unless the negligence of itself or servants contributed to the loss. *Missouri Pac. R. Co. v. China Mfg. Co.*, 79 Tex. 26, 14 S. W. Rep. 785. *Missouri Pac. R. Co. v. Sherwood*, 84 Tex. 125, 19 S. W. Rep. 455.

While a railway can limit its liability to loss or injury upon its own road, yet where the article shipped was never delivered, it devolves upon the defendant that received the freight to show compliance with its contract and a safe delivery to the connecting carrier. The burden of proof rests upon the carrier receiving the goods, which were never delivered, to clear itself of blame, to avoid liability. *International & G. N. R. Co. v. Foltz*, 3 Tex. Civ. App. 644, 22 S. W. Rep. 541.—APPLYING *Savannah, F. & W. R. Co. v. McIntosh*, 73 Ga. 532. FOLLOWING *Ryan v. Missouri, K. & T. R. Co.*, 65 Tex. 14; *Texas & P. R. Co. v. Adams*, 78 Tex. 372.

In a suit against a railway company, if the petition alleges facts which, if true, will entitle the plaintiff to damages on account of injury to specific articles of freight, to be measured by their value at the point of destination, the defendant cannot introduce evidence of a special contract to limit its liability to a more restricted measure of damages, in the absence of a plea setting it up. *Missouri Pac. R. Co. v. Edwards*, 75 Tex. 334, 12 S. W. Rep. 853.

482. The statute does not apply to interstate shipments.—Article 278 Rev. St. prescribes that "Railroad companies and other common carriers of goods, wares, and merchandise for hire within this state, on land, or in boats or vessels on the waters, entirely within the body of this state, shall not limit or restrict their liability as it exists at common law," etc. This does not apply to a foreign or interstate shipment, but only to shipments purely domestic, beginning and ending in the state of Texas. *Missouri Pac. R. Co. v. Sherwood*, 84 Tex. 125, 19 S. W. Rep. 455. *Missouri Pac. R. Co. v. International M. Ins. Co.*, 84 Tex. 149, 19 S. W. Rep. 459. *Gulf, C. & S. F. R. Co. v. Maetze*, 18 Am. & Eng. R. Cas. 613, 2 Tex. App. (Civ. Cas.) 553.

A limitation on the common-law liability of a carrier for the proper delivery of articles to a point beyond the limits of Texas, to be recognized must be reasonable. *Missouri Pac. R. Co. v. Harris*, 28 Am. & Eng.

R. Cas. 107, 67 Tex. 166, 2 S. W. Rep. 574.

In an action against a common carrier for the loss of cotton which it contracted to transport from a point in Texas to a point in Massachusetts, the plaintiff pleaded a statute of Texas making void any stipulation exempting the carrier from its common-law liability. The Supreme Court of Texas had decided that this statute applied only to shipments purely domestic. Held, that it was error to refuse an instruction asked by the defendant, which was intended to inform the jury that the Texas statute did not apply to the bill of lading sued upon, but that the judgment would not be reversed for this error, where it appeared that the court placed its findings for the plaintiff on the ground that the cotton was lost by reason of the negligence of the defendant or its agent. *Otis Co. v. Missouri Pac. R. Co.*, 55 Am. & Eng. R. Cas. 636, 112 Mo. 622, 20 S. W. Rep. 676.

483. What is a domestic, and what an interstate shipment.—By a contract of domestic shipment is understood such a contract as contemplates the shipment of goods from one point in the state to another point therein. Transportation is only domestic when confined to the boundaries of the state in which the contract of shipment is made. *Missouri Pac. R. Co. v. Sherwood*, 84 Tex. 125, 19 S. W. Rep. 455.

By a contract of foreign or interstate shipment is understood such a contract as contemplates the transportation thereunder of goods from a point within the state to a foreign country or to a point within another state. *Missouri Pac. R. Co. v. Sherwood*, 84 Tex. 125, 19 S. W. Rep. 455.

An undertaking on the part of the carrier is a contract for foreign shipment when contracting to carry cotton upon its lines and to deliver it to its connecting lines, to be carried to the city of New Orleans, La., there to be delivered to the West India P. S. Co., to be transported to Liverpool. *Missouri Pac. R. Co. v. Sherwood*, 84 Tex. 125, 19 S. W. Rep. 455.

The track of a railway company may extend beyond the state; yet if goods be carried by it from one point to another within this state, such carriage constitutes transportation within this state, and such railway is a "carrier within the state." But if the railway, whether by itself or by its connecting lines, its agents, transport goods from a point within this state to a point in

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another state, it is a carrier not "within this state." In the latter it is engaged in interstate commerce. *Missouri Pac. R. Co. v. Sherwood*, 84 Tex. 125, 19 S. W. Rep. 455.

484. Other jurisdictions.*—Illinois act of 1872 (Rev. St. ch. 27), prohibiting a common carrier from limiting its liability by contract, does not apply to a shipment of goods where the shipper is asked their value but declines to give it. *Mather v. American Exp. Co.*, 9 Biss. (U. S.) 293, 2 Fed. Rep. 49.

A railroad company operating a line of railroad in Nebraska is a common carrier, and cannot under the provisions of the constitution limit its liability, as such, by special agreement with a shipper. *Missouri Pac. R. Co. v. Vandewater*, 37 Am. Rep. 508, R. Cas. 651, 26 Neb. 222, 41 N. W. Rep. 508.

Common carriers cannot limit their liability or evade the consequences of a breach of their legal duties as such, by an express agreement or special acceptance of the goods to be transported. Accordingly, where common carriers, on receiving goods for transportation, gave the owner a memorandum by which they promised to forward the goods to their place of destination, danger of fire, etc., excepted—*held*, that they were liable for a loss by fire, though not resulting from negligence. *Gould v. Hill*, 2 Hill (N. Y.) 623. — FOLLOWING *Cole v. Goodwin*, 19 Wend. (N. Y.) 281. REFERRING TO *Atwood v. Reliance Transp. Co.*, 9 Watts (Pa.) 87. — DISAPPROVED IN *Indianapolis, P. & C. R. Co. v. Allen*, 31 Ind. 394; *Zouch v. Chesapeake & O. R. Co.*, 36 W. Va. 524. NOT FOLLOWED IN *Dorr v. New Jersey S. Nav. Co.*, 4 Sandf. (N. Y.) 136. OVER- RULED IN *Dorr v. New Jersey S. Nav. Co.*, 11 N. Y. 485.

A common carrier is responsible to the full extent of his liability as such, notwithstanding any contract he may make with reference thereto; but one not a common carrier may make any lawful contract which the parties choose. *Piedmont Mfg. Co. v. Columbia & G. R. Co.*, 16 Am. & Eng. R. Cas. 194, 19 So. Car. 353.

In an action against defendants as common carriers the plaintiff proved a receipt signed by them contracting to carry on certain conditions, and that they had carried fish for one witness called, as well as for the

plaintiff, on an arrangement made by their agent in their office for a month. This witness also said the other fishermen in Gode-rich had arrangements with defendants for the carriage of fish. *Held*, some evidence that defendants were common carriers; and that if so, they were liable to an action at common law for refusing to carry except upon conditions limiting their common-law liability. To support such an action it must be shown that the plaintiff tendered the goods to be carried, as well as the fare. *Leonard v. American Exp. Co.*, 26 U. C. Q. B. 533. — APPLYING *Johnson v. Midland R. Co.*, 4 Ex. 367. QUOTING *Carr v. Lancashire & Y. R. Co.*, 7 Ex. 709.

e. How Limitation Lost—Limiting Time in Which Notice Shall be Given or Suit Brought.

485. Benefit of limitation lost by diverting goods from designated route.—Where goods are shipped for a point beyond the initial carrier's line to go through "all-rail," and with a provision that each carrier's liability is to end upon the goods being receipted for by the next carrier in good order, if the goods are carried part of the distance by rail and then forwarded by vessel the carrier assumes the risk of safe transportation and is liable as an insurer for any damage that occurs. *Fatman v. Cincinnati, H. & D. R. Co.*, 2 Disney (Ohio) 248. — QUOTING *Noyes v. Rutland & B. R. Co.*, 27 Vt. 110. REVIEWING *Collins v. Bristol & E. R. Co.*, 11 Ex. 790.

Where the plaintiff claims to recover against a common carrier, on a verbal contract to carry by an all-rail route at an agreed rate and within a specified time, for a loss by fire at the end of the transit but before the liability of the carrier as such is ended, and the defendant denies that he carried the goods under the contract as alleged, but admits such carriage and delivery under bills of lading not differing from the verbal contract as to rate or time, but which provide for carrying the goods over the company's usual route, not all-rail, to the point of delivery, where they were lost without his fault, and he claims exemption from such loss by the terms of such bills of lading, and the record shows that issue was joined by reply, and the case has been fully heard upon all the issues thus made—*held*, that this was substantially an answer in evidence of liability for loss at the end of the transit,

* The statutes on which some of these cases are based have been repealed.

and the plaintiff was entitled to recover on such liability unless the proof showed that such exemption was part of the contract for shipment, and also that the carrier was without fault; although the special provision as to an all-rail route was not proved as alleged, such allegation not being necessary to a recovery for a loss at the end of the transit, although, if proved, it might furnish an additional ground for such recovery. *Gaines v. Union T. & I. Co.*, 28 *Ohio St.* 418, 14 *Am. Ry. Rep.* 158.

486. Validity of such limitations, generally.*—A clause in a shipping contract requiring that suits for damages be filed within forty days after the right accrues is valid, and when suit was not brought within the time, it was proper to charge such failure as a defense, unless it be shown that the plaintiffs could not by reasonable diligence have brought their suit within the forty days. *McCarty v. Gulf, C. & S. F. R. Co.*, 79 *Tex.* 33, 15 *S. W. Rep.* 164.—FOLLOWED IN *Gulf, C. & S. F. R. Co. v. McCarty*, 82 *Tex.* 608.

A provision in a contract for shipment requiring the shipper or consignee to give the carrier notice of any claim for loss or damage within a reasonable time is lawful and will be enforced. *Coles v. Louisville, E. & St. L. R. Co.*, 41 *Ill. App.* 607.—QUOTING *Southern Exp. Co. v. Caldwell*, 21 *Wall. (U. S.)* 264. REVIEWING *Black v. Wabash, St. L. & P. R. Co.*, 111 *Ill.* 351.—*Jennings v. Grand Trunk R. Co.*, 49 *Am. & Eng. R. Cas.* 98, 127 *N. Y.* 438, 28 *N. E. Rep.* 394, 40 *N. Y. S. R.* 318; *affirming* 52 *Hun* 227, 23 *N. Y. S. R.* 15, 5 *N. Y. Supp.* 140.

Conditions releasing the company from liability for the loss of goods falsely described, and for a loss for which claim is not made within seven days after the time when the goods should have been delivered—held to be reasonable. *Lewis v. Great Western R. Co.*, 29 *L. J. Ex.* 425, 5 *H. & N.* 867.

A stipulation in a contract of shipment that no claim in respect of goods will be allowed unless made within three days, and that all goods are received subject to the

company's general lien, both for carriage thereof and all other charges against the customer, is reasonable. *Moore v. Great Northern R. Co.*, *L. R.* 8 *Ir.* 95.

A general rule of a railroad that "no claim for loss or damage * * * will be allowed unless notice in writing is given * * * within twenty-four hours after the goods are delivered," of which a consignee of goods has notice—held, valid. *Kyle v. Buffalo & L. H. R. Co.*, 16 *U. C. C. P.* 76.

A condition of a contract of shipment provided that no claim for damage to, loss or detention of goods should be allowed unless notice in writing, with particulars, was given to the station-agent at or nearest the place of delivery within thirty-six hours after delivery of the goods in respect to which the claim was made. Held, per Strong, J., that a plea setting up non-compliance with this condition having been demurred to, and the plaintiff not having appealed against a judgment overruling the demurrer, the question as to the sufficiency in law of the defense was *res judicata*. Held, also, per Strong, J. (Gwynne, J., *contra*), that part of the consignment having been lost, such notice should have been given in respect to the same within thirty-six hours after the delivery of the goods which arrived safely. *Grand Trunk R. Co. v. McMillan*, 42 *Am. & Eng. R. Cas.* 468, 16 *Can. Sup. Ct.* 543; *allowing appeal*, 15 *Ont. App.* 14, which *affirms* 12 *Ont.* 103.

487. Limitations held unreasonable and invalid.—A provision in a bill of lading providing that consignees "are requested to notify the company of any errors within twenty-four hours, or the company will consider their liability as ended," will not prevent a shipper from suing for damages to goods caused by the carrier's negligence, though no notice be given of the loss. *Sanford v. Housatonic R. Co.*, 11 *Cush. (Mass.)* 155.

A condition as to perishable articles to be carried, which releases the company from liability "for any damage to any such articles on the ground of loss of market, provided the same was delivered within a reasonable time after the arrival thereof at the station from whence delivery was made," is unreasonable. *Lord v. Midland R. Co.*, 36 *L. J. C. P.* 170, *L. R.* 2 *C. P.* 339, 15 *W. R.* 405, 16 *L. T.* 576.

One of the conditions in the shipping bills was to the effect that no claim for loss

*Limitation of time within which claim must be presented, see notes, 16 *AM. & ENG. R. CAS.* 260; 32 *Id.* 546; 3 *L. R. A.* 344.

Stipulations for notice to the carrier of claim for damages, see note, 30 *AM. & ENG. R. CAS.* 56.

Reasonableness of regulations requiring notice of loss to be presented within a given number of days, see note, 3* *AM. REP.* 509.

or detention shall be allowed unless notice in writing and particulars of the claim be "given to station freight agent at or nearest to the place of delivery within thirty-six hours after the goods, in respect to which said claim is made, are delivered." *Held*, that this provision was applicable to shipments beyond the terminus of defendant's railway; but that in view of the nature of the property and of the claim for damages, the time specified was unreasonable, and so was not applicable to the shipments in question; and that a failure to give such a notice was not a bar to a recovery. *Jennings v. Grand Trunk R. Co.*, 49 *Am. & Eng. R. Cas.* 98, 127 *N. Y.* 438, 28 *N. E. Rep.* 394, 40 *N. Y. S. R.* 318; *affirming* 52 *Hun* 227, 23 *N. Y. S. R.* 15, 5 *N. Y. Supp.* 140.

488. Claim may be made within a reasonable time.—A provision in a bill of lading, that a claim for loss must be made when the goods are delivered, does not protect the company where the claim is not made at the time of delivery but within a reasonable time thereafter. *Memphis & C. R. Co. v. Holloway*, 9 *Baxt. (Tenn.)* 188.

489. When time begins to run.—Where goods are shipped under a provision in the contract requiring written notice of a loss to be given to the carrier within one month, the one month does not begin to run where the goods are reported lost, and while the carrier is making efforts to trace and find them. *Ghormley v. Dinsmore*, 19 *J. & S. (N. Y.)* 196. — **DISTINGUISHING** *Magnin v. Dinsmore*, 70 *N. Y.* 410.

490. Procedure—Waiver of notice.—The reason for the rule holding the carrier to the common-law accountability is public policy to prevent fraud on the shipper. While the reason for the rule would sweep away every stipulation of the contract in derogation of the duty imposed on the carrier, it has no application to a provision referring to an act on the part of the shipper subsequent to delivery—such provision being for the protection of the carrier against fraud on the part of the shipper. To abrogate such provision would open the door to fraud. *Pavitt v. Lehigh Valley R. Co.*, 153 *Pa. St.* 302, 25 *Atl. Rep.* 1107.

The supreme court will not sustain a verdict for a shipper who has failed to give notice within the time required by the contract, even where there is evidence of waiver of such notice by the company, if it appears that no point was presented by

plaintiff on the question of waiver, and the charge of the court contained no allusion to it; but a new *venire* will be awarded. *Pavitt v. Lehigh Valley R. Co.*, 153 *Pa. St.* 302, 25 *Atl. Rep.* 1107.—**QUOTING** *Coggs v. Benard*, 2 *Ld. Raym.* 909.

IX. STOPPAGE IN TRANSITU.

1. Nature and Extent of the Right—When and How Exercised.*

491. Must be based on purchaser's insolvency.†—The right of stoppage *in transitu* arises solely upon the insolvency of the buyer, such insolvency being unknown to the vendor at the time of the sale, and may be exercised at any time before the actual or constructive delivery of the goods to the buyer by the carrier. *Farrell v. Richmond & D. R. Co.*, 37 *Am. & Eng. R. Cas.* 704, 102 *N. Car.* 390, 3 *L. R. A.* 647, 9 *S. E. Rep.* 302.

As between the seller and the purchaser, insolvency is necessary to the right of stoppage *in transitu*; but as to the carrier, strict proof of insolvency is not required in order to support the right of the seller of goods to a person of doubtful solvency; but if the carrier delivers the goods he may show the solvency of the purchaser, as tending to show that the seller could collect the price, and was therefore not damaged by the delivery. *Bloomington v. Memphis & C. R. Co.*, 6 *Lea (Tenn.)* 616.

492. Whether insolvency must have arisen since sale.—It is not essential to a vendor's right of stoppage *in transitu* that the vendee's insolvency should have arisen since the sale and shipment. *Schwabacher v. Kane*, 13 *Mo. App.* 126.

The fact that consignees were insolvent at the time they purchased goods will not defeat the seller's right of stoppage *in transitu* if the insolvency was unknown to the latter at the time of the sale. *Farrell v. Richmond & D. R. Co.*, 37 *Am. & Eng. R. Cas.* 704, 102 *N. Car.* 390, 3 *L. R. A.* 647, 9 *S. E. Rep.* 302.

In an action involving, among other things, the right of stoppage *in transitu*, the vendor claiming that the right existed and had been properly exercised, sustaining it

* Right of stoppage *in transitu*, how exercised, see notes, 6 *AM. & ENG. R. CAS.* 375; 37 *Id.* 714; 49 *Id.* 73; 29 *AM. DEC.* 393; 19 *AM. REP.* 37; 1 *AM. ST. REP.* 312; 3 *L. R. A.* 647.

† Insolvency the only ground for the exercise of the right, see note, 29 *AM. DEC.* 386.

alone by evidence that after the sale and shipment of the goods he had learned that a deed of trust had been given on them to secure the debt of another—*held*, that the evidence of itself was not sufficient to show that the seller learned of the insolvency of the purchaser after shipment of the goods. *Houston & T. C. R. Co. v. Poole*, 63 Tex. 246.

493. Effect of delivery to carrier.

—Upon the consignment of goods the title becomes vested in the consignee, absolutely and against all the world, subject only to the carrier's lien for freight and the consignor's right of stoppage *in transitu* upon the consignee's insolvency. *Memphis & L. R. R. Co. v. Freed*, 9 Am. & Eng. R. Cas. 212, 38 Ark. 614. *Colcord v. Dryfus*, 1 Okla. 228, 32 Pac. Rep. 329.

After delivery of goods to a railway company and receipt of the bill of lading therefor, the consignor loses all right of control over them except the legal right of stoppage *in transitu*. *Armentrout v. St. Louis, K. C. & N. R. Co.*, 1 Mo. App. 158. *Ober v. Indianapolis & St. L. R. Co.*, 13 Mo. App. 81.

Where goods are left with a common carrier to be delivered to the consignee without any qualification or restriction, the consignor cannot, by a subsequent direction to the carrier, prevent their delivery to the consignee, unless such facts are shown as will justify the stoppage of the goods *in transitu*. *Philadelphia & R. R. Co. v. Wireman*, 88 Pa. St. 264.

494. Sufficiency of notice to carrier.*—A carrier, on receiving notice from the consignor to stop and retain goods *in transitu*, is bound to act in accordance therewith, although the notice contains no statement of the nature or basis of the claim to have the goods stopped. *Allen v. Maine C. R. Co.*, 30 Am. & Eng. R. Cas. 122, 79 Me. 327, 9 Atl. Rep. 895, 4 N. Eng. Rep. 543.

A notice by the vendor to the carrier of his intention to stop goods *in transitu*, without any express demand, is sufficient to charge the carrier; and the notice is sufficient if the carrier is clearly informed that it is the intention and desire of the informer to exercise the right of stoppage. *Bloomington v. Memphis & C. R. Co.*, 6 Lea (Tenn.) 616.

In the absence of evidence showing that a railroad company had a general freight

agent at the point in question, notice of stoppage of goods *in transitu* given to a station agent at the point of destination is sufficient notice to the company. *Poole v. Houston & T. C. R. Co.*, 9 Am. & Eng. R. Cas. 197, 58 Tex. 134.

A notice to a railway to stop goods *in transitu* must contain a sufficient description of them to enable the company to identify them. *Clementson v. Grand Trunk R. Co.*, 42 U. C. Q. B. 263.

Notice to the carrier by the vendor is not necessary where the goods have been taken from the carrier's custody by legal process. *Schwabacher v. Kane*, 13 Mo. App. 126.

Goods which came from Montreal in bond were deposited in the customs warehouse at the Grand Trunk Railway station at Toronto. The consignees became insolvent, and the consignors gave notice of stoppage *in transitu* to the railway company, after which the agent of the company gave an order for delivery on payment of charges to another person, who made the entry and received them from the customs. *Held*, that the notice to the company was sufficient, though in such cases it is advisable to give notice also to the customs officer; and that an action would lie against the company for such delivery. *Ascher v. Grand Trunk R. Co.*, 36 U. C. Q. B. 609.—REVIEWING BURN v. Wilson, 13 U. C. Q. B. 478.

495. Only exists where there is privity of contract between debtor and creditor.*—A. ordered goods of B., who sent the order to C. to be filled, which was done, and the bill and bill of lading were sent to B. and the goods charged to him, who became insolvent while the goods were in the hands of the carrier. *Held*, that there was no privity of contract between C. and A., and that the former could not stop the goods *in transitu*. *Memphis & L. R. R. Co. v. Freed*, 9 Am. & Eng. R. Cas. 212, 38 Ark. 614.—QUOTING *Stubbs v. Lund*, 7 Mass. 453. REVIEWING *Feise v. Wray*, 3 East 93.

496. Right to stop where shipper takes bill of lading in his own name, or retains title until paid for.—Where property is shipped by a seller, the title not to pass to the purchaser until payment of the price, the shipper has a right to claim possession at any time before delivery to

* What is sufficient notice to carrier to stop goods in transit, see note, 30 AM. & ENG. R. CAS. 126.

* Only vendor or quasi-vendor can exercise the right, see note, 29 AM. DEC. 385.

the purchaser, upon default in payment. *Morse v. Chicago, R. I. & P. R. Co.*, 73 Iowa 226, 34 N. W. Rep. 825.

Where the shipper of goods takes a bill of lading in his own name or to his own order, the delivery of the goods to the carrier is not a delivery to a third party to whom the shipper, under a previous contract, had agreed to deliver them. Under the bill of lading the shipper retains title to the property. *Illinois C. R. Co. v. Southern Bank*, 41 Ill. App. 287.

A. shipped from Chicago a quantity of wheat, consigned, according to the bill of lading in duplicate taken by him, to B., at Indianapolis, on account of A., who had contracted it to B., but it was not to be his until paid for. A. drew at sight, on the date of the shipment, for the price of the wheat, attaching to the draft one copy of the bill of lading indorsed, and negotiated the draft at a Chicago bank, which transmitted it to an Indianapolis bank for collection. During the forenoon of the day after the shipment, while the wheat was in transit, C. purchased the wheat of B., at Indianapolis, and paid for it, taking from him at the time a bill of lading for the wheat, issued by a railroad company at Indianapolis, on that day, to B., on account of C., who supposed the wheat had then arrived at Indianapolis. The shipping list had been received, but the wheat did not arrive until the night of the following day. C. had no notice of any right of A. to the wheat. Said draft reached Indianapolis at about the hour that B. sold the wheat to C. An attempt was immediately made to present the draft, but B., the drawee, who was insolvent and failed that day, could not be found. In the afternoon the Indianapolis bank notified the carrier, said railroad company, to hold the wheat for the consignor; and at a later hour on the same day a similar notice was given at the express instance of said consignor; and the wheat was held accordingly. *Held*, in an action of replevin by C., that he had no right to the possession of the wheat. *Pattison v. Culton*, 33 Ind. 240.

497. Superiority of shipper's lien.*

—An attachment or execution against the vendee does not preclude the exercise of the right of stoppage *in transitu*. *Farrell*

* Right of stoppage not defeated by attachment, execution, or other lien, see notes, 32 AM. & ENG. R. CAS. 567, 29 AM. DEC. 393.

v. Richmond & D. R. Co., 37 Am. & Eng. R. Cas. 704, 102 N. Car. 390, 3 L. R. A. 647, 9 S. E. Rep. 302. *Rucker v. Donovan*, 13 Kan. 251. *Chicago, B. & Q. R. Co. v. Painter*, 15 Neb. 394, 19 N. W. Rep. 488. *Hays v. Mouille*, 14 Pa. St. 48.

498. Carrier's lien for charges—For general balance.*—It is not necessary that the charge or lien of the carriers, for freight, be paid before the writ of replevin be issued; it is sufficient if it be paid before the goods are taken from their possession. *Hays v. Mouille*, 14 Pa. St. 48.

The exercise of the right of stoppage *in transitu* is but a resumption of the vendor's right of possession, which enables the seller to insist on his lien as vendor, which he had waived by delivery to the carrier, and the carrier has no right, as against the vendor, to retain the goods under a lien arising by agreement for a general balance due by the consignee. *Pennsylvania R. Co. v. American Oil Works*, 42 Am. & Eng. R. Cas. 357, 126 Pa. St. 485, 17 Atl. Rep. 671. *Farrell v. Richmond & D. R. Co.*, 37 Am. & Eng. R. Cas. 704, 102 N. Car. 390, 3 L. R. A. 647, 9 S. E. Rep. 302.

A clause in a bill of lading which provides that the consignee or owner shall pay the freight on the goods consigned to him at the time of their delivery, and that the goods may be retained by the carrier for the charges due thereon, and also for any charges due from him for other goods, does not take effect until the transit is at an end and the goods are deliverable to the consignee; and where the transit has been terminated by the vendor of the goods exercising his right of stoppage *in transitu*, the carrier can claim no general lien thereunder. *Pennsylvania R. Co. v. American Oil Works*, 42 Am. & Eng. R. Cas. 357, 126 Pa. St. 485, 17 Atl. Rep. 671. *Farrell v. Richmond & D. R. Co.*, 37 Am. & Eng. R. Cas. 704, 102 N. Car. 390, 3 L. R. A. 647, 9 S. E. Rep. 302.

499. Right to stop at intermediate point.†—The right of a freighter to stop the transportation of his goods at any point other than their destination without paying the through freight can only be acquired by special contract with the road. *Withers v. Macon & W. R. Co.*, 35 Ga. 273.

* Lien of carrier for general balance. Effect on right of stoppage *in transitu*, see note, 42 AM. & ENG. R. CAS. 366.

† Right of vendee to intercept goods at intermediate station and defeat right of stoppage *in transitu*, see note, 29 AM. DEC. 389.

When goods are shipped to a consignee over a railway, the shipper cannot, by notice to the carrier, compel him to stop the goods at an intermediate point. *Pinnix v. Charlotte & S. C. R. Co.*, 66 N. Car. 34.

He has no right to require a delivery, even should he offer to pay the freight through to the point of destination. *Pinnix v. Charlotte & S. C. R. Co.*, 66 N. Car. 34.

A shipper may countermand the direction given for the shipment of goods at any period of the transit, and demand them back, at least, on payment of the carriage, unless perhaps when the unpacking and re-delivering of them would be productive of much inconvenience. *Scotthorn v. South Staffordshire R. Co.*, 8 Ex. 341, 22 L. J. Ex. 121, 7 Railw. Cas. 870.

Where a party delivers to a railroad company chattels to be transported from the point of delivery to another designated point on its line, and pays the charges for such transportation in advance, he has the right, as against the company, to resume the exclusive possession and control of his chattels before they have reached the destination named in the bill of lading, whenever and wherever he can do so without unreasonable interference with the business of the company; and if he thus resumes exclusive possession and control of his chattels during the time within which the company might, without unreasonable delay, proceed in the performance of its contract of affreightment, and receives them in good order and condition, he thereby absolves the company from all further responsibility on account of them. *Cleveland & P. R. Co. v. Sargent*, 19 Ohio St. 438.

500. Right of seller's agent to stop.

—Any agent authorized to act for the consignor, either generally or in relation to the consignment in question, may stop goods *in transitu*, without any authority to adopt that particular measure. In case of questions arising, the carrier has the right to a reasonable time to ascertain the facts, and the agent to produce his authority and to furnish an indemnity. *Reynolds v. Boston & M. R. Co.*, 43 N. H. 580.

Where one sells goods to another through an agent, and they are delivered to a carrier for shipment to the purchaser, the agent has no right to stop the goods *in transitu* because his principal owes him money advanced in the purchase of the goods; and if the carrier refuses to deliver

to the purchaser, it is liable to him in damages. *Gwyn v. Richmond & D. R. Co.*, 6 Am. & Eng. R. Cas. 452, 85 N. Car. 429, 39 Am. Rep. 708.

501. No actual seizure necessary.

—No actual seizure of the goods before delivery to the vendee is essential to the right of stoppage *in transitu*. A demand of the carrier, notice to him to stop the goods, or a claim and endeavor to get the possession, is sufficient. Such demand must be made of the one in possession of the goods. *Rucker v. Donovan*, 13 Kan. 251.

502. Stopping goods not a rescission of sale—Remedy not exclusive.

—Stoppage *in transitu* is the enforcement of a lien and not a rescission of the sale. *Rucker v. Donovan*, 13 Kan. 251.

Stoppage *in transitu* gives the plaintiff the right to rescind, but not the defendant, who was in default. *Clark v. Philadelphia & R. C. & I. Co.*, 16 Phila. (Pa.) 135.

A vendor in exercising the right of stoppage does not take possession of the goods as his own, but as the goods of the purchaser, on which the vendor has a lien for the unpaid purchase money; and it follows that in thus assuming possession the vendor may pursue any other remedies he may have to enforce his debt. And where the carrier is sued for a wrong delivery, after notice of the intention to stop, he may show that the debt could have been collected by legal remedy from the purchaser. *Bloomingtondale v. Memphis & C. R. Co.*, 6 Lea (Tenn.) 616.

503. Where laws relating to fraudulent conveyances have no application.

—Missouri Rev. St. 1879, § 2505, providing that sales of goods and chattels, where possession remains in the vendor, shall be deemed fraudulent as against the creditors of the vendor, and shall be liable for the debts of creditors of the vendee, unless the contract be evidenced by writing and recorded, has no application to a case where a vendee fraudulently obtains possession of personal property sold before payment of the purchase price and sells it to a third party to whom it is assigned, and the original vendor exercises his right of stoppage *in transitu*, where the contest is between the last purchaser and the carrier for the value of the property which it failed to deliver. *Bergeman v. Indianapolis & St. L. R. Co.*, 104 Mo. 77, 15 S. W. Rep. 992.

2. *Liability of Carrier to Seller and Purchaser, Respectively.*

504. Liability to shipper for delivery after notice.—A common carrier is liable for the value of goods delivered by error to the vendee, after notice by the shipper (vendor) not to deliver them. *Campbell v. Jones*, 9 *Low. Can.* 10. *Foggan v. Lake Shore & M. S. R. Co.*, 40 *N. Y. S. R.* 718, 61 *Hun* 623, 16 *N. Y. Supp.* 25.

If the consignor, after stopping the goods unreasonably, refuse to furnish the carrier with any evidence of the validity of his claim, such refusal may be considered as a waiver of his right; but in the absence of such unreasonable refusal the carrier is liable for the value of the goods if, after receiving such notice, he delivers them to the consignee. *Allen v. Maine C. R. Co.*, 30 *Am. & Eng. R. Cas.* 122, 79 *Me.* 327, 9 *Atl. Rep.* 895, 4 *N. Eng. Rep.* 543.

Where a seller of goods has claimed the right of stoppage *in transitu*, but where the carrier has wrongfully delivered the goods, the fact that the seller has attempted to collect the price from the purchasers by legal process is not such affirmation of the sale as to relieve the carrier from liability. The exercise of the right to stop is not a rescission of the sale, but simply places the parties as nearly as may be in the same situation they would have been if the vendor had not parted with the possession. *Bloomington v. Memphis & C. R. Co.*, 6 *Lea (Tenn.)* 616.

And the subsequent receipt by the consignor of the consignee's note, and an attempt on his part to collect it, does not relieve the carrier's liability unless the note be paid. Where the facts justify it, the notice not to deliver constitutes part of the carrier's contract. *Adams Exp. Co. v. Wentworth*, 1 *Cin. Super. Ct.* 142.

505. Liability for delivery by collusion with the seller's attorney.—After a merchant had sold goods and placed them in the hands of a carrier he notified the carrier of his intention to stop them *in transitu*, the latter replying that it would hold them. He then indorsed the bill of lading to an attorney, and forwarded it with an order for him to take up the goods, which he did at an intermediate station. The attorney thereupon fraudulently marked the goods in the name of a fictitious person, and forwarded them in

such a way as to procure their delivery to the original consignee. *Held*, that both the carrier and the attorney were liable at the suit of the seller. *Poole v. Houston & T. C. R. Co.*, 9 *Am. & Eng. R. Cas.* 197, 58 *Tex.* 134.

506. When carrier not liable in trover for delivery.—Plaintiffs, at M., having sold goods on credit to H. & Co., living at M., shipped them by the G. T. R. Co. to T., and thence by defendants' railway to C. While they were at C. defendants received notice of stoppage *in transitu*, but they delivered the goods to H. & Co., who were found by the jury to have been insolvent at the time of the notice; and the plaintiffs thereupon brought trover. *Held*, that the action would not lie, for the goods by the sale and delivery to the carriers were at the purchaser's risk, and the stoppage *in transitu* did not give the plaintiffs the right of property and possession necessary to maintain trover. *Childs v. Northern R. Co.*, 25 *U. C. Q. B.* 165.

507. Carrier not liable where goods are attached, after notice to seller.—An order to stop goods *in transitu* is not available to secure the consignor possession of them after they have been attached in the hands of the carrier; and if the carrier gives the owner proper notice he is not responsible if the goods are sold under the attachment proceedings. *Baltimore & O. R. Co. v. Davis*, (Pa.) 32 *Am. & Eng. R. Cas.* 563, 12 *Atl. Rep.* 335.

508. Company not bound to ship to another person and place.—A common carrier who, upon notice from the owner of goods to stop them *in transitu* and hold them for such owner, complies, does not become a party to a new contract of carriage by the subsequent order of the owner to ship them to another person and place. *MacVeagh v. Atchison, T. & S. F. R. Co.*, 18 *Am. & Eng. R. Cas.* 651, 3 *N. Mex.* 205, 5 *Pac. Rep.* 457.

509. Not liable to purchaser for failure to deliver.—A consignee has no cause of action against a common carrier who refuses to deliver the goods consigned after being forbidden to do so by the consignor. *Pool v. Columbia & G. R. Co.*, 23 *So. Car.* 286.

Where a consignee sues a carrier *in detinue* for a refusal to deliver goods, a nonsuit is properly ordered where the plaintiff's evidence shows that the consignor, under

his right of stoppage *in transitu*, had directed the carrier not to deliver to the consignee; and where the plaintiff has already given bond and taken possession of the goods, it is proper to enter judgment for their return, or, upon a failure to do so, for the value of the goods. *Pool v. Columbia & G. R. Co.*, 23 So. Car. 286.

A consignee who had sued a carrier for a failure to deliver goods alleged a good cause of action and proved enough to make out a *prima facie* case, but in his own evidence admitted that the consignor had directed the carrier not to deliver the goods. *Held*, that the consignor had a right to stop the goods *in transitu*, and such admission was fatal to a recovery, and it was proper to order a nonsuit. *Pool v. Columbia & G. R. Co.*, 23 So. Car. 286.

3. How Right to Stop is Lost.

510. By delivery to purchaser, actual or, constructive.*—In the absence of a usage or agreement to the contrary, the right of stoppage *in transitu* continues till the property is actually or constructively delivered to the consignee. *Farrell v. Richmond & D. R. Co.*, 37 Am. & Eng. R. Cas. 704, 102 N. Car. 390, 3 L. R. A. 647, 9 S. E. Rep. 302. *Greve v. Dunham*, 60 Iowa 108, 14 N. W. Rep. 130.—*FOLLOWING* *McFetridge v. Piper*, 40 Iowa 627.—*Sawyer v. Joslin*, 20 Vt. 172.—*REVIEWED IN* *Kitchen v. Spear*, 30 Vt. 545.

The vendor's right of stoppage *in transitu* continues until the goods have reached their ultimate destination and come into the actual possession of the vendee. *Mohr v. Boston & A. R. Co.*, 106 Mass. 67.

The right of stoppage terminates only with an actual delivery, unless the carrier consents to hold the goods for the consignee, or wrongfully refuses to deliver them. A notice to the carrier not to deliver the goods is enough; a demand of delivery is not necessary. *Reynolds v. Boston & M. R. Co.*, 43 N. H. 580.

Goods, when shipped, are deemed to be *in transitu* not only while in the actual possession of the carrier, whether on land or water, though the carrier may have been appointed by the consignee, but also while they remain in any place of deposit connected with their transmission and delivery,

and until they arrive in the actual or constructive possession of the consignee at the place named by the buyer to the seller as their place of destination. *Half v. Allyn*, 60 Tex. 278.

511. What is a sufficient delivery.—A consignee of goods went to the railroad station and paid the freight charges thereon, receipted for the goods, and asked the privilege of leaving them with the agent until he could send for them. *Held*, that this constituted such constructive delivery as to defeat the shipper's right of stoppage *in transitu*. *Langstaff v. Stix*, 28 Am. & Eng. R. Cas. 85, 64 Miss. 171, 1 So. Rep. 97.

512. What is not a sufficient delivery.—The *transitus* is not at an end until the goods have reached the place contemplated by the contract between the buyer and seller as the place of their destination. So where whiskey was sold while stored in a government warehouse, to be shipped to the purchaser as he might order, the right of stoppage *in transitu* continued until the goods reached the purchaser; and the fact that they were transferred to him on the government records at the warehouse would not constitute such a constructive delivery as to defeat the right. *Mohr v. Boston & A. R. Co.*, 106 Mass. 67.

So the delivery to a mercantile house, merely for transmission by a forwarding house to the vendee, does not amount to a delivery to the vendee. *Hays v. Mouille*, 14 Pa. St. 48.

The fact that goods are received at the nearest railway depot to their place of destination by one who exhibited the bills of lading to the carrier and had an order for their delivery from the purchaser, does not of itself determine the fact that on their delivery on the order they ceased to be *in transitu*, in the absence of evidence showing the purpose for which the order for their delivery was given. *Half v. Allyn*, 60 Tex. 278.

The consignee of certain freights agreed that the carrier might set them aside in its depot to be sold and the proceeds applied to the payment of freight charges due the company. There was no delivery of the particular goods, no assignment of the bill of lading to the company, neither were the freight charges paid. *Held*, not a sufficient delivery to defeat the right of stoppage *in transitu*. *Macon & W. R. Co. v. Meador*, 6 Am. & Eng. R. Cas. 450, 65 Ga. 705.

* Delivery to put an end to transit, see note, 29 AM. DEC. 389.

A consignee of a safe, who was owing the carrier for freights on other goods, said to the carrier's agent: "I place this safe in your hands as security for what I owe." *Held*, inasmuch as the carrier already had a lien on the safe for freights, there was no such actual delivery to the consignee as to defeat the shipper's right of stoppage *in transitu*. *Farrell v. Richmond & D. R. Co.*, 37 *Am. & Eng. R. Cas.* 704, 102 *N. Car.* 390, 3 *L. R. A.* 647, 9 *S. E. Rep.* 302.

513. By transfer of the bill of lading.*—The seller of goods may exercise the right of stoppage *in transitu* at any time before the delivery of the goods to the consignee, or a *bona-fide* sale of them to a third person, as by indorsement of a bill of lading in good faith for a valuable consideration. *Bloomingdale v. Memphis & C. R. Co.*, 6 *Lea (Tenn.)* 616.

The transfer and assignment of a bill of lading is equivalent to a delivery of the property described therein; so the seller of goods has no right of stoppage *in transitu* of goods as against a transferee of the bill of lading for a valuable consideration, and an antecedent debt will be regarded as a valuable consideration. *St. Paul Roller Mill Co. v. Great Western Despatch Co.*, 27 *Fed. Rep.* 434.

While the seller may exercise the right of stopping a shipment of goods while in the carrier's possession, and such stoppage would be a defense in favor of the railway company carrier against the demand of the consignee, still the right of stoppage *in transitu* must exist at time exercised. In this case the right had been destroyed by the indorsement of the bill of lading before the stoppage of the goods. *Missouri Pac. R. Co. v. Heidenheimer*, 82 *Tex.* 195, 17 *S. W. Rep.* 608.

A quantity of tobacco was shipped and a bill of lading in duplicate was taken. The duplicate was transmitted to the consignee, and the original attached to a draft on him, and was forwarded to a bank for collection. Before the draft was presented the consignee transferred the duplicate to a purchaser of the tobacco, and received payment, and afterward refused to accept the draft. Some two weeks after the shipment the consignee failed and the seller and

shipper of the goods notified the carrier not to deliver them. Some days after this notice the party purchasing from the consignee demanded the goods from the carrier, and upon being refused, sued to recover them. *Held*, that plaintiff had sufficient notice to have put him on inquiry as to what disposition had been made of the original bill of lading, and that the transfer to him of the duplicate did not convey any such title as would defeat the right of the seller to stop the goods. *Castanola v. Missouri Pac. R. Co.*, 21 *Am. & Eng. R. Cas.* 75, 24 *Fed. Rep.* 267.

514. By a reshipment.—The right of stoppage *in transitu* only extends to the original shipment, and where goods have reached their destination and have been reshipped by the consignee, the right is lost. *Mollison v. Lockhart*, 30 *New Brun.* 398.

515. Not lost by assignment by purchaser, nor by attachment against him.—A., residing in Vermont, purchased goods of B., in New York, to be forwarded by railroad to R., where A. resided. Immediately on their arrival at R., and before they were placed in the warehouse of the railroad company, A. having in the meantime become insolvent, C., a creditor of A., caused the goods to be attached, and to be taken directly from the cars and removed away from the railroad. The officer paid for the freight upon the goods and retained possession of them under the attachment until B. demanded them of him. *Held*, that B.'s right of stoppage *in transitu* had not ceased at the time of the attachment, or of the demand, and that he was entitled to the goods. *Kitchen v. Spear*, 30 *Vt.* 545.—REVIEWING Sawyer v. Joslin, 20 *Vt.* 172.

The plaintiffs, merchants in Boston, sold and consigned goods to J. C. & Son, in Toronto. While the goods were held by the railroad company in T., J. C. & Son assigned to the defendant as trustee for the benefit of creditors. The defendant, immediately after the assignment, passed and entered the goods, and paid the duty thereon, and the railway company removed the goods from the customs warehouse to their freight sheds, where they remained, and delivery was refused to the defendant for non-production by him of a bill of lading, and the freight was not paid or tendered. The plaintiff having stopped the goods—*held*, that the *transitus* was not at an end,

* When indorsement of bill of lading defeats right of stoppage *in transitu*, see notes, 23 *AM. & ENG. R. CAS.* 703, 38 *AM. DEC.* 422.

for the railway company continued to hold the goods as carriers, and not as agents for the defendant. *Morgan Envelope Co. v. Boustead*, 7 Ont. 697.

516. Right not lost by shipping goods a second time, nor by laches.

—The vendor's right of stoppage *in transitu* is not affected by his laches so long as the goods remain in transit. *Schwabacher v. Kane*, 13 Mo. App. 126.

Where a consignee refuses to receive goods and they are sent back to the consignor, who refuses to take them back, and they are sent again to the consignee, remaining at the station until he becomes bankrupt, the consignor has a right of stoppage *in transitu*, and the company is justified in detaining the goods for him. *Bolton v. Lancashire & Y. R. Co.*, L. R. 1 C. P. 431, 12 Jur. N. S. 317, 35 L. J. C. P. 137, 14 W. R. 430, 13 L. T. 764.

517. Nor by taking notes from purchaser.*—The right to stop the goods *in transitu*, is not interfered with by the plaintiff taking the promissory note of the vendee for the goods, at the time the goods were sold. *Campbell v. Jones*, 9 Low. Can. 10.

The purchaser's notes given for the price of the goods need not be tendered back, before stopping the goods *in transitu*. *Hays v. Mouille*, 14 Pa. St. 48.

X. ENGLISH ACTS.

1. Carrier's Act (11 Geo. IV. & 1 Wm. IV. c. 68.)

518. Carrier not liable for goods worth £10 or more, unless value declared.†—Under the Carriers' Act, 11 Geo. IV. & 1 Wm. IV. c. 68, §1, a carrier is not liable for loss of goods of a certain description, unless the shipper declares the value of such goods at the time of their delivery, no matter where the delivery was made. *Hart v. Baxendale*, 6 Ex. 769, 16 Jur. 126, 21 L. J. Ex. 123.

A bill of lading given by a railway company for the transportation of goods from Rotterdam to London, via Harwich—held, to have contemplated the conveyance of the goods partly by land; and the value of the goods not having been declared, as required by the Carriers' Act, and the value being

above £10, the company was not liable. *Baxendale v. Great Eastern R. Co.*, 38 L. J. Q. B. 137, L. R. 4 Q. B. 244, 17 W. R. 412.

A carrier is not protected by the Carriers' Act from liability as to either a gilt frame or a packing case inclosing a lace corporal intended for exhibition, and sent by railway without any declaration of value. *Treadwin v. Great Eastern R. Co.*, L. R. 3 C. P. 308, 37 L. J. C. P. 83, 17 L. T. 601, 16 W. R. 365.

In an action against a carrier for the loss of goods, the defendant's plea that the plaintiff gave no notice of the nature or value of the goods, as required by the Carriers' Act, 11 Geo. IV. & 1 Wm. IV. c. 68, is bad, for not alleging with certainty that the articles in question were articles of some or one of the descriptions mentioned in the act. *Smith v. London, B. & S. C. R. Co.*, 7 C. B. 782.

519. Shipper is concluded by his declaration of value.—Under the Carriers' Act a shipper is concluded by his declaration of the value of things shipped, although they actually exceeded the value of £10 and were injured through the negligence of the company. *M'Cance v. London & N. W. R. Co.*, 3 H. & C. 343, 10 Jur. N. S. 1058, 12 W. R. 1086, 11 L. T. 426, 34 L. J. Ex. 39.

520. What goods and shipments are within protection of § 1.—A carrier entering into a special contract exempting it from liability for railway accidents, breakage, or wrong delivery caused by error or insufficiency in marks or numbers, does not lose the protection of the Carriers' Act. *Baxendale v. Great Eastern R. Co.*, 10 B. & S. 212.

A contract with a carrier for the conveyance of goods from a foreign port in England, and thence by land, is divisible, and it is entitled, as to the land carriage, to the protection of the Carriers' Act, 11 Geo. IV. & 1 Wm. IV. c. 68, § 1. *Baxendale v. Great Eastern R. Co.*, 10 B. & S. 212, 4 Q. B. 244, 38 L. J. Q. B. 137, 3 Ry. & C. T. Cas. xii.

A silk dress, part of a passenger's wearing apparel, is within 11 Geo. IV. & 1 Wm. IV. c. 68, § 1. *Flowers v. South Eastern R. Co.*, 16 L. T. 329.

A carrier is not deprived of the protection of the Carriers' Act, 11 Geo. IV. & 1 Wm. IV. c. 68, § 1, by the fact that the loss happens after the goods have been negligently taken beyond their destination. *Mor-*

* Right of stoppage, how affected by taking note, security, part payment, etc., see note, 29 AM. DEC. 387.

† See also *ante*, 190-203, 444.

2 D. R. D.—13.

v. North Eastern R. Co., L. R. 1 Q. B. D. 302, 45 L. J. Q. B. D. 289, 34 L. T. 940, 24 W. R. 386; *affirming* 45 L. J. Q. B. D. 289, 24 W. R. 335, 35 L. T. 94.

The word "paintings," in the Carriers' Act, 11 Geo. IV. & 1 Wm. IV. c. 68, § 1, does not include colored imitations of rugs and carpets and colored working designs; the word denotes only works of art. *Woodward v. London & N. W. R. Co.*, L. R. 3 Ex. D. 121, 47 L. J. Ex. 263, 38 L. T. 321, 26 W. R. 354.

521. Notice required by § 4.—Under the Carriers' Act, the only purpose of the notice required to be affixed by the carrier, in its office, is to allow it to make an increased charge after having received notice of the nature and value of the goods. *Hart v. Baxendale*, 6 Ex. 769, 16 Jur. 126, 21 L. J. Ex. 123.

Section 4 of the Carriers' Act (11 Geo. IV. & 1 Wm. IV. c. 68) is confined to public notice. *Walker v. York & N. M. R. Co.*, 2 El. & Bl. 750, 18 Jur. 143, 23 L. J. Q. B. 73.

522. Special contracts within § 6.—Section 6 of the Carriers' Act applies only to special contracts which are inconsistent with the protection given the carrier by section 1. *Baxendale v. Great Eastern R. Co.*, 10 B. & S. 212.

Where a shipper of a horse received a ticket relieving the company from all liability, there was held to be a special contract, valid under section 6 of the Carriers' Act, and the company was protected from liability in respect of the injury to the horse. *Great Northern R. Co. v. Morville*, 7 Railw. Cas. 830, 16 Jur. 528, 21 L. J. Q. B. 319.

A fishmonger who sends his fish after notice is served by the company that fish will not be taken, unless on certain terms, assents to a special contract to carry on those terms, and the company is protected under 11 Geo. IV. & 1 Wm. IV. c. 68. *Walker v. York & N. M. R. Co.*, 2 El. & Bl. 750, 18 Jur. 143, 23 L. J. Q. B. 73.

523. What are goods "in a parcel or package" within meaning of § 8.—If a package containing pictures in frames, exceeding £10 in value, is delivered to a carrier to be carried for hire, without any declaration as to the value and nature of the articles, the picture and frame are to be considered as one article; and the carrier is protected from liability as well in respect of damage done to the frames as in respect of damage done to the picture itself. *Hender-*

son v. London & N. W. R. Co., L. R. 5 Ex. 90, 39 L. J. Ex. 55, 3 Ry. & C. T. Cas. xii.

Pictures exceeding the value of £10 were laid upon one another without any covering or tie in the owner's wagon, which had sides, but no top, and the wagon was delivered to a railroad company and placed by their servants on one of their trucks for carriage by the railway. *Held*, that the pictures were "contained in a parcel or package," within the meaning of section 8 of the Carriers' Act, so as to give the company the protection of that statute. *Waite v. Lancashire & Y. R. Co.*, L. R. 9 Ex. 67, 43 L. J. Ex. 47, 3 Ry. & C. T. Cas. xii.

524. When goods are stolen by employees or strangers.—Every person employed by a carrier is its servant within the meaning of section 1 of the Carriers' Act. *Machu v. London & S. W. R. Co.*, 2 Ex. 415, 5 Railw. Cas. 302, 12 Jur. 501, 17 L. J. Ex. 271.—APPROVED in *Doolan v. Midland R. Co.*, L. R. 2 App. Cas. 792, 37 L. T. 217, 25 W. R. 882.

A felony by a carrier's servant is alone a good answer to a defense by it under the Carriers' Act; but the felony must be proved, a mere suspicion not being sufficient. *Great Western R. Co. v. Rimell*, 27 L. J. C. P. 201.

In an action for loss of goods, to make out a case for the jury in support of a replication of felony by the carrier's servants to a plea of the Carriers' Act, 11 Geo. IV. & 1 Wm. IV. c. 68, § 8, it is not enough to show that the servants had greater facilities of access to the goods than any other persons. *McQueen v. Great Western R. Co.*, 32 L. T. 759, 23 W. R. 698, L. R. 10 Q. B. 569, 44 L. J. Q. B. 130.

There is no evidence of a loss of goods by the felony of a carrier's servants where it is merely shown that the goods were packed by the porters on a truck and covered over, and remained for some hours on a long siding to which the public had access, and were stolen. *McQueen v. Great Western R. Co.*, 32 L. T. 759, 23 W. R. 698, L. R. 10 Q. B. 569, 44 L. J. Q. B. 130.

The exemption of a carrier from liability for the loss of certain goods exceeding £10 in value, the value of which has not been declared, and for which increased charges have not been paid, does not extend to any loss whatsoever occasioned by the non-delivery or by delay in the delivery of the goods by the neglect of the carrier, but ex-

tends only to a loss by the abstraction of the goods by a stranger or by the carrier's own servants (not being a felonious act), or by the carrier or his servants losing them from the vehicle or by mislaying them. *Hearn v. London & S. W. R. Co.*, 10 Ex. 793, 3 C. L. R. 597, 1 Jur. N. S. 236, 24 L. J. Ex. 180.

Where the plaintiff in an action for the loss of goods, to which the Carriers' Act is pleaded as a defense, alleges that the loss arose from the felonious acts of the company's servant, and the company pleads that the goods were stolen by one who reported himself to be a servant of the company, obtaining a pass out of the company's yard, which enabled him to steal the goods, the company is not estopped from denying that the thief was its servant. *Way v. Great Eastern R. Co.*, L. R. 1 Q. B. D. 692, 45 L. J. Q. B. D. 874, 35 L. T. 253.

Where a parcel was delivered to a porter at a station for carriage after the way-bill and the guard's parcel-book had been made up, and the parcel was placed by the porter in the usual receptacle in the luggage-van and entered by him on the way-bill, but the fact of his having so placed it was not communicated to the guard, and after several stoppages the parcel was missed, there is no evidence for the jury of the parcel having been stolen by a servant of the company. *Great Northern R. Co. v. Rimell*, 18 C. B. 575.

A parcel of silk was delivered at a receiving office for transmission to a station on the defendants' railway. No declaration of value was made at the time of delivery. The place where the goods were delivered was stated in the published time-tables of the defendants to be a receiving office for parcels and goods intended for carriage by the defendants. The goods were collected in due course by the defendants and taken to one of their stations: while there they were obtained by a person in the employ of the proprietor of the receiving office, by means of a forged order, and were stolen. *Held*, that the defendants were not protected by the provisions of the Carriers' Act (11 Geo. IV. & 1 Wm. IV. c. 68), as the loss had arisen from the felonious act of a person who was a servant of the defendants, within the meaning of section 8 of that act. *Stephens v. London & S. W. R. Co.*, 18 Q. B. D. 121, 56 L. J. Q. B. 161, 56 L. T. 220, 5 Ry. & C. T. Cas. vii.—APPLYING *Machu v. London &*

S. W. R. Co., 2 Ex. 415; *Syms v. Chaplin*, 5 Ad. & El. 634.

525. Liability for temporary loss or delay.—A carrier is not deprived of the protection afforded by the Carriers' Act (11 Geo. IV. & 1 Wm. IV. c. 68, § 1) merely by the fact that the loss of the goods is temporary and not permanent, nor can the owner of goods, which ought to have been but were not declared pursuant to that statute, recover damages for the consequences of the loss of them—e.g., being compelled to replace them—as distinguished from the loss itself. *Millen v. Brasch*, 9 Am. & Eng. R. Cas. 326, L. R. 10 Q. B. D. 142, 52 L. J. Q. B. D. (App.) 127; reversing 8 Q. B. D. 35, 51 L. J. Q. B. D. 160, 45 L. T. 653.—EXPLAINING *Hearn v. London & S. W. R. Co.*, 10 Ex. 793. REVIEWING *Pianciani v. London & S. W. R. Co.*, 18 C. B. 226; *Wallace v. Dublin & B. R. Co.*, 8 Ir. C. L. 341.

526. When carrier liable though increased charge has not been paid.—Under the Carriers' Act, if the carrier makes no demand for the increased charge mentioned in the notice affixed in his office, the shipper is not bound to attend to it, and the carrier is liable for loss or injury, although the increased charge has not been paid. *Great Northern R. Co. v. Behrens*, 7 H. & N. 950, 8 Jur. N. S. 567, 31 L. J. Ex. 299, 10 W. R. 389, 8 L. T. 328; affirming 6 H. & N. 366, 30 L. J. Ex. 153, 9 W. R. 338, 3 L. T. 863.

527. What is a "bill, order, note," etc., within the meaning of the act.—A draft directed by a person to himself, ordering the payment of a certain amount (more than £10), and accepted by him, but having no drawer's name, and sent by railway to a person in order that he might add his name as drawer, is not "a bill, order, note, security for payment of money, or writing of value exceeding £10," so as to give the carrier the benefit of the Carriers' Act. *Stoessiger v. South Eastern R. Co.*, 3 El. & Bl. 549, 2 C. L. R. 1595, 18 Jur. 605, 23 L. J. Q. B. 293.

528. Sufficiency of plea setting up the statute as a defense.—A plea to a declaration alleging the loss of goods delivered to a carrier for transportation, setting up the provisions of the Carriers' Act—*held*, to constitute a good answer. *Baxendale v. Great Eastern R. Co.*, 38 L. J. Q. B. 137, L. R. 4 Q. B. 244, 17 W. R. 412.

2. *Railway and Canal Traffic Act.*

a. Generally.*

529. Purpose and scope of the act.

—The Railway and Canal Traffic Act was aimed against undue preferences and discriminations, and was not intended to apply to the case of a breach or neglect by the company of a public duty which was already susceptible of redress by mandamus or indictment. *Bennett v. Manchester, S. & L. R. Co.*, 6 C. B. N. S. 707.

The failure of a railway company to properly maintain one of its docks, as required by statute, is not the subject of redress under the Railway and Canal Traffic Act, although its object was to discourage the traffic at such dock and divert it to another one. *Bennett v. Manchester, S. & L. R. Co.*, 6 C. B. N. S. 707.

The Railway and Canal Traffic Act (17 & 18 Vict. c. 31) does not apply to special contracts entered into between a railway company and other persons as to the receiving, forwarding and delivering of traffic beyond the limits of its own lines. *Zuns v. South Eastern R. Co.*, L. R. 4 Q. B. 539, 10 B. & S. 594, 38 L. J. Q. B. 209, 20 L. T. 873; *s. c. nom. Turner v. South Eastern R. Co.*, 17 W. R. 1096.—CONSIDERED IN *Watkins v. Rymill*, L. R. 10 Q. B. D. 178, 52 L. J. Q. B. 121, 48 L. T. 426, 31 W. R. 337, 47 J. P. 357.

The Railway and Canal Traffic Act 1854 incorporates the whole of section 16 of the Regulation of Railways Act 1868, and extends its provisions to traffic carried partly by railway and partly by steam-vessels, even where the railway company has no power to work steam-vessels; and the Regulation of Railways Act 1871, § 12, extends the whole of the Railway and Canal Traffic Act 1854 to all cases where railway companies procure traffic to be carried in a steam-vessel not belonging to them. *Doolan v. Midland R. Co.*, 25 W. R. 882, 37 L. T. 317.

530. Does not take away equity jurisdiction.—The jurisdiction of the court of chancery or the attorney-general is not abolished or abridged by the Railway and Canal Traffic Act, 17 & 18 Vict. c. 31.

* Force in America of English decisions as to the English Railway and Canal Traffic Act, see note, 29 AM. & ENG. R. CAS. 59.

"Just and reasonable" conditions, see note, 16 AM. & ENG. R. CAS. 187.

"Fair interests" of railway company, see note, 29 AM. & ENG. R. CAS. 60.

Attorney-General v. Great Northern R. Co., 1 Drew. & S. 154.—DISCUSSED IN *Attorney-General v. Great Eastern R. Co.*, L. R. 11 Ch. D. 449, 48 L. J. Ch. 429, 40 L. T. 265.

The jurisdiction of courts of chancery is not abridged by the Railway and Canal Traffic Act giving a concurrent jurisdiction to courts of law. *Baxendale v. West Midland R. Co.*, 3 Giff. 650; *affirmed on appeal in 7 L. T. 297.*

531. Injunction — Overcharge.—In general, it is only after a complainant has laid his grievance against a railway company, which he alleges is violating the Railway and Canal Traffic Act, before the company itself that the court will grant an injunction. *Cooper v. London & S. W. R. Co.*, 4 Jur. N. S. 762.

The court declined to review the decision of the judge at chambers refusing to allow a railway company its costs of resisting an unsuccessful summons for an injunction under the Railway and Canal Traffic Act. *Ilfracombe P. Conveyance Co. v. London & S. W. R. Co.*, L. R. 4 C. P. 151.

An injunction will be refused under the Railway and Canal Traffic Act where the shipper has sued to recover the excess of charges paid by him over those required of other shippers, and having recovered a judgment, the company continuing the same charges, he applies for an injunction upon affidavits stating facts similar to the evidence adduced in the action for the overcharges. *Sutton v. South Eastern R. Co.*, 4 H. & C. 325, L. R. 1 Ex. 33, 35 L. J. Ex. 38.

532. Procedure—Costs.—It is enough to warrant an application under section 7 of the Railway and Canal Traffic Act 1888 calling upon the court for its interference, if the practices complained of—whether their present effect be serious or trivial—are in themselves legally objectionable, and if they may lead to consequences legally injurious to the interests of those represented by the applicants. *Liverpool C. & T. Assoc. v. London & N. W. R. Co.*, 7 Ry. & C. T. Cas. 125.

A rule requiring a railway company to show cause why it should not comply with the Railway and Canal Traffic Act is too vague. *Marriott v. London & S. W. R. Co.*, 3 Jur. N. S. 493, 26 L. J. C. P. 154.

Where a rule under the Railway and Canal Traffic Act 1854 has been moved without mention of costs, the general practice is to make the rule absolute without costs.

Marriott v. London & S. W. R. Co., 3 *Jur. N. S.* 493, 26 *L. J. C. P.* 154.

Where the conduct of a railway company makes it proper and necessary for a person to come into court for redress under the Railway and Canal Traffic Act, the court will ordinarily make the rule absolute with costs. *In re Baxendale & L. & S. W. R. Co.*, 12 *C. B. N. S.* 758, 28 *L. J. C. P.* 81, 4 *Jur. N. S.* 1279.—CONSIDERED IN *Palmer v. London & S. W. R. Co.*, *L. R.* 1 *C. P.* 588, 35 *L. J. C. P.* 289, 12 *Jur. N. S.* 926, 15 *L. T.* 159, 15 *W. R.* 11.

Where a complainant asks by a rule under the Railway and Canal Traffic Act more than he is entitled to and the company has been partially in the wrong, neither party will be allowed costs. *Oxlade v. North Eastern R. Co.*, 1 *C. B. N. S.* 454.

b. Duty of Carrier to Furnish "Reasonable Facilities," Under § 2.

533. Generally.—The Railway and Canal Traffic Act 1854, § 2, requires facilities to be given according to the powers of railway companies, and as special railway acts make the powers of some companies larger than those of others, so they also extend or limit the facilities they give to the public, and thus the general enactment as to affording facilities has to be read and considered with reference to the language of any special clauses regarding them. *Tharsis S. & C. Co. v. London & N. W. R. Co.*, 3 *Ry. & C. T. Cas.* 455.

The cost of working any particular description of traffic is not material as an answer to the obligation of section 2 of the Railway and Canal Traffic Act 1854, to afford all due and reasonable facilities for the conveyance of traffic. *Winsford Local Board v. Cheshire Lines Committee*, 7 *Ry. & C. T. Cas.* 72.

If a line as a whole earns a profit a railway company cannot single out this or that particular traffic, and say "We find that particular traffic is not remunerative, and therefore we shall cease to provide any facilities for it." *Winsford Local Board v. Cheshire Lines Committee*, 7 *Ry. & C. T. Cas.* 72.

Section 2 of the Railway and Canal Traffic Act, which prohibits undue and unreasonable preferences or advantages being given by railways and canal companies to particular persons, does not apply to the case of arrangements made by a railway

company, whose line terminates at the sea, with a steamboat owner for carrying across the sea goods and passengers brought by the railway. *Napier v. Glasgow & S. W. R. Co.*, 1 *Ry. & C. T. Cas.* 292, 4 *Sess. Cas.* 87, 3d ser.

534. For receiving and delivering goods.—The obligation imposed upon railway companies by section 2 of the Railway and Canal Traffic Act 1854, to afford to the public facilities for using a railway as regards the receipt and delivery of traffic, is not confined to the granting of such facilities at existing stations only. *Local Board of Newington v. North Eastern R. Co.*, 3 *Ry. & C. T. Cas.* 306.

A railway commits an infringement of the above-mentioned section if, not having the excuse of inability, it refuses to receive and deliver traffic of a particular district except at places on its railway which are unreasonably remote, and if also the convenience that the opening of a station within easy reach would be to traffic that would use it, measured by quantity and other considerations, has a clear preponderance over the inconvenience from expense and trouble which it would cause the railway company to give that accommodation. *Local Board of Newington v. North Eastern R. Co.*, 3 *Ry. & C. T. Cas.* 306.

Where the court finds that defendants had wrongfully taken up and removed the rails forming the connection of a branch railway or siding belonging to complainant with the defendants' main line of railway, whereby complainant was deprived of the use of the said siding as a means of receiving from the defendants goods consigned to him, and which had come by the defendants' railway, and also of delivering to the defendants goods for conveyance on their railway, under section 76 of the Railway Clauses Act 1845, and the Railway and Canal Traffic Act 1888, defendants will be ordered and enjoined at their own expense forthwith to restore the communication between complainant's branch railway or siding with defendants' line of railway. *Portwall v. Colne Valley & H. R. Co.*, 7 *Ry. & C. T. Cas.* 102.

A railway company which employed agents for delivering in a large town goods brought by the railway to the parties to whom they were addressed, arranged within the station the goods to be delivered by these agents, and afforded to them other facilities in the

use of the station. *Held*, that the company, in refusing to give the same advantages to carriers to whom goods were consigned, were not guilty of a contravention of the provisions of the Railway and Canal Traffic Act. *Pickford v. Caledonian R. Co.*, 1 Ry. & C. T. Cas. 252.—*APPLYING Wannan v. Scottish C. R. Co.*, 1 Ry. & C. T. Cas. 237.

Under complaint that a railway company did not afford due facilities for receiving and forwarding merchandise traffic at N. because it had not connected its railway with the Albert Basin at the port of N., near its Dublin Bridge station, it appeared that the Dublin Bridge station was used only for passenger traffic, and that goods and cattle arriving by railway and going on by sea, or arriving by sea and going on by railway, had to be taken by road between the port and the company's goods station at Edward Street, a distance of nearly one mile. *Held*, that under all the circumstances proved, the railway company had not contravened the provisions of section 2 of the Railway and Canal Traffic Act 1854, relating to the obligation to afford reasonable facilities for traffic. *Newry Nav. Co. v. Great Northern R. Co.*, 7 Ry. & C. T. Cas. 176.

535. For through shipments, or exchange of traffic between carriers.

—The obligation imposed upon every railway company to afford all due and reasonable facilities for receiving and forwarding by its railway traffic coming by another, which forms with it a continuous line of communication, is not limited to the cases in which a railway company has accommodation to take over such traffic at the point of junction. *Victoria C. & I. Co. v. Neath & B. & M. R. Cos.*, 3 Ry. & C. T. Cas. 37.

Upon complaint by the lessees of a colliery, situated on the N. & B. Railway, at a short distance from its junction with the M. Railway to S., that they were prevented sending the traffic of their colliery to S. by the railways of the two companies which formed a direct route, and in consequence had to send it by a circuitous route, it was proved that the two railways formed a continuous line of communication, and that, physically, there was no difficulty in the traffic of the colliery being carried to S. by the direct route. *Held*, that the applicants were entitled, under section 2 of the Railway and Canal Traffic Act 1854, to have their traffic conveyed by any route they

pleased, and to use the two railways as if they were one continuous line. *Victoria C. & I. Co. v. Neath & B. & M. R. Cos.*, 3 Ry. & C. T. Cas. 37.

Two companies ran trains to T. W., and each had a station there. The stations were a mile apart, but were connected by a line of railway, which was used for the transit of goods only. The two systems were intended by the legislature to join at T. W. Upon complaint by the inhabitants of the district that no passengers were conveyed on the railway between the two stations, although there was a continuous line of railway—*held*, that the case came within section 2 of the Railway and Canal Traffic Act 1854, and accordingly an order was made enjoining both the companies to afford a continuous communication for passengers as well as for goods by means of their continuous lines. *Uckfield Local Board v. London, B. & S. C. R. Co.*, 2 Ry. & C. T. Cas. 214.

The Swindon & M. Co. were the owners of a railway in two sections connected by lines belonging to two other companies which were worked by the Great W. R. Co. The Swindon & M. Co. did not book or work traffic between their two sections, and the Great W. R. Co. did not book from the stations on the lines worked by them to stations on either section of the Swindon & M. Co.'s railway. To permit of the exchange of traffic required by the applicants, sidings and other accommodation at one of the junctions were necessary. *Held*, that the failure to provide these between April 25 and June 29, during which time the companies were considering the alterations which were necessary to enable the Swindon & M. Co. to exercise their running powers over those connecting lines, was not a failure to provide facilities for the receiving, forwarding, and delivery of traffic; that the route, until so completed and sanctioned by the board of trade, was not a continuous line of railway communication. *Hammans v. Great Western R. Co.*, 4 Ry. & C. T. Cas. 181.

The junction between the northern section of the Swindon & M. Co.'s railway and that of the M. Co. was at M., and it was physically complete, but it was not opened because the Swindon & M. Co. had not given the necessary notice. As the application asked for an order against the Great Western Company only, an injunction was

refused. *Hammans v. Great Western R. Co.*, 4 Ry. & C. T. Cas. 181.

Averments that a railway company refused to give effect to general orders left with it to deliver goods arriving at its stations by a particular carrier, and that the company refused to hand over goods for delivery by a particular carrier, to whose care they were addressed—*held*, no relevant allegations of a contravention of the second section of the Railway and Canal Traffic Act 1854, and therefore not sufficient to warrant the summary procedure provided for in the act. *Wannan v. Scottish C. R. Co.*, 1 Ry. & C. T. Cas. 237, 2 Sess. Cas. 1373.

536. Failing to properly equip and work road.—A railway was transferred to a railway company under a special act, section 15 of which provided that the railway company, when requested so to do by any persons occupying works or manufactories adjacent to and having sidings connected with the railway transferred, was at all reasonable times and with all due diligence to provide wagons proper and sufficient for the conveyance of all traffic passing exclusively on the lines of railway transferred. *Tharsis S. & C. Co. v. London & N. W. R. Co.*, 3 Ry. & C. T. Cas. 455.

Upon complaint by persons occupying works or manufactories adjacent to the railway that the railway company did not supply sufficient wagons for the traffic on the railway—*held*, that although the duty cast upon the railway company by the special act was limited to cases where there was a request for wagons by members of a particular class, and where also only particular lines of railway were required to be used; yet where the duty did arise, it determined what was a reasonable facility, within the meaning of section 2 of the Railway and Canal Traffic Act 1854, as effectively as if it were a duty of a more general kind, or one which applied under any circumstances; and the railway company was enjoined to afford all reasonable facilities for the receiving, forwarding, and delivery of the applicants' ore passing exclusively over the lines transferred, having regard to the above section. *Tharsis S. & C. Co., v. London & N. W. R. Co.*, 3 Ry. & C. T. Cas. 455.

Upon complaint by traders whose collieries and brick works were connected by sidings with respondents' railway that the respondents did not duly and properly

work and manage their railway, and did not provide sufficient locomotive power for that purpose, and that they improperly and unnecessarily detained empty wagons destined for the collieries and works of the applicants, and failed to haul away with regularity and dispatch from the sidings connecting the said works and collieries with the railway loaded wagons placed ready for removal, the commissioners decided that the respondents did not, according to their powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from their railway, and for the return of carriages and trucks; and the commissioners ordered the respondents to work and manage their railway duly and properly, and to provide sufficient locomotive power and labor for that purpose, and to desist from unduly detaining empty or unloaded wagons destined for the collieries and works of the applicants, and to haul away with regularity and dispatch from the sidings communicating with their railway loaded wagons properly placed ready for removal. *Watkinson v. Wrexham, M. & C. Q. R. Co.* 3 Ry. & C. T. Cas. 446.

537. Facilities and charges on alternative routes must be equal.—

Where a company are owners of two or more lines forming parts of alternative routes between the same places it is their duty to see that the service is as good one way as it is the other, subject to what may be required for the general purposes of their traffic. They are at perfect liberty to send all the traffic they have the control of in whichever direction they like, and to canvass as much as they please for consignments in the direction which suits themselves best. But so far as and to whatever extent they, without sufficient excuse, give a worse service in one direction than they supply in the other, they are guilty of an undue prejudice to the traffic desirous of using the route in which the service is worse, under section 2 of the Railway and Canal Traffic Act 1854. *Ayrshire & W. R. Co. v. Glasgow & S. W. R. Co.*, 6 Ry. & C. T. Cas. 26.

Upon complaint that a railway, that had two routes by which it could carry the applicant's traffic, disregarded the consignor's orders by carrying by a different route from that by which the traffic was consigned, it was proved that this change of the route did not affect the rate which the company

charged, and that the applicant was not in any worse position than he would have been if the company had specifically obeyed his direction and had actually carried the traffic over the route by which he desired it should be carried. *Held*, that the company had not contravened section 2 of the Railway and Canal Traffic Act 1854. *Donald v. North Eastern R. Co.*, 6 Ry. & C. T. Cas. 53.

538. Company not bound to receive off its line.—A railway company is not bound to provide booking offices for traffic at places off its railway, nor to arrange for the conveyance by road of goods between such places to the nearest station on its railway. *Dublin & M. R. Co. v. Midland, G. W. R. Co.*, 3 Ry. & C. T. Cas. 379.

XI. CONNECTING LINES.

1. Who Are, and Respective Liability, Generally.*

539. Who are — Transfer companies.—A connecting carrier is one whose route, not being the first one, lies somewhere between the point of shipment and the point of destination. It becomes such by virtue of the agreement between the consignor or shipper and the first carrier, whereby the latter undertakes to deliver the shipment at its ultimate destination, and thus makes the carrier beyond its own route its agent for continuing the transportation, or else undertakes only to deliver the goods safely to the next carrier on the route, who thus becomes the agent of the shipper for carrying them further. *Nanson v. Jacob*, 12 Mo. App. 125.

A transfer company employed by a consignee to remove goods from a station is not a connecting carrier. *Nanson v. Jacob*, 32 Am. & Eng. R. Cas. 553, 93 Mo. 331, 12 West. Rep. 358, 6 S. W. Rep. 246; *affirming* 12 Mo. App. 125.

Defendant company received a piano for a point beyond its line, and gave a bill of lading reciting that it was to be carried to the end of its line and delivered "to the next connecting common carrier." The next railroad line and defendant's road were connected by a "Y," but their freight depôts were about one mile apart. It was

the habit of the companies in transferring freights by the car-load from one line to the other to use the "Y," but freights in less quantities were removed from the cars and transported by drays. In this case defendant removed the piano from its car and delivered it to persons doing business as a transfer company, who let the piano fall, in transporting it from one station to the other, and injured it. *Held*, that such transfer company was not "a connecting common carrier," within the meaning of the bill of lading, and that defendant company was liable for the injury. *Missouri Pac. R. Co. v. Young*, 25 Neb. 651, 41 N. W. Rep. 646. —APPLYING *Hooper v. Chicago & N. W. R. Co.*, 27 Wis. 81.

540. Common-law obligations.—The common-law obligations of a railroad company to a connecting line are the same as to reception, transportation, and delivery of freight, as those existing between a railroad company and an individual shipper, and whatever rights, beyond those belonging to a natural person, are claimed by one company against another must be found either in the charters of the companies or arise from contracts. *Shelbyville R. Co. v. Louisville, C. & L. R. Co.*, 21 Am. & Eng. R. Cas. 233, 82 Ky. 541.—FOLLOWED IN *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.*, 37 Fed. Rep. 567, 2 L. R. A. 289, 2 Int. Com. Rep. 351.

541. When each carrier is liable for loss or injury whenever occurring.—Where several carriers unite to complete a line of transportation and receive goods for one freight, and give a through bill of lading, each carrier is the agent of all the others to accomplish the carriage and delivery of the goods, and is liable for any damage to them, on whatever part of the line the damage is received. *Harp v. The Grand Era*, 1 Woods (U. S.) 184.—DISTINGUISHED IN *Atchison, T. & S. F. R. Co. v. Roach*, 27 Am. & Eng. R. Cas. 257, 35 Kan. 740. FOLLOWED IN *Texas & P. R. Co. v. Fort*, 9 Am. & Eng. R. Cas. 392, 1 Tex. Law Rep. 289; *Richardson v. Chouteau*, 37 Fed. Rep. 532. REVIEWED IN *Peterson v. Chicago, R. I. & P. R. Co.*, 80 Iowa 92, 45 N. W. Rep. 573.—*Richardson v. Chouteau*, 37 Fed. Rep. 532.—FOLLOWING *Harp v. The Grand Era*, 1 Woods (U. S.) 184.—*Houston & T. C. R. Co. v. Park*, 1 Tex. App. (Civ. Cas.) 142. *Texas & P. R. Co. v. Fort*, 9 Am. & Eng. R. Cas. 392, 1 Tex.

* Injury to goods in transit when there is no evidence in whose hands they were at time of injury, see note, 9 AM. & ENG. R. CAS. 94.

Remedy of shipper of through goods when he cannot locate place of loss, see note, 72 AM. DEC. 243.

App. (Civ. Cas.) 722, 1 Tex. Law Rep. 289.
—FOLLOWING *Harp v. The Grand Era, 1 Woods (U. S.) 184.*

Where it is shown that two companies have an arrangement by which they carry passengers and freight over their roads on through tickets and through bills of lading, either company is liable for the non-delivery of freight when such delay is caused, not by its own negligence, but by the negligence of the other company on which it has issued a through bill of lading. *Texas & P. R. Co. v. Parrish, 1 Tex. App. (Civ. Cas.) 529.*

Where the initial carrier has contracted for through carriage of goods and has received the freight charges therefor, the shipper may maintain an action against any succeeding carrier in whose custody the goods are when injured; and it is no objection that there is no privity of contract between the shipper and such carrier. *Wing v. New York & E. R. Co., 1 Hill. (N. Y.) 235.*

Each carrier on a through bill of lading, or on connecting lines, is liable only for the negligence that arises on its own line, unless some different understanding be shown, or circumstances from which such an understanding might be inferred. *Sumner v. Walker, 30 Fed. Rep. 261.*—FOLLOWING *Ogdensburg & L. C. R. Co. v. Pratt, 22 Wall. (U. S.) 123, 95 U. S. 43.*

542. Under New York act—Pleadings.—Under N. Y. Rev. St. p. 1240, § 53, providing that "whenever two or more railroads connect, any company owning either of said roads receiving freight to be transported on the line of either of said roads, shall be liable as common carriers for the delivery of such freight at such place," in order to recover against one of such roads, which would not otherwise be liable, it is necessary to state in the complaint all the facts necessary under the statute to create the liability. *Hempstead v. New York C. R. Co., 28 Barb. (N. Y.) 485.*—APPROVED IN *Coates v. United States Exp. Co., 45 Mo. 238.*

543. When each carrier liable only for loss or injury on its own line.—(1) *General rules.*—In transportation of goods over connecting lines of railroad, when there is no special contract, each road is only liable to the extent of its own line and for safe carriage and delivery to the next road. *Savannah, F. & W. R. Co. v.*

Harris, 42 Am. & Eng. R. Cas. 457, 26 Fla. 148, 7 So. Rep. 544.—QUOTING *Myrick v. Michigan C. R. Co., 107 U. S. 107; Michigan C. R. Co. v. Mineral Springs Mfg. Co., 16 Wall. (U. S.) 318.*—*Harding v. International Nav. Co., 12 Fed. Rep. 168.*—FOLLOWING *Ogdensburg & L. C. R. Co. v. Pratt, 22 Wall. (U. S.) 123.*—*Montgomery & W. P. R. Co. v. Moore, 51 Ala. 394.*—NOT FOLLOWED IN *Mobile & G. R. Co. v. Copeland, 63 Ala. 219, 35 Am. Rep. 13.*

In the case of the transportation of property over several railroads constituting a connecting line, neither company is agent of the owner; each exercises an independent employment as a contractor with the owner, and is responsible for its own negligence, and it cannot make the owner responsible for the negligence of a connecting road. *Sherman v. Hudson River R. Co., 64 N. Y. 254; affirming 5 Daly 521.*

Where goods are shipped to be transferred by successive carriers, the carrier in whose possession they are when destroyed or injured is liable as such to the owner or consignee for the loss. *Packard v. Taylor, 35 Ark. 402, 37 Am. Rep. 37.*—DISTINGUISHING *Bank of Ky. v. Adams Exp. Co., 93 U. S. 174; Newell v. Smith, 49 Vt. 255.* EXPLAINING *Farmers' & M. Bank v. Champlain Transp. Co., 23 Vt. 209.*

In the absence of a partnership or joint arrangement, the last carrier in the chain of connecting carriers is not liable for property it never received. *Church v. Atchison, T. & S. F. R. Co., 1 Okla. 44, 29 Pac. Rep. 530.*

Where a railroad company enters into an agreement whereby it binds itself to "receive, load and unload, deliver and way-bill" such freight as should be sent to it by the dispatch company, but does not expressly assume the risk of a common carrier, except while goods are "on their line of road or in their possession," such a contract does not impose upon the railroad company any obligation to carry beyond its own line, or subject it to liability for the negligence of other carriers; nor can the dispatch company enter into any contract whereby such obligation or liability shall be imposed upon the railroad company. *St. Louis Ins. Co. v. St. Louis, V., T. H. & I. R. Co., 3 Am. & Eng. R. Cas. 260, 104 U. S. 146.*—FOLLOWED IN *Deming v. Norfolk & W. R. Co., 16 Am. & Eng. R. Cas. 232, 21 Fed. Rep. 25.* QUOTED IN *Jones v. Pennsylvania R. Co., 8 Mackey (D. C.) 178.*

(2) *Illustrations*.—Several connecting carriers entered into an agreement for the through carriage of freights, providing that each succeeding carrier should pay the freight charges due the next preceding carrier, and that the last carrier should collect the whole of the charges, the accounts to be settled between the companies at stated times according to certain stipulated rates. *Held*, that such arrangement did not constitute a partnership between the companies, and that each company was only liable for loss or injury occurring on its own line or through its own negligence. *Darling v. Boston & W. R. Corp.*, 11 *Allen (Mass.)* 295. —REFERRING TO *Najac v. Boston & L. R. Co.*, 7 *Allen (Mass.)* 329; *Farmers' & M. Bank v. Champlain Transp. Co.*, 23 *Vt.* 209; *Nutting v. Connecticut River R. Co.*, 1 *Gray (Mass.)* 502. REVIEWING *Fitchburg & W. R. Co. v. Hanna*, 6 *Gray (Mass.)* 539.—APPROVED IN *Gass v. New York, P. & B. R. Co.*, 99 *Mass.* 220. NOT FOLLOWED IN *Lake Erie & W. R. Co. v. Oakes*, 11 *Ill. App.* 489. QUOTED AND APPLIED IN *Hot Springs R. Co. v. Trippe*, 18 *Am. & Eng. R. Cas.* 562, 42 *Ark.* 465, 48 *Am. Rep.* 65. REVIEWED IN *Nashua Lock Co. v. Worcester & N. R. Co.*, 48 *N. H.* 339; *Gray v. Jackson*, 51 *N. H.* 9.

Two connecting roads entered into an agreement, to the effect that any injury to persons or property should be paid for by the company on whose road it might occur; but if it could not be ascertained on which road the injury occurred, then each should pay in proportion to its share of the through charge. *Held*, that such contract did not constitute the two roads partners; and, in case of damage to through freights, only the company in whose hands the goods were at the time of injury could be sued. *Aigen v. Boston & M. R. Co.*, 6 *Am. & Eng. R. Cas.* 426, 132 *Mass.* 423.

An action was brought against three railroads as joint contractors for damage to goods transported over them in November, 1852. In 1849 one of them published a notice by which they made themselves liable as joint contractors with the others. On the 1st of October, 1852, they published another notice that they would be liable for damage to cotton "after it came into their possession, but no further." The receipt given by one railroad contained the clause: "Roads liable for such injuries only as shall be established to have occurred while

in their possession." *Held*, that defendants were not liable as joint-contractors, and a nonsuit was ordered. *Bradford v. South Carolina R. Co.*, 10 *Rich. (So. Car.)* 221.

544. Joint liability.—Where different connecting lines of carriers unite to form a through line between designated points, and charge a through freight rate, and give through receipts, they are jointly liable for a loss. *Cincinnati, H. & D. R. Co. v. Spratt*, 2 *Duv. (Ky.)* 4.—QUOTED IN *Nashua Lock Co. v. Worcester & N. R. Co.*, 48 *N. H.* 339. REVIEWED IN *Crawford v. Southern R. Assoc.*, 51 *Miss.* 222; *Gray v. Jackson*, 51 *N. H.* 9.

If several common carriers, having each its own line, associate and form what to the shipper is a continuous line, and contract to carry goods through for an agreed price, which the shipper or consignee pays in one sum, and which the carriers divide among them, then, as to third parties with whom they contract, they are liable jointly for a loss taking place on any part of the whole line. *Wyman v. Chicago & A. R. Co.*, 4 *Mo. App.* 35.—APPROVING *Evansville & C. R. Co. v. Androscoggin Mills*, 22 *Wall. (U. S.)* 594; *Ogdensburg & L. C. R. Co. v. Pratt*, 22 *Wall. (U. S.)* 123. QUOTING *Root v. Great Western R. Co.*, 45 *N. Y.* 524.—DISTINGUISHED IN *Lin v. Terre Haute & I. R. Co.*, 10 *Mo. App.* 125.—*Barrett v. Indianapolis & St. L. R. Co.*, 9 *Mo. App.* 226.

When several distinct corporations associate together and form a continuous line of common carriers, each being empowered to contract for freight and passengers for the whole line, and to receive pay for the same, which is to be divided in prescribed proportions, they are jointly liable for losses or injuries upon any part of the line. *Barter v. Wheeler*, 49 *N. H.* 9.—FOLLOWED IN *Burke v. Concord R. Co.*, 61 *N. H.* 160. REVIEWED IN *Peterson v. Chicago, R. I. & P. R. Co.*, 80 *Iowa* 92, 45 *N. W. Rep.* 573.—*Swift v. Pacific Mail Steamship Co.*, 30 *Am. & Eng. R. Cas.* 105, 106 *N. Y.* 206, 12 *N. E. Rep.* 583, 8 *N. Y. S. R.* 602; *affirming* 36 *Hun* 643, *mem.*

Where two connecting roads have entered into and are concerned in a contract for carrying goods, and are jointly interested in the road, in running and managing the trains, and both share in the profits, they may be jointly sued for a loss or injury. *Wylde v. Northern R. Co.*, 14 *Abb. Pr. N. S. (N. Y.)* 213.

Where several connecting lines of carriers unite in a contract for the through transportation of goods they are jointly liable for a loss, though the bills of lading may contain statements that the companies contract "severally and not jointly," and that in case of loss or damage the company alone shall be answerable in whose actual custody the goods may be at the time of the loss or damage. *Milne v. Douglass*, 4 *McCrary* (U. S.) 368, 13 *Fed. Rep.* 37.

Where, for the purpose of facilitating transportation, connecting lines of common carriers enter into a general arrangement whereby they mutually become forwarding agents, the liability of the several carriers for damages resulting from negligence is confined to such as may occur by the conduct of its own agents or servants on its own line. *Washington v. Raleigh & G. R. Co.*, 37 *Am. & Eng. R. Cas.* 25, 101 *N. Car.* 239, 1 *L. R. A.* 830, 7 *S. E. Rep.* 789.

Where a steamship owner and a railway company make an arrangement for the running of the boat in connection with the railway, and dividing the through freights, and the steamship owner has the sign of the railway company over his office-door, they are joint contractors with respect to through freight, and the railway company is liable for breaches of contract in the course of transportation by the steamer. *Hayes v. South Wales R. Co.*, 9 *Ir. C. L.* 474.

In an action against railroad companies for the value of wheat carried by them and destroyed in the cars by fire after reaching its destination, where the petition avers that the first carrier delivered the wheat to a railroad other than that named in the agreement, and that it was burned while in possession of such second carrier, it is sufficient to support a recovery against both railroads. *Independence Mills Co. v. Burlington, C. R. & N. R. Co.*, 32 *Am. & Eng. R. Cas.* 456, 72 *Iowa* 535, 34 *N. W. Rep.* 320.

A joint liability of the second carrier with the railway company executing the bill of lading, or a ratification of the contract to transport the freight through to destination at the rate stipulated, will not be presumed from the fact that the second carrier received and hauled the car and collected the charges. *Miller v. Texas & N. O. R. Co.*, 83 *Tex.* 518, 18 *S. W. Rep.* 954.

Several railroad companies, forming a connection from an inland city to the seacoast, entered into an arrangement to trans-

port cotton to the seacoast at a specified rate. Defendant company, being the one reaching the coast, published a notice stating the arrangement, and requesting shippers to take duplicate receipts and forward one of them to its agent at a designated place, "in order to fix the responsibility on this company," and guaranteeing satisfaction to all concerned. *Held*, that the different companies forming the line were jointly liable to one who had shipped cotton and complied with the above notice, making the defendant company liable for a loss occurring before the cotton reached its road. *Bradford v. South Carolina R. Co.*, 7 *Rich. (So. Car.)* 201.—DISTINGUISHED IN *Felder v. Columbia & G. R. Co.*, 27 *Am. & Eng. R. Cas.* 264, 21 *So. Car.* 35, 53 *Am. Rep.* 656. QUOTED IN *Nashua Lock Co. v. Worcester & N. R. Co.*, 48 *N. H.* 339. REVIEWED IN *Barter v. Wheeler*, 49 *N. H.* 9; *Gray v. Jackson*, 51 *N. H.* 9.

545. Joint and several liability.—Connecting lines of carriers, where freight is shipped over such lines upon a through bill of lading, are each responsible for the loss of or injury to such freight, and the person entitled to damages for such loss or injury may at his election sue either one or all of such lines; and his right to recover of the line sued does not depend upon whether or not such loss or injury occurred while the freight was in charge of the line sued. *Gulf, C. & S. F. R. Co. v. Golding*, 23 *Am. & Eng. R. Cas.* 732, 3 *Tex. App. (Civ. Cas.)* 60. *Rice v. Indianapolis & St. L. R. Co.*, 3 *Mo. App.* 27.

A provision in the bill of lading, that the carrier in whose custody the goods were when injured should alone be liable, does not alter the rule. *Missouri Pac. R. Co. v. Creath*, 3 *Tex. App. (Civ. Cas.)* 109.

Where the several roads were liable as joint obligors, it is not necessary to the liability of the defendant that it appear that it received the freight charges, or a part of the profits of the freight shipment. *International & G. N. R. Co. v. Anderson*, 3 *Tex. Civ. App.* 8, 21 *S. W. Rep.* 691.—DISTINGUISHING *International & G. N. R. Co. v. Campbell*, 1 *Tex. Civ. App.* 509.

Several railroad corporations having connecting lines between Boston and Chicago formed an association, under a specified name, for the transportation of goods between those places. An agent was appointed in Boston, with authority to give

bills of lading. A bill of lading for the carriage of goods from Boston to Colorado mentioned only the name of the association. *Held*, that the corporations were liable jointly and severally for the loss of goods received by their agent. *Block v. Fitchburg R. Co.*, 21 *Am. & Eng. R. Cas.* 1, 139 *Mass.* 308, 1 *N. E. Rep.* 348.

546. When liable as partners.*—

In case of a through shipment, in order to hold one carrier responsible for the default of another, a partnership between them must be shown, either express or implied, or it must appear that one was acting as the agent of the other against whom the recovery is sought. *Galveston, H. & S. A. R. Co. v. Van Winkle*, 3 *Tex. App. (Civ. Cas.)* 538.

Where carriers on connecting routes form associations and arrangements for the purpose of carrying goods or parcels through the whole line, they are, beyond question, partners, and each is responsible for any loss or injury to goods which may happen, in whatever part of the line it occurs. *Coates v. United States Exp. Co.*, 45 *Mo.* 238.—APPROVING *Van Santvoord v. St. Johns*, 6 *Hill (N. Y.)* 157; *Hempstead v. New York C. R. Co.*, 28 *Barb. (N. Y.)* 485; *Quimby v. Vanderbilt*, 17 *N. Y.* 306; *Northern R. Co. v. Fitchburg R. Co.*, 6 *Allen (Mass.)* 254; *United States Exp. Co. v. Rush*, 24 *Ind.* 403; *Farmers' & M. Bank v. Champlain Transp. Co.*, 18 *Vt.* 131, 23 *Vt.* 209; *Hood v. New York & N. H. R. Co.*, 22 *Conn.* 1; *Nutting v. Connecticut River R. Co.*, 1 *Gray (Mass.)* 502. DISAPPROVING *Muschamp v. Lancaster & P. J. R. Co.*, 8 *M. & W.* 421.—DISTINGUISHED IN *Dimmitt v. Kansas City, St. J. & C. B. R. Co.*, 103 *Mo.* 433. FOLLOWED IN *Snider v. Adams Exp. Co.*, 63 *Mo.* 376. REVIEWED IN *Bennett v. Missouri Pac. R. Co.*, 46 *Mo. App.* 656.

547. Acts not amounting to a partnership.—An association among carriers for the transportation of through freights and a division of the receipts in prescribed proportion, does not constitute a partnership nor render the carriers jointly liable for loss or injuries occurring to goods transported. *Hot Springs R. Co. v. Trippe*, 18 *Am. & Eng. R. Cas.* 562, 42 *Ark.* 465, 48 *Am. Rep.* 65.—APPLYING *Converse v. Norwich & N. Y. Transp. Co.*, 33 *Conn.* 166.

* Railway partnerships and fast freight lines, see note, 21 *AM. & ENG. R. CAS.* 3.

QUOTING AND APPLYING *Darling v. Boston & W. R. Co.*, 11 *Allen (Mass.)* 295.—*Gass v. New York, P. & B. R. Co.*, 99 *Mass.* 220. *Phifer v. Carolina C. R. Co.*, 89 *N. Car.* 311, 45 *Am. Rep.* 687.

An agreement between connecting carriers on a through route, each having exclusive control and ownership of its line, with arrangements for continuous transportation on through bills of lading at settled rates of compensation, each being by special provision in the bills of lading responsible only for his own acts or omissions, does not make such carriers partners and responsible for the acts or omissions of each other. *Deming v. Norfolk & W. R. Co.*, 16 *Am. & Eng. R. Cas.* 232, 21 *Fed. Rep.* 25.—FOLLOWING *St. Louis Ins. Co. v. St. Louis, V., T. H. & I. R. Co.*, 104 *U. S.* 146.—DISTINGUISHING *Michigan C. R. Co. v. Mineral Springs Mfg. Co.*, 16 *Wall. (U. S.)* 318; *Bussey v. Memphis & L. R. Co.*, 13 *Fed. Rep.* 330.

In an action against a carrier, by which it is sought to hold the defendant as a partner of another road by which the goods were shipped, the mere fact that such roads are continuous, and that an association engaged in shipping goods between points connected by these roads, and using its own cars and employing agents distinct from those of these roads, was in the habit of giving through bills of lading between these points and distributing the freight received among the roads actually engaged in the carriage, in proportion to the freight earned by each road, is not evidence of a partnership between the roads, or that the shipping association in question made the contract of affreightment in question as the agent of the defendant. *Watkins v. Terre Haute & I. R. Co.*, 8 *Mo. App.* 570.—DISTINGUISHED IN *Lin v. Terre Haute & I. R. Co.*, 10 *Mo. App.* 125.

Where there is an arrangement between different connecting railroads whereby each road agrees to carry the cars of the others having the name "Green Line" painted thereon, over its own road, without breakage of bulk, at such rates as might be agreed on, each company fixing its own rates of freight passing over its own road and collecting the same as the freight passed over its road, and having no interest in freights not reaching its road, each road desirous of making a through rate over other roads, via these Green Line cars, would ascertain

the rates the intermediate road or roads charged, and, adding the same to its own rates, fix its own schedule of through rates, which it termed "Green Line rates," and there was no joint expense, or loss, or profit, except that where a loss could not be located on any particular road a *pro rata* share of the loss was borne by all that carried the freight, it was *held*, that there was no partnership as between the different roads. *Irvin v. Nashville, C. & St. L. R. Co.*, 92 Ill. 103.

And where there was an arrangement like the foregoing, the fact that the words "Green Line" were painted on the roof of a wharf-boat, and were also printed at the top of the bills of lading, the name of the railroad company being also printed on the bills of lading, would not estop such railroad company from denying there was such a partnership. *Irvin v. Nashville, C. & St. L. R. Co.*, 92 Ill. 103.

The defendants, being engaged in the transportation of freight, etc., between the city of New York and various places west, by way of the Hudson River and canals, made an arrangement with the Mohawk & Hudson Railroad Company, by which it was mutually agreed that the defendants should deliver their up freight, etc., to the company at Albany, and their down freight at Schenectady—the *termini* of the railroad—the company to transport the freight and passengers over their road, etc., and the defendants to pay therefor in the proportion that thirty miles bore to the whole distance of canal transportation west of Albany, assuming the contract price fixed between the owner of the freight and the defendants as the basis of the calculation. *Held*, in *assumpsit* by the company to recover for the transportation, that the arrangement did not constitute a partnership between the parties; and this, though it was further agreed that the company should furnish "warehouse facilities" and pay a portion of the expense of offices at each end of their road. *Mohawk & H. R. Co. v. Niles, 3 Hill (N. Y.)* 162.

548. When each road becomes the agent of the others.—Where several common carriers unite to form a line for the transportation of merchandise, and receive goods and give a through bill of lading, each carrier becomes the agent of the others to carry into effect the transportation and de-

livery of the property. *Missouri Pac. R. Co. v. Twiss*, 55 Am. & Eng. R. Cas. 434, 35 Neb. 267, 53 N. W. Rep. 76.

In such cases the agent of a connecting road may be the agent of the defendant road; but in order to make the agent of one road the agent of the other, it must appear that there was an arrangement or contract between the roads for the through carriage of freights. *Evans v. Atlanta & W. P. R. Co.*, 56 Ga. 498.

549. Power of Concord railroad to form a partnership.—The Concord Railroad Corporation is authorized to make, with the Nashua & Lowell Railroad Corporation, such a business connection as will give the public the accommodation of a continuous line from Concord to Boston, but not to form a general partnership with the Nashua & Lowell for the operation of their roads by both corporations as joint principals. *Burke v. Concord R. Co.*, 8 Am. & Eng. R. Cas. 552, 61 N. H. 160.—*FOL-LOWING* Ogdensburg & L. C. R. Co. v. Pratt, 22 Wall. (U. S.) 123; *Barter v. Wheeler*, 49 N. H. 9; *Nashua Lock Co. v. Worcester & N. R. Co.*, 48 N. H. 339.

550. Power to make connections under Canadian statutes.—The Railway Act of 1868, 31 Vict. c. 68 D., authorized directors of any railroad to make arrangements with any other company, either in Canada or elsewhere, for an interchange of all kinds of traffic. *Held*, that the powers of a company to make such arrangements were not qualified by the subsequent act of 41 Vict. c. 26, granting similar powers, but providing "that the power hereby granted shall not extend to the right of making such arrangements with respect to any competing lines of railways." *Campbell v. Northern R. Co.*, 26 Grant Ch. (U. C.) 522.

551. Non-joinder of other carriers—When raised by demurrer.—Where one of connecting carriers is sued for loss or injury to goods, if the facts disclosed in the complaint show that other carriers are jointly liable with the defendant as partners or otherwise, an objection of their non-joinder must be taken by demurrer, assigning that specially as the cause; otherwise it is waived. *Baltimore & O. R. Co. v. McWhinney*, 36 Ind. 436, 5 Am. Ry. Rep. 312.

In an action to recover from a railroad company the value of flour delivered to a combination of railroad companies, which

divided freight *pro rata* among themselves according to the length of each road, of which combination the railroad company sued was a member, and received the flour when it reached the line of its road, and transported the same to its destination, and refused to deliver it on demand to the plaintiff—*held*, that a demurrer to the complaint for want of sufficient facts did not present the question whether the other railroad companies united with it in the receipt and transportation of the flour and freight generally were partners and proper parties with it as defendants to the action. *Baltimore & O. R. Co. v. McWhinney*, 36 Ind. 436, 5 Am. Ry. Rep. 312.

552. Lien of each for charges.*—When several independent carriers successively receive goods for carriage, each is entitled to demand payment in advance or to a lien on the goods for the carriage price. In such cases each road is by mercantile custom entitled to pay the back charges and to a lien on the goods for such charges, and for its own carriage price. *Knight v. Providence & W. R. Co.*, 9 Am. & Eng. R. Cas. 90, 13 R. I. 572, 43 Am. Rep. 46.

553. Third persons not affected by agreement between carriers.—Whatever effect an agreement between the several companies owning connecting lines of railroad may have upon the parties thereto, it cannot have any upon strangers to it, nor alter or change the relations of either of them towards third parties, nor have the effect of making those who were employed and paid wages by either of the contracting parties the co-employees of the agents and workmen of the other parties, nor make the others liable, either severally or jointly, for any loss or damage caused by the neglect of any one of them, even were the agreement silent in this respect. *Philadelphia, W. & B. R. Co. v. State*, 10 Am. & Eng. R. Cas. 792, 58 Md. 372.

554. When agreement may be terminated by one road at will.—Where two carriers enter into a contract for the interchange of freights, but not for any fixed time, one of the carriers may terminate it at will without previous notice to the other. *Investment Co. of Phila. v. Ohio & N. W. R. Co.*, 41 Fed. Rep. 378.

2. Rights, Duties, and Liabilities of Initial Carrier.

a. Generally.*

555. Liability for diverting goods from designated route.—If a shipper of goods designed for a point beyond the first carrier's line gives directions to forward them by a particular line, and it is the custom of the company to receive such directions, the receiving company will be liable for a failure to obey such instructions. *Michigan S. & N. I. R. Co. v. Day*, 20 Ill. 375.

When goods are delivered to the first of a connecting line of railroads, to be shipped by a specified route, a delivery to another railroad which forms a part of a different route is a conversion which renders the first road liable for the value of the goods. If they be delayed by such delivery, or damage result, the first road may be held responsible therefor. *Georgia R. Co. v. Cole*, 68 Ga. 623.

Whether the carrier receiving and transporting the goods had knowledge of the direction that they should be transported by a different line, is a question of fact for the jury; and the marks on the goods, with other circumstances, may be considered in determining that question. *Bird v. Georgia R. Co.*, 27 Am. & Eng. R. Cas. 39, 72 Ga. 655.

Where an owner delivers his goods to a transportation line employed in the business of transportation from Cincinnati to New York, undertaking and holding themselves out as prepared to carry goods through, and on such delivery makes a special contract determining the terms of the carriage, he may insist upon his contract as against any and all persons who may be employed by the Cincinnati line to assist in the transportation. The Cincinnati line has no right to deliver the property over to other independent carriers for transportation, or, if so delivered, the other carriers act in subordination to the contract; and if they acquire any rights as against the owner, it is only as agents of the contracting line, under a delegation to them as such agents of the interests which have accrued under the con-

* Prepayment of freight, see note, 40 AM. & ENG. R. CAS. 139.

* Liability of company receiving goods to be transported beyond its own lines, see notes, 3 AM. & ENG. R. CAS. 271; 72 AM. DEC. 243.

tract. *Mallory v. Burrett*, 1 E. D. Smith (N. Y.) 234.

556. Not liable to second carrier for such diversion.—A contract between the shipper and the defendant, a common carrier, whereby the defendant was to carry goods to its terminal point and there deliver them to the plaintiff, also a common carrier, for transportation to the point of destination, was not a contract made by other parties for the plaintiff's benefit, but only embodied an incidental advantage which the plaintiff might derive from earnings for part of the transportation; and no right of action accrued to the plaintiff against the defendant for a violation of the contract in giving the extended transportation to a carrier other than the plaintiff. *St. Louis & T. Packet Co. v. Missouri Pac. R. Co.*, 35 Mo. App. 272.

557. Failure to transmit necessary instructions to next carrier.*—Where a railroad company requires a shipper of freight consigned beyond its terminus, to advance the amount of freight for the entire distance, it must so deliver the goods to its connecting carrier that the latter would be under the same obligation in reference to them as would have been upon it if the goods had been received by it from the consignor with advance payment of the freight. *Palmer v. Chicago, B. & Q. R. Co.*, 35 Am. & Eng. R. Cas. 629, 56 Conn. 137, 6 N. Eng. Rep. 470, 13 Atl. Rep. 818.

A common carrier who undertakes to transport goods over the whole or any part of his own route, and then to forward them to a designated destination beyond, is bound to transmit, with their delivery to the carrier next *en route*, all special instructions received by him from the consignor; and in default thereof, in any material or substantial particular, to stand responsible for and make good the loss to which such negligence shall have contributed. *Little Miami R. Co. v. Washburn*, 22 Ohio St. 324.

Marks or labels on the packages delivered will not supply the omission of such instructions from the accompanying shipping bills, where they are shown not to have come to the actual knowledge of the next succeeding carrier or his agent, charged

with the duty of receiving and forwarding such bills. *Little Miami R. Co. v. Washburn*, 22 Ohio St. 324.

A common carrier is not required, in transferring goods to a second carrier, to ship them otherwise than as directed by the shipper; and where the directions given by the shipper as to the shipment omit to give the name of the consignor, the carrier will be guilty of no negligence because it fails to give the name of the consignor upon delivering the goods to the second carrier. *Indianapolis, B. & W. R. Co. v. Murray*, 72 Ill. 128.—DISTINGUISHING *Chicago & N. W. R. Co. v. Ames*, 40 Ill. 249.

Goods were delivered to a carrier marked to a point beyond the end of its line, but it was instructed to deliver them at the end of its line to the order of the consignor or his assigns; but it forwarded them through intermediate carriers without transmitting such instructions, to the place of destination, where they were delivered to the consignee without the production of a bill of lading. Held, that the initial carrier became liable for the value of the goods by violating such instructions. *North v. Merchants' & M. Transp. Co.*, 146 Mass. 315, 5 N. Eng. Rep. 907, 15 N. E. Rep. 779.

558. Duty to obey shipper's instructions—How determined—Conflict of evidence.—In undertaking to forward goods beyond the terminus of his own route the carrier is bound to obey all reasonable instructions of the shipper or consignor not in conflict with the terms of the contract between them; and if the goods are lost in consequence of his disregard of such instructions he is liable for their value, although the loss occurred in the possession of another carrier or another person. *Alabama G. S. R. Co. v. Thomas*, 89 Ala. 294, 7 So. Rep. 762.

In construing a contract for the through shipment of goods where the owner has designated the connecting carriers, the printed portions of the contract must give way to the written portion where there is a conflict between the two. *Babcock v. Lake Shore & M. S. R. Co.*, 43 How. Pr. (N. Y.) 317.

When the transactions in which a person, such as a freight agent of a road, are engaged are both numerous and uniform, the probability of their being remembered is slight; but when the transactions are numerous but not of a uniform character, such

* Duty and liability as forwarding agents in transmitting shipper's instructions, see notes, 40 AM. & ENG. R. CAS. 142; 26 Id. 81.

as the shipper is liable to be engaged in, the chances of their being remembered is largely increased. So where the question as to what instructions were given to an agent at the time of the shipment of goods is to be determined by the conflicting evidence of the shipper and the agent, and both are of equal credibility, greater weight should be given to the evidence of the shipper. *Johnson v. New York C. R. Co.*, 39 *How. Pr. (N. Y.)* 127.

559. Duty to observe marks on goods.—It is the duty of a railroad company receiving goods for transportation to exercise reasonable care to ascertain from the marks on the goods or boxes the place of destination, and if its road only extends part of the way, it should deliver the goods to the proper company, to be forwarded by the usual route. *Congar v. Galena & C. U. R. Co.*, 17 *Wis.* 477.

560. When initial carrier acts as agent in forwarding goods.—A carrier of goods acts as agent of the owner in transferring them to another carrier, and not as the latter's agent. *Marquette, H. & O. R. Co. v. Kirkwood*, 9 *Am. & Eng. R. Cas.* 85, 45 *Mich.* 51, 7 *N. W. Rep.* 209. *Patten v. Union Pac. R. Co.*, 29 *Fed. Rep.* 590.—NOT FOLLOWING *Fitch v. Newberry*, 1 *Dougl. (Mich.)* 1.

By delivery to the carrier in Louisiana the owner made each successive carrier his agent for forwarding the cotton. *Vaughan v. Providence & W. R. Co.*, 9 *Am. & Eng. R. Cas.* 41, 13 *R. I.* 578.

So far as the carrier acts as the forwarding agent of the consignor, undertaking to have the goods forwarded by a connecting line, he is liable only as bailee for the exercise of ordinary care; that is, such care as persons of ordinary prudence exercise in reference to their own property. *Alabama G. S. R. Co. v. Thomas*, 89 *Ala.* 294, 7 *So. Rep.* 762. *Northern R. Co. v. Fitchburg R. Co.*, 6 *Allen (Mass.)* 254.—APPROVED IN *Coates v. United States Exp. Co.*, 45 *Mo.* 238.

A carrier who receives goods to be carried over its own lines and over successive lines of transportation connected therewith, to be delivered at some distant point, acts as the forwarding agent of the owner in giving instructions as to the transportation of the goods; and in case of a mistake by the first carrier in directing the goods, the last carrier will have a lien upon them for the

freight earned by it, unless the owner gave notice of the route and the lines of road over which his goods were to be transported. *Bird v. Georgia R. Co.*, 27 *Am. & Eng. R. Cas.* 39, 72 *Ga.* 655. *Patten v. Union Pac. R. Co.*, 29 *Fed. Rep.* 590.—QUOTING *Whitney v. Beckford*, 105 *Mass.* 271.

Goods were carried a part of their distance by rail and the remainder by steamer. In transferring the goods the railroad took a receipt and bill of lading from the steamer in its own name. *Held*, that in doing so the railroad company acted as the agent of the consignee, and in a suit against the steamer for loss, evidence of the terms of the contract was proper. *Patterson v. Clyde*, 67 *Pa. St.* 500.—DISTINGUISHING *Clyde v. Graver*, 54 *Pa. St.* 251.—FOLLOWED IN *Witting v. St. Louis & S. F. R. Co.*, 101 *Mo.* 638.

561. Liability as affected by usage or custom.—Burden of proof.—The general usage of a railroad company in respect to forwarding goods marked for points beyond its terminus will be deemed to enter into its contract of transportation. *Hansen v. Flint & P. M. R. Co.*, 37 *Am. & Eng. R. Cas.* 628, 73 *Wis.* 346, 41 *N. W. Rep.* 529.

Where the general usage of a company is to receive goods marked for a point beyond its own line, and to transfer them to the next connecting carrier, and a shipper of goods acts with reference to this usage, the initial carrier will be liable for damages to the goods received before such transfer is completed. *Hooper v. Chicago & N. W. R. Co.*, 27 *Wis.* 81, 5 *Am. Ry. Rep.* 302.—APPLIED IN *Missouri Pac. R. Co. v. Young*, 25 *Neb.* 651, 41 *N. W. Rep.* 646.

It is competent for a common carrier to show by parol the practice of shippers in giving directions and the carrier's usage in complying therewith, as to a delivery of goods to the next succeeding carrier, where the written bill of lading is silent as to such matters. *Hooper v. Chicago & N. W. R. Co.*, 27 *Wis.* 81, 5 *Am. Ry. Rep.* 302.—REVIEWED IN *Gates v. Northern Pac. R. Co.*, 64 *Wis.* 64.

If a carrier relies upon any special custom in regard to the delivery of goods to a succeeding carrier, or affecting such delivery, the burden of proof is upon him to establish such custom. *Irish v. Milwaukee & St. P. R. Co.*, 19 *Minn.* 376 (*Gil.* 323), 19 *Am. Ry. Rep.* 89.

Where it is the usage and custom for one connecting road to deliver a freight bill and voucher for previous expenses with a car in transferring freights from one road to the other, the first carrier will be liable for a loss of perishable freights, which are being transported in cold weather, caused by a delay in a second carrier refusing to receive the car until such freight bill and voucher was furnished, it appearing that such usage and custom was reasonable, and necessary for further transportation and the collection of freights from the consignees. *Reynolds v. Boston & A. R. Co.*, 121 Mass. 291.

Plaintiffs delivered to defendant at New York goods "to be forwarded to Det. (Detroit) only;" the goods were marked "Day & Lathrop, Dryden, Michigan, via Ridgway." The G. T. R. Co. was the customary and usual carrier of goods from Detroit to Ridgway. A regulation of that company was to the effect that it would not accept goods for transportation unless the shipper would take a receipt limiting its common-law liability. Up to a short time prior to the shipment in question the G. T. R. Co. had not exacted of defendant a compliance with this regulation. From the time of its enforcement defendant had been accustomed to detain goods destined to points on the route of that road, and to notify consignees awaiting their directions; this was not known to plaintiff. Upon arrival of the goods at Detroit they were deposited in defendant's warehouse without being offered, or notice given of their arrival to any other carrier beyond that point. Notice was given to the consignees, who gave no instructions. About twenty days thereafter they were destroyed by an accidental fire. In an action to recover the damages—held, that defendant was not excused from tendering the goods to the G. T. R. Co., on account of such regulation, as he would have been justified in delivering them, and in accepting the usual contract required of that company; that no custom was established superseding the general obligation to make delivery to the next carrier; and that defendant held the goods as a common carrier and was liable. *Rawson v. Holland*, 59 N. Y. 611; affirming 5 Daly 155, 47 How. Pr. 292.—DISTINGUISHING *Lamb v. Camden & A. R. & T. Co.*, 46 N. Y. 271. REVIEWING *Van Santvoord v. St. John*, 6 Hill (N. Y.) 160; *Gibson v. Culver*, 17 Wend. (N. Y.) 305.

2 D. R. D.—14.

It was the custom of a railroad, in receiving goods for a point beyond its road and requiring further transportation by water, to carry the goods to the end of its road and deposit them in its warehouse. It was not its custom to give the connecting water carrier notice, but the latter usually sent a boat twice a day to receive all goods that were ready. Held, that a shipper was presumed to have had notice of this custom and contracted accordingly; and that the railroad company was not required, as to any particular shipment, to give special notice, or do anything outside of its usual course of business. *Wood v. Milwaukee & St. P. R. Co.*, 27 Wis. 541, 2 Am. Ry. Rep. 342.

502. Power of general freight agent to make contract for through carriage.—A carrier cannot excuse the failure to carry goods to a point beyond its line after having contracted to do so, upon the ground that its agent was not authorized to make such a contract, where the proof shows that he was the general freight and transportation agent of the company, and that the shipper had no notice of any limitation upon his powers. *Schroeder v. Hudson River R. Co.*, 5 Duer (N. Y.) 55.—DISTINGUISHED IN *Wait v. Albany & S. R. Co.*, 5 Lans. (N. Y.) 475.

503. Duty to provide means of through shipment.*—When a carrier undertakes to deliver goods at a distant point over connecting roads he makes them all one road as between him and the freighter, and he must see to it that he has such arrangements with those who control the roads he must use as will enable him to perform his undertaking in due time. *Arnold v. Shade*, 3 Phila. (Pa.) 82.

A common carrier whose contract contemplates a reshipment by other agencies than his own is not imperatively bound to accept the first opportunity that offers. The carrier who is an insurer as to the ultimate delivery is bound only to a delivery within a reasonable time, in the absence of any stipulation as to time, and is bound only to exercise reasonable diligence in procuring transshipment by other agencies. *Frank v. Memphis & C. R. Co.*, 52 Miss. 570.

504. Liability where there is delay or refusal of next carrier to receive.†—Where a railroad company, with-

* See also *ante*, 53.

† Liability of company for goods in storage at

out contracting for restricted liability, receives goods consigned to a point beyond its terminus, but on the line of a connecting route, it is bound to deliver them at their destination. But where goods so consigned are received under a contract restricting the liability of the company as a carrier to their delivery at its terminus, it is then bound to deliver them there with all convenient speed, according to the usual course of business, to the next carrier; and if there be none ready at the terminus to receive the goods and forward them along the proper route, then it ought to retain them and notify the owner. The company is not bound in such case to transport the goods beyond its terminus upon any link, however short, of the connecting route, unless its established usage imply such undertaking. *Louisville & N. R. Co. v. Campbell*, 7 Heisk. (Tenn.) 253, 12 Am. Ry. Rep. 490.—QUOTING *East Tenn. & G. R. Co. v. Nelson*, 1 Coldw. (Tenn.) 276.—DISTINGUISHED IN *Merchants' Dispatch Transp. Co. v. Bloch*, 86 Tenn. 393, 6 Am. St. Rep. 847, 6 S. W. Rep. 881.

A railroad company accepting perishable freight for transportation over its own and connecting roads must forward the same promptly, to the extent of its ability, until it has delivered or offered to deliver it to the connecting carrier, and is not excused from the performance of such duty by the mere fact that its agent supposed there would be a delay in the forwarding of such freight by the connecting carrier. *Blodgett v. Abbot*, 72 Wis. 516, 7 Am. St. Rep. 873, 40 N. W. Rep. 491.

Where a carrier receives goods for a point beyond its line, a failure to carry to the end of its line and deliver or offer to deliver to the next carrier is not excused merely by the fact that there is a block of freights on the next carrier's line and no room for the goods in the initial carrier's depot at the end of its line, which facts were known to its agent at the time of the reception of such goods. *McLaren v. Detroit & M. R. Co.*, 23 Wis. 138.

A railroad cannot excuse a delay in carrying freights by showing that its road, or a connecting line, was blockaded by snow, where the company's agents knew of the blockade and failed to notify the shipper.

terminus waiting transportation over connecting lines, see note, 18 AM. & ENG. R. CAS. 585.

Great Western R. Co. v. Burns, 60 Ill. 284, 12 Am. Ry. Rep. 309.

The receiving of goods for shipment to a point beyond its line, by a carrier having knowledge of an obstruction in transportation beyond its line, may not be a breach of its duty as a carrier. *McCarthy v. Terre Haute & I. R. Co.*, 9 Mo. App. 159.

Where a railroad company receives freight for carriage and delivery at a point beyond its line on a connecting road, in the absence of special contract limiting its responsibility, the company receiving the freight is bound to deliver it at its destination. It is no excuse for not doing so that the connecting road refused to receive the freight and advance the charges due and paid by the company sued. *Memphis & C. R. Co. v. Stockard*, 11 Heisk. (Tenn.) 568.—REVIEWED IN *Louisville & N. R. Co. v. Weaver*, 16 Am. & Eng. R. Cas. 218, 9 Lea (Tenn.) 38.

Defendant received cotton and transported it safely and promptly to Norfolk and tendered it to the steamship company, the next link in the chain of connecting carriers. The steamship company, owing to unusual press of business, was unable to receive or forward it, and requested defendant company to store the cotton on one of its own wharves, and to insure it, and promised to charter an extra steamer and send it to the railroad wharf to load within a short time. This was done. There was a delay in the arrival of the steamer, and before it was sent the cotton was destroyed by fire. *Held*, that defendant company had done everything that could be done, and that it was in nowise liable, it being shown that there was no other way of forwarding the cotton over other lines open to the defendant company. *Deming v. Norfolk & W. R. Co.*, 17 Phila. (Pa.) 540.—DISTINGUISHING *Bussey v. Memphis & L. R. R. Co.*, 13 Fed. Rep. 330; *Michigan C. R. Co. v. Mineral Springs Mfg. Co.*, 16 Wall. (U. S.) 318.

565. Duty to give notice of such delay or refusal.*—Where a common carrier accepts goods directed to a point beyond the termination of its line consigned to the care of a connecting carrier, and the latter refuses to receive the goods, the former does not discharge its duty by stor-

* Company bound to notify owner in case of obstruction of connecting lines, see note, 18 AM. & ENG. R. CAS. 585.

ing the goods, but must use reasonable diligence to notify the consignor or consignee of such interruption in the transit. *Lesinsky v. Great Western Dispatch*, 10 Mo. App. 134. *Petersen v. Case*, 18 Am. & Eng. R. Cas. 578, 21 Fed. Rep. 885.—APPLYING *Conkey v. Milwaukee & St. P. R. Co.*, 31 Wis. 637.—*Lesinsky v. Great Western Dispatch*, 13 Mo. App. 575.

In an action for damages in such a case, it is competent for the owner to show that six days after its refusal to receive the goods the intermediate carrier would have accepted and delivered the goods to the consignee, and that the defendant had notice of this. *Lesinsky v. Great Western Dispatch*, 10 Mo. App. 134.

Where goods are received for a point beyond a receiving company's line, and the shipper gives directions as to shipment over connecting lines, if the receiving company finds, on carrying the goods to the end of its line, that it cannot forward them according to directions, it is its duty to store the goods and notify either the consignor or the consignee. *Johnson v. New York C. R. Co.*, 39 How. Pr. (N. Y.) 127.

566. Measure of damages for such delay.—Where a carrier received goods for a destination beyond its line, the measure of damages for a delay caused by the next connecting carrier refusing to receive them on account of a press of business, is the difference at the place of destination between their market value at the time they should have arrived and at the time they did arrive. *Petersen v. Case*, 18 Am. & Eng. R. Cas. 578, 21 Fed. Rep. 885.

A carrier is not liable for the depreciation in value of goods after the consignor had notice of the intermediate carrier's refusal to receive them. *Lesinsky v. Great Western Dispatch*, 13 Mo. App. 575.

Defendant company agreed to carry goods to a certain point on its road and there deliver to a connecting road to be carried to the consignees. There was considerable delay in delivering to the connecting road, but the goods were carried and delivered to the consignees before suit was brought. Held, that the consignees had no cause of action except for a delay in transporting the goods. *Briggs v. New York C. R. Co.*, 28 Barb. (N. Y.) 515.

567. Duty to give notice to consignee or next carrier of arrival of goods.—It is the duty of the first carrier to

give notice of the arrival of the goods, and having failed to do so its liability as common carrier continues. *Sprague v. New York C. R. Co.*, 52 N. Y. 637.

A railroad company that undertakes to carry goods over its road and forward them to a place beyond the termination of its line of transportation is bound to deliver the goods to the next carrier, with notice of the ultimate destination and ownership of such goods. *Selma & M. R. Co. v. Butts*, 43 Ala. 385.

The notice must be given by some agent or servant of the company specially charged with the duty, and in a reasonable time after the goods have reached the point of reshipment, from which they are to be forwarded. In such a case, notice to one member of the firm who are consignees is sufficient; it need not be given to each member of the firm. *Selma & M. R. Co. v. Butts*, 43 Ala. 385.

The first of a line of through carriers, receiving goods and issuing a through bill of lading therefor, is not bound to give notice to the consignee of the delivery of the goods by him to the connecting line. *Mason v. Grand Trunk R. Co.*, 37 U. C. Q. B. 163.

568. Action over by initial carrier.—Where a first carrier is made liable to the owner for a loss of goods at the end of its line, while awaiting delivery to a connecting carrier, it may have a remedy against the connecting carrier, if the latter has neglected to transfer them to its road in due time and according to the usual course of business. *Conkey v. Milwaukee & St. P. R. Co.*, 31 Wis. 619, 2 Am. Ry. Rep. 353.—REVIEWING *Nashua Lock Co. v. Worcester & N. R. Co.*, 48 N. H. 339.—FOLLOWED IN *Wood v. Milwaukee & St. P. R. Co.*, 32 Wis. 398.

If goods are lost by one carrier in a line of carriers, the first to whom the goods are delivered, and who agrees to transport them to their destination, will be liable to the owner, and the latter will not be required to sue the carrier who lost the same; but this rule applies only in favor of the owner of the goods. The first carrier, if he sues to recover what he has paid, must sue the carrier in default. *Chicago & N. W. R. Co. v. Northern L. Packet Co.*, 70 Ill. 217.

A carrier who enters into a through contract of shipment and sublets such contract to a second carrier, through whose negli-

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gence the goods are injured, the two contracts being different and independent, cannot recover of such second carrier the costs of defending an action brought by the shipper, although he notified the second carrier to defend the action. *Baxendale v. London, C. & D. R. Co.*, 44 L. J. Ex. 20, L. R. 10 Ex. 35, 23 W. R. 167, 32 L. T. 330.

A forwarder of goods sued by a shipper on account of damages sustained while the goods were in the hands of a railway company with which the forwarder had contracted for their carriage, cannot, in an action against the carrier, recover the cost of the previous action without the carrier's express authority to defend it. *Baxendale v. London, C. & D. R. Co.*, 23 W. R. 167, 32 L. T. 330, L. R. 10 Ex. 35, 44 L. J. Ex. 20; reversing 28 L. T. 849.—FOLLOWED IN *Fisher v. Val de Travers Asphalte Co.*, L. R. 1 C. P. D. 511, 45 L. J. C. P. D. 479, 35 L. T. 366.

If one carrier is sued for the loss of goods, and notifies a second carrier to whom he delivered the same and requires him to defend, the judgment against the first is not conclusive. It is only conclusive on such privies that the judgment was recovered, and that it was for the value of the goods lost; but the judgment is not so far conclusive of the question of privity as to fix the liability of the person served with notice. *Chicago & N. W. R. Co. v. Northern L. Packet Co.*, 70 Ill. 217.

569. Presumption of negligence where goods reach destination damaged.—A presumption of negligence arises against the first carrier where goods are found to be in a damaged condition at the point of destination. *New York C. & H. R. Co. v. Eby*, (Pa.) 12 Atl. Rep. 482.

In an action against the initial carrier for negligently loading goods in unsafe cars, whereby they reached their destination on a connecting line damaged by being wet, proof of defendant's universal habit to carefully inspect cars before sending them out will not justify a peremptory instruction for defendant, if there is also evidence that the goods were received by it in good condition and loaded into cars the seal of which remained unbroken, the contents being undisturbed throughout the journey, but being found damaged by wet on reaching the destination, caused presumably by loading in unsuitable cars. *Searles v. Alabama & V. K. Co.*, 69 Miss. 186, 13 So. Rep. 815.

In such case the presumption as to the fitness of the cars, arising out of the proof of their inspection, is opposed by the presumption of unsuitableness arising out of the evidence that their contents became wet although in sealed cars. Under such circumstances, whether the cars were secure as originally furnished is for the jury to decide under all the evidence. *Searles v. Alabama & V. R. Co.*, 69 Miss. 186, 13 So. Rep. 815.

570. Sufficiency of evidence to show loss before delivery to next carrier.—A case of goods was shipped with others, filling two cars, to be carried to the end of the railroad and there delivered to a line of steamers. The proof showed that the agent of the steamer received the cars unopened, and that they were kept on its wharf carefully watched and guarded until ready for transfer to the steamer, when the cars were opened, but the case of goods was not in either car. *Held*, not error in the court to refuse to charge that there was no evidence of loss while in the hands of the railroad company. *Green v. Boston & L. R. Co.*, 128 Mass. 221.

571. Liability for goods lost in depot maintained jointly by first and second carrier.—Defendant road carried oil in barrels and delivered them at the end of its line to a connecting carrier, the warehouses of both roads being adjoining. By careless handling the barrels were leaking when so delivered, but through the gross carelessness of the second carrier the leaking oil became ignited and both warehouses were destroyed. *Held*, that defendant was not liable for the loss of other goods thus destroyed in its warehouse. *McMillan v. Michigan S. & N. I. R. Co.*, 16 Mich. 79.—FOLLOWED IN *Columbus & W. R. Co. v. Ludden*, 89 Ala. 612. NOT FOLLOWED IN *Leavenworth, L. & G. R. Co. v. Maris*, 16 Kan. 333. *Eaton v. St. Louis, I. M. & S. R. Co.*, 12 Mo. App. 386.

572. Liability cannot be avoided by showing failure of due care in connecting carrier.—Where the defendant had been guilty of such negligence in the transportation of goods as to render it liable, it could not relieve itself by showing that a connecting road might have made up for its default. *Philadelphia, W. & B. R. Co. v. Lehman*, 6 Am. & Eng. R. Cas. 194, 56 Md. 209, 40 Am. Rep. 415.

b. When Liable Beyond its Own Line.*

573. Generally.—Ordinarily the initial carrier is liable for injuries arising from the negligence of connecting carriers. *Ohio & M. R. Co. v. Hamlin*, 42 Ill. App. 441.

The liability of a common carrier is limited to such injuries as are sustained while the goods are in his possession. He is not liable after they have passed to the custody of others, nor was he before they came into his possession. *Hunt v. New York & E. R. Co.*, 1 Hill. (N. Y.) 228.—REVIEWED IN *Gray v. Jackson*, 51 N. H. 9.

A railroad company whose rights and powers in respect to a connecting road are merely those of a stockholder is not liable for the negligence of the connecting railroad. *Atchison, T. & S. F. R. Co. v. Cochran*, 41 Am. & Eng. R. Cas. 48, 43 Kan. 225, 7 L. R. A. 414, 23 Pac. Rep. 151.

Where various companies form an association and unite in making a continuous line of their respective roads, and collect in advance either at the place of receiving or at the place of delivery the freight due for the entire route, subdividing among themselves, the receiving road becomes responsible for the default of any of the associated companies, and no special contract need be shown. *Phillips v. North Carolina R. Co.*, 78 N. Car. 294, 16 Am. Ry. Rep. 206.

Where no such association exists and no special contract is made, and goods are delivered to a road for transportation over it, though marked to a place beyond its terminus, the carrier discharges its duty by safely conveying over its own road and then delivering to the next connecting road in the direct and usual line of common carriers toward the point of ultimate destination. *Phillips v. North Carolina R. Co.*, 78 N. Car. 294, 16 Am. Ry. Rep. 206.—DISTINGUISHED IN *Weinburg v. Albemarle & R. R. Co.*, 18 Am. & Eng. R. Cas. 597, 91 N. Car. 31; *Knott v. Raleigh & G. R. Co.*, 98 N. Car. 73. FOLLOWED IN *Lindley v. Richmond & D. R. Co.*, 88 N. Car. 547.

The weight of American cases limits the carrier's liability as such where there is no special contract to his own line, though there are cases which hold the liability as continuing the same throughout the whole route; and such is the English doctrine.

*Extra-terminal liability of connecting lines, see notes, 9 AM. & ENG. R. CAS. 39; 16 *Id.* 228; 35 *Id.* 663; 36 AM. REP. 761; 1 L. R. A. 703; 4 *Id.* 376; 6 *Id.* 852.

Houston & T. C. R. Co. v. Park, 1 Tex. App. (Civ. Cas.) 142.

There exists no distinction in principle between the liability of a receiving railway company, when assumed by contract for the transportation of freight over connecting lines of transportation, and the liability by contract for the carrying of passengers. *Harris v. Howe*, 39 Am. & Eng. R. Cas. 498, 74 Tex. 534, 12 S. W. Rep. 224.

Where a railway company's contract for the carriage of coal is founded upon the basis that there should be no unreasonable detention of the cars by the connecting company, which was to deliver them to it, it is a condition precedent to the obligation that there be no unreasonable delay on the part of such connecting company in hauling the cars. *Johnassohn v. Great Northern R. Co.*, 10 Ex. 434, 24 L. J. Ex. 31.

574. Common-law liability.—At common law a carrier who received goods for transportation to a point beyond his own line engages only to carry them safely and within a reasonable time to the end of his line and there deliver them to the next connecting carrier for further transportation, unless the usage of business, or his language or conduct, shows that he took the goods as carrier for the whole route. *Crouch v. Louisville & N. R. Co.*, 42 Mo. App. 248.

Independent of any statute, where a railroad company receives and agrees to carry goods to a point beyond its own line, it is liable for a loss or injury which occurs on a connecting line. *King v. Macon & W. R. Co.*, 62 Barb. (N. Y.) 160.—FOLLOWING *Root v. Great Western R. Co.*, 45 N. Y. 524; *Maghee v. Camden & A. R. Co.*, 45 N. Y. 514.

If damage result or loss occur to goods marked to a place beyond the first carrier's line, and shipped under circumstances which would render a carrier liable, the carrier who received the goods in the first instance must account to the owner therefor, whether the damage or loss occurred upon his own line or upon that of some other carrier on the line of transit. But while such is the common-law liability of the carrier, he may, by special contract, limit his liability to such damage or loss as may occur on his own line. *Illinois C. R. Co. v. Frankenberg*, 54 Ill. 88.—FOLLOWED IN *Chicago & N. W. R. Co. v. Church*, 12 Ill. App. 17.

575. In absence of special contract, only liable on its own line.

In the absence of a special contract a carrier is not liable where it receives goods for a destination beyond its line, but on the line of a connecting carrier, for loss or injury occurring on such connecting line, where it only takes pay for the transportation over its own road, and where it has no business connection with such connecting road. *Nutting v. Connecticut River R. Co.*, 1 *Gray (Mass.)* 502.—APPROVING *Van Santvoord v. St. John*, 6 *Hill (N. Y.)* 157; *Farmers' & M. Bank v. Champlain Transp. Co.*, 18 *Vt.* 140, 23 *Vt.* 209; *Hood v. New York & N. H. R. Co.*, 22 *Conn.* 1; *Weed v. Saratoga & S. R. Co.*, 19 *Wend. (N. Y.)* 534. NOT FOLLOWING *Muschamp v. Lancaster & P. J. R. Co.*, 8 *M. & W.* 421; *Watson v. Ambergate, N. & B. R. Co.*, 3 *Eng. L. & Eq.* 497.—APPROVED IN *Michigan C. R. Co. v. Myrick*, 9 *Am. & Eng. R. Cas.* 25, 107 *U. S.* 102; *Coates v. United States Exp. Co.*, 45 *Mo.* 238. DISTINGUISHED IN *Fitchburg & W. R. Co. v. Hanna*, 6 *Gray (Mass.)* 539. FOLLOWED IN *Elmore v. Naugatuck R. Co.*, 23 *Conn.* 457. QUOTED IN *Nashua Lock Co. v. Worcester & N. R. Co.*, 48 *N. H.* 339. REFERRED TO IN *Darling v. Boston & W. R. Co.*, 11 *Allen (Mass.)* 295. REVIEWED IN *Gray v. Jackson*, 51 *N. H.* 9.—*Skinner v. Hall*, 60 *Me.* 477. *Reed v. Philadelphia, W. & B. R. Co.*, 3 *Houst. (Del.)* 176. *Illinois C. R. Co. v. Kerr*, 68 *Miss.* 14, 8 *So. Rep.* 330. *Knott v. Raleigh & G. R. Co.*, 32 *Am. & Eng. R. Cas.* 481, 98 *N. Car.* 73, 2 *Am. St. Rep.* 321, 3 *S. E. Rep.* 735.—DISTINGUISHING *Phillips v. North Carolina R. Co.*, 78 *N. Car.* 298; *Phifer v. Carolina C. R. Co.*, 89 *N. Car.* 311.—*Baltimore & O. R. Co. v. Schumacher*, 29 *Md.* 168.

Although in such case the exaction by the receiving carrier of a guaranty by the shipper of the payment of through freight is an important circumstance to show a contract to convey to the point of destination, it is not conclusive evidence thereof. *Illinois C. R. Co. v. Kerr*, 68 *Miss.* 14, 8 *So. Rep.* 330.

A carrier receiving goods marked for delivery beyond the end of his line is, in the absence of a special agreement, only responsible for safe carriage over his line and safe delivery to the next carrier. *Knight v. Providence & W. R. Co.*, 9 *Am. & Eng. R. Cas.* 90, 13 *R. I.* 572, 43 *Am. Rep.* 46.—

REVIEWED IN *Harris v. Grand Trunk R. Co.*, 15 *R. I.* 371.

In the absence of a special contract a common carrier is bound to transport and deliver goods marked to a certain destination beyond the end of its line only according to the usage of its business, and is not liable for losses beyond its line. *McCarthy v. Terre Haute & I. R. Co.*, 9 *Mo. App.* 159.

A common carrier is not liable beyond the terminus of its own line unless it has assumed such liability, and a contract which contains a stipulation relieving the carrier from liability beyond the terminus of its own line is valid. *Hunter v. Southern Pac. R. Co.*, 42 *Am. & Eng. R. Cas.* 501, 76 *Tex.* 195, 13 *S. W. Rep.* 190.—FOLLOWED IN *McCarn v. International & G. N. R. Co.*, 84 *Tex.* 352; *International & G. N. R. Co. v. Thornton*, 3 *Tex. Civ. App.* 197.

576. Special contract may be implied.—A railroad company is not responsible for the non-delivery of freight beyond its own line, except by contract, express or implied; and its receipt of goods to be forwarded to a place beyond the terminus of its line is not evidence of a contract to carry to and deliver at the place of destination. *Crawford v. Southern R. Assoc.*, 51 *Miss.* 222.—NOT FOLLOWING *Illinois C. R. Co. v. Copeland*, 24 *Ill.* 332; *Illinois C. R. Co. v. Johnson*, 34 *Ill.* 389. REVIEWING *Cincinnati, H. & D. R. Co. v. Spratt*, 2 *Duv. (Ky.)* 4.—*Weil v. Merchants' D. & T. Co.*, 7 *Dab. (N. Y.)* 456.

In the absence of stipulation by a carrier to transport freight beyond the terminus of its own route, it is not responsible for the default of those it employs to convey the remainder of the distance; but if it makes itself responsible by contract, or if an agreement to be so can be fairly inferred from the bill of lading, it will be liable for a misdelivery of the goods by another carrier, to whom it has delivered them to be carried to their ultimate destination. *Clyde v. Hubbard*, 88 *Pa. St.* 358.

577. Liability determined from special contract, usage, or nature of business.—A railroad company is not liable as a common carrier beyond its own line, unless it has made itself so by contract, usage, or character of business transacted. *Piedmont Mfg. Co. v. Columbia & G. R. Co.*, 16 *Am. & Eng. R. Cas.* 194, 19 *So. Car.* 353.—DISTINGUISHING *New York*

C. R. Co. v. Lockwood, 17 Wall. (U. S.) 357. REVIEWED IN Wallingford v. Columbia & G. R. Co., 30 Am. & Eng. R. Cas. 40, 26 So. Car. 258, 2 S. E. Rep. 19.

Or unless some arrangement in the nature of a partnership exists between it and connecting carriers. *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 31 Am. & Eng. R. Cas. 103, 31 Fed. Rep. 247.

A carrier may by express contract bind himself to carry to any destination, whether beyond the end of his line or not, and the giving of a through bill of lading or receipt, the fact that the first carrier held himself out as carrier for the whole route, or that it has a contract with the connecting lines such as would create a joint liability, or that it was the custom of the carrier to carry to the destination of the goods, are circumstances to be left to the jury, as tending to show such a contract. *McCarthy v. Terre Haute & I. R. Co.*, 9 Mo. App. 159.

578. Liability under special contract.—In the absence of a special contract a railroad company is only liable, in receiving goods for a destination beyond its line, for their safe carriage and delivery to the next connecting carrier; but it may make itself liable by contract over the whole distance to the place of destination. *Ogdensburg & L. C. R. Co. v. Pratt*, 22 Wall. (U. S.) 123. *Bryan v. Memphis & P. R. Co.*, 11 Bush (Ky.) 597, 14 Am. Ry. Rep. 395.

A transportation company by making a through contract with a shipper thereby makes itself responsible for loss or damage occurring anywhere on the route contemplated by the terms of the contract. *Merchants' Despatch Transp. Co. v. Hatley*, 35 Am. & Eng. R. Cas. 565, 14 Can. Sup. Ct. 572; affirming 12 Ont. App. 201, which affirms 4 Ont. 723. *Southwestern R. Co. v. Thornton*, 71 Ga. 61.—FOLLOWING *Southwestern R. Co. v. Bryant*, 67 Ga. 212, 68 Ga. 305.—*Freeburg Coal Co. v. Union R. & T. Co.*, 10 Mo. App. 596. *Newell v. Smith*, 49 Vt. 255, 17 Am. Ry. Rep. 100.—DISTINGUISHED IN *Packard v. Taylor*, 35 Ark. 402, 37 Am. Rep. 37.

Where the receiving carrier gives a through rate on goods, and the goods are destroyed by fire while in transit on line of delivering carrier, the shipper must seek his redress against receiving, not delivering, carrier. *Gordon v. Great Western R. Co.*, 34 U. C. Q. B. 224.—REVIEWING *Coxon v. Great Western R. Co.*, 5 H. & N. 272.

Where a railroad company contracts to convey goods over its own and connecting lines, and to deliver them at their destination at a place beyond its terminus, within a certain time, it is liable to the shipper for losses caused by delays in transportation over the connecting roads. *Pereira v. Central Pac. R. Co.*, 18 Am. & Eng. R. Cas. 565, 66 Cal. 92, 4 Pac. Rep. 988.—DISTINGUISHED IN *Harris v. Grand Trunk R. Co.*, 15 R. I. 371.

Where goods are to be carried to a certain destination, which will require them to pass over several connecting roads, and where a through contract is made by the first carrier, and the amount of freight received is for a through carriage, the first carrier will not be relieved from liability for loss or injury because some of the goods are shipped at the beginning of the second carrier's line. *Ogdensburg & L. C. R. Co. v. Pratt*, 22 Wall. (U. S.) 123, 11 Am. Ry. Rep. 431.

Where goods are shipped with a certain company for transportation, and the goods pass through other companies merely as agents of the first, and are lost, suit should be brought against the first company alone, and it is error to take judgment against all the companies. *Anchor Line v. Dater*, 68 Ill. 369.

579. Illustrations of liability.—The plaintiffs, who were engaged in gathering crude turpentine, and manufacturing it into spirits and resin, delivered to the defendant a still-worm to be transported to their works. The worm was delivered by the defendants to a connecting carrier and by it carried to the wrong place and delivered to the wrong parties. After much time and expense spent in endeavoring to trace the worm, it was finally recovered by the plaintiffs. During that time the still had to lie idle and the tree-boxes from which the crude gum was gathered ran over for want of barrels in which to deposit it, and much of the gum was wasted, whereby plaintiffs sustained considerable damage. *Held*: (1) that the defendant was liable for the failure of the connecting carrier to make a prompt delivery; (2) that if the jury should find that the loss of the gum was directly, although not altogether, attributable to the delay, and reasonable care and prudence could not have prevented it, the defendant was liable for its loss. *Savannah, F. & W. R. Co. v. Pritchard*, 28 Am. & Eng. R. Cas.

57, 77 *Ga.* 412, 4 *Am. St. Rep.* 92, 1 *S. E. Rep.* 261.

Common carriers transporting goods between N. and A., receiving a package directed to a place beyond A., and giving an acceptance of the same, without limiting their responsibility to A., are liable for a loss of the goods after their delivery at A. to other forwarders, though such delivery is conformable to the usage of the trade, if knowledge of such usage is not brought home to the owner of the goods. *St. John v. Santvoord*, 25 *Wend. (N. Y.)* 660.

The Laurens Railroad Company gave receipts for cotton, "to be delivered on presentation of this receipt, at Charleston." The cotton passed over the Laurens railroad, and was delivered to another road for transportation to Charleston, but was lost. *Held*, that said company was liable, the undertaking being special—to carry to Charleston. *Kyle v. Laurens R. Co.*, 10 *Rich. (So. Car.)* 382.—APPROVING *Muschamp v. Lancaster & P. J. R. Co.*, 2 *Railw. Cas.* 607; *Farmers' & M. Bank v. Champlain Transp. Co.*, 18 *Vt.* 140. REVIEWING *Lipford v. Charlotte & S. C. R. Co.*, 7 *Rich. (So. Car.)* 409.—REVIEWED IN *Piedmont Mfg. Co. v. Columbia & G. R. Co.*, 16 *Am. & Eng. R. Cas.* 194, 19 *So. Car.* 353; *Gray v. Jackson*, 51 *N. H.* 9.

Three railroad companies, whose lines formed a continuous road between X. and Y., held themselves out to the public as having formed a combination for the transportation of goods on the entire route. A. at X. shipped goods with one of the companies addressed to B. at Y., and took a receipt whereby the company undertook to forward as per directions. Said receipt contained numerous provisions limiting liability. It provided that all the carriers participating in the property as a part of the through line should be entitled to all the exceptions and conditions therein mentioned. *Held*, that said carrier had contracted to carry the goods through to Y., and was liable for a loss occurring in consequence of delay in said transit although the same occurred beyond its own line. *Cummings v. Dayton & U. R. Co.*, (*Ind.*) 9 *Am. & Eng. R. Cas.* 36.

580. Illustrations of non-liability.

—By a contract between railroad corporations whose routes formed a continuous line, it was provided that each should furnish, on its own route only, connecting

trains and boats respectively, for the transportation of passengers and merchandise over the line at agreed rates of fare or freight, the proceeds to be divided between the contracting parties in an agreed proportion; and that "loss or damage occasioned by injuries to person or property on said line shall be borne by the party having possession of the same at the time the injuries were done." *Held*, that a person who delivered goods to one corporation, for transportation over the line to a point on the route of the other corporation, could not, by virtue of this contract, hold the first corporation liable for loss of goods while on the route and in the possession of the second. *Burroughs v. Norwich & W. R. Co.*, 100 *Mass.* 26.

Where a shipper knows that the company to which he delivers his goods does not reach the point of destination indicated, the omission, in the receipt given for the goods, of the name of the point where the road forms its connection with another railroad is unimportant; and where such road delivers the goods to the connecting road, with the transfer bill, which contains the words, "Deliver on bill of lading," the shipper cannot, without a special contract to that effect, claim damages from the road with which he made the contract of shipment for the wrongful delivery by the connecting road to the consignee, without requiring the presentation of the bill of lading. *Rickerson Roller Mill Co. v. Grand Rapids & I. R. Co.*, 32 *Am. & Eng. R. Cas.* 487, 67 *Mich.* 110, 10 *West. Rep.* 888, 34 *N. W. Rep.* 269.

Under a contract "to forward" goods to a point beyond the line of the receiving carrier, such carrier cannot be held responsible for damages occasioned by neglect of duty by the connecting carrier, where it expressly "assumes no liability beyond its own rails," although the contract provides for the payment of the entire freight charges between the point of shipment and the destination of the goods. *Dunbar v. Port Royal & A. R. Co.*, 55 *Am. & Eng. R. Cas.* 466, 36 *So. Car.* 110, 15 *S. E. Rep.* 357.

581. Liability for loss of fruit by freezing.—When a special contract is made with a shipper by which the carrier agrees to deliver goods which are liable to injury by freezing, at a point on a connecting line, by a specified date, and the carrier knows that the special contract is made for

the purpose of avoiding the danger of injury by frost, the carrier with whom the contract is made is liable for injuries to the goods by freezing whilst being transported over the connecting line, if the injury is caused by the negligent delay of the carrier in delivering the goods thereto. *Fox v. Boston & M. R. Co.*, 37 *Am. & Eng. R. Cas.* 632, 148 *Mass.* 220, 19 *N. E. Rep.* 222, 1 *L. R. A.* 702.—DISTINGUISHING *Denny v. New York C. R. Co.*, 13 *Gray (Mass.)* 481; *Hoadley v. Northern Transp. Co.*, 115 *Mass.* 304; *Ingledeu v. Northern R. Co.*, 7 *Gray (Mass.)* 86.

The defendant having received fruit under a special through contract of shipment, to be transported to destination over other lines, and not having in any manner limited its legal liability, is bound, by itself or competent agents, to deliver the goods at destination within a reasonable time, and is as liable for damages resulting from the negligence of such agents in failing to so deliver as it would be for such negligence upon its own line. *Central R. & B. Co. v. Georgia, F. & V. Exch.*, 55 *Am. & Eng. R. Cas.* 606, 91 *Ga.* 389, 17 *S. E. Rep.* 904.

The freezing of apples while being transported by a subsequent carrier is not so direct and natural a result of unreasonable delay by the first carrier as to make such first carrier liable therefore by reason of such delay. *Michigan C. R. Co. v. Burrows*, 33 *Mich.* 6.

Proof of negligent delay by a subsequent carrier, and that without it the injury would have been avoided, is a complete answer to an action seeking to hold the first carrier responsible, by reason of his delay, for the injury to fruit by freezing while in custody of such subsequent carrier. *Michigan C. R. Co. v. Burrows*, 33 *Mich.* 6.

582. How liability determined.—

Where the initial carrier is sued for a loss of goods occurring beyond its line, its liability must be determined by proof as to whether or not it contracted to carry to the place of destination. If there is competent evidence of such contract the weight of such evidence is for the jury. *Ogdensburg & L. C. R. Co. v. Pratt*, 22 *Wall. (U. S.)* 123, 11 *Am. Ry. Rep.* 431.—APPROVED IN *Wyman v. Chicago & A. R. Co.*, 4 *Mo. App.* 35. DISTINGUISHED IN *Harris v. Grand Trunk R. Co.*, 15 *R. I.* 371. FOLLOWED IN *Harding v. International Nav. Co.*, 12 *Fed. Rep.* 168; *Sumner v. Walker*, 30 *Fed. Rep.*

261; *Burke v. Concord R. Co.*, 61 *N. H.* 160. QUOTED IN *Cummins v. Dayton & U. R. Co.*, (Ind.) 9 *Am. & Eng. R. Cas.* 36.

Such contract is not established by proof that the carrier received the goods with knowledge of their destination and named the through rate therefor. In absence of special contract to deliver the goods at a point beyond its line, the receiving carrier is not liable for loss or damage occurring to them after delivery to connecting carriers. *McConnell v. Norfolk & W. R. Co.*, 40 *Am. & Eng. R. Cas.* 155, 86 *Va.* 248, 9 *S. E. Rep.* 1006.

583. Liability of mortgage trustees

in possession.—Trustees operating a railroad occupied, at the terminus of the road on Lake Superior, a dock with a warehouse thereon, at which they received and delivered freight which had been or was to be carried by vessels on the lake. They had no control over the lake transportation lines, and no interest in their earnings. On receiving at such dock goods which were to be transported on one of such lake lines, the said trustees gave a shipping receipt which provided that when freight was received by the trustees to be forwarded by their lines their liability should cease at their depot at which the freight was to be delivered to another carrier to be transported to its destination; that the trustees should not be liable for loss and damage on the lakes and rivers unless caused by their negligence, and that "for all loss and damage occurring in the transit of said packages the legal remedy shall be against the particular carrier or forwarder only in whose custody the said packages may actually be at the time of the happening thereof, it being understood that the trustees * * * assume no other responsibility for their safe carriage or safety than may be incurred on their own road." *Held*, that the trustees were not liable for loss or damages happening while the goods were in transit on the lake. *Tolman v. Abbot*, 78 *Wis.* 192, 47 *N. W. Rep.* 264.—DISTINGUISHING *Peet v. Chicago & N. W. R. Co.*, 19 *Wis.* 118; *Candee v. Pennsylvania R. Co.*, 21 *Wis.* 582; *Wahl v. Holt*, 26 *Wis.* 703; *Hansen v. Flint & P. M. R. Co.*, 73 *Wis.* 346.

Testimony as to the methods of the trustees in transacting shipping business on their docks with other parties was immaterial. *Tolman v. Abbot*, 78 *Wis.* 192, 47 *N. W. Rep.* 264.

The fact that a week after the goods were delivered at the dock the shipper voluntarily paid freight charges to the dock agent of the trustees, and such agent gave a receipt therefor and paid the money over to the lake line on account of which he received it, is of no significance. *Tolman v. Abbot*, 78 Wis. 192, 47 N. W. Rep. 264.

584. Liability for loss by connecting steamer.—Where a shipper delivers freight to a railroad marked to a point which he knows is beyond the end of the road, requiring further shipment by steamer belonging to other carriers, the railroad company does not become a common carrier beyond the end of its line, nor liable for losses occurring on the steamer, though it has accepted freight charges for the entire distance, to be divided between the two carriers. *Washburn & M. Mfg. Co. v. Providence & W. R. Co.*, 113 Mass. 490.—DISTINGUISHING *Hill Mfg. Co. v. Boston & L. R. Co.*, 104 Mass. 122. FOLLOWING *Burroughs v. Norwich & W. R. Co.*, 100 Mass. 26.

The rule that where a railway company undertakes the carriage of goods to a specified place, and the goods are lost at a point beyond the terminus of its line, the company is responsible, applies when a portion of the transit is to be effected by water, or even by sea. *Wilby v. West Cornwall R. Co.*, 2 H. & N. 703, 4 Jur. N. S. 284, 27 L. J. Ex. 181.

585. Liability extends to branch or local lines.—Where a railroad company, operating a long line of road in the state, projects, constructs, controls, and manages another road for the purpose of a local line, it will be liable for the negligence of the men operating the same. *Atchison, T. & S. F. R. Co. v. Davis*, 25 Am. & Eng. R. Cas. 305, 34 Kan. 199, 8 Pac. Rep. 146.—FOLLOWING *St. Louis, W. & W. R. Co. v. Ritz*, 30 Kan. 31.

586. When through liability implied from mere receipt of goods.—A common carrier who receives goods destined for a place beyond its own line of transportation, without limiting its liability by express contract, is responsible for their non-delivery at the point of destination. *Mobile & G. R. Co. v. Copeland*, 63 Ala. 219, 35 Am. Rep. 13.—FOLLOWING *Muschamp v. Lancaster & P. J. R. Co.*, 8 M. & W. 421. NOT FOLLOWING *Ellsworth v. Tartt*, 26 Ala. 733; *Montgomery & W. P. R. Co. v.*

Moore, 51 Ala. 394.—DISTINGUISHED IN *Alabama G. S. R. Co. v. Thomas*, 32 Am. & Eng. R. Cas. 464, 83 Ala. 343, 3 So. Rep. 802. FOLLOWED IN *Louisville & N. R. Co. v. Meyer*, 27 Am. & Eng. R. Cas. 44, 78 Ala. 597. QUOTED IN *Montgomery & E. R. Co. v. Culver*, 22 Am. & Eng. R. Cas. 411, 75 Ala. 587.—*Muschamp v. Lancaster & P. J. R. Co.*, 8 M. & W. 421, 2 Railw. Cas. 607, 5 Jur. 656.

And the connecting carriers have no contract with the shipper, and are not liable to him. *Alabama G. S. R. Co. v. Mt. Vernon Co.*, 35 Am. & Eng. R. Cas. 657, 84 Ala. 173, 4 So. Rep. 356.

Whether a railroad company receiving goods directed to a point beyond the terminus of its route is liable for damages to the value at the point to which the goods are directed, *quare*. *Michigan S. & N. I. R. Co. v. Caster*, 13 Ind. 164.

A railroad company receiving goods for transportation to a point beyond the terminus of its road is not to be understood as undertaking to carry the goods beyond such terminus, unless there is an express promise to that effect. *Detroit & B. C. R. Co. v. McKenzie*, 9 Am. & Eng. R. Cas. 15, 43 Mich. 609, 5 N. W. Rep. 1031.—QUOTED IN *Rickerson Roller Mill Co. v. Grand Rapids & I. R. Co.*, 32 Am. & Eng. R. Cas. 487, 67 Mich. 110.

Mere marks or direction to a destination beyond the terminus of the first carrier's line will not make such first carrier liable for the loss of the goods beyond such terminus. *Crawford v. Southern R. Assoc.*, 51 Miss. 222.

To show liability of a connecting line for damages to freight caused elsewhere than upon its line, something more must be shown than a freight contract for through shipment made by the railway company receiving the freight, and that it was shipped upon the route indicated by the contract. *Ft. Worth & D. C. R. Co. v. Williams*, 42 Am. & Eng. R. Cas. 464, 77 Tex. 121, 13 S. W. Rep. 637.

587. Receipt is prima-facie evidence.—Where a railway company receives goods at one place to carry them to another, it is answerable for any loss that may occur between them, although it may be on a line of railway that does not belong to such company; and the receipt of goods so to be carried is *prima-facie* evidence of such liability. *Watson v. Ambergate*, 15 Jur.

448. *S. P., Scotthorn v. South Staffordshire R. Co.*, 8. *Ex.* 341, 22 *L. J. Ex.* 121, 7 *Railw. Cas.* 810.

588. Burden of proof.—Where goods are to pass *en route* over the line of several carriers and are lost, the burden is on the receiving company to show that it carried them safely and delivered them to the next carrier, but beyond that it is not required to show where or by whom lost. *American Exp. Co. v. Second Nat. Bank*, 69 *Pa. St.* 394.

The general rule is that the burden of accounting for a loss of goods while in transportation is upon the carrier; but this rule does not apply where the carrier has only agreed to carry to the end of his line and deliver to a connecting carrier, and where the loss occurs after such delivery. The first carrier is not required to account for a loss beyond its own line. *Dixon v. Columbus & I. R. Co.*, 4 *Biss. (U. S.)* 137.

A shipper cannot recover of the receiving carrier for a loss occurring beyond the terminus of its line, without proving both a loss and a contract by the defendant to transport the goods beyond such terminus, where it proves that it delivered the goods in good order to the connecting carrier. *Orr v. Chicago & A. R. Co.*, 21 *Mo. App.* 333.

In the absence of evidence of a contract by a carrier to be liable for goods beyond its own line, the burden is on the shipper, if he seeks to charge the first carrier for an injury to the goods, to show that the injury occurred on that carrier's line. *Crouch v. Louisville & N. R. Co.*, 42 *Mo. App.* 248.

589. Under New York act of 1847.

—Under N. Y. act 1847, ch. 270, § 9, a company receiving goods to be transported to a point beyond its terminus and on the line of a connecting road, whether within the state or not, is liable as a common carrier for a loss or injury occurring either on its own road or on a connecting line. *Burtis v. Buffalo & S. L. R. Co.*, 24 *N. Y.* 269.—APPLIED IN *Talcott v. Wabash R. Co.*, 50 *N. Y. S. R.* 423. FOLLOWED IN *Root v. Great Western R. Co.*, 45 *N. Y.* 524. QUOTED IN *Baker v. Kansas City, St. J. & C. B. R. Co.*, 28 *Am. & Eng. R. Cas.* 61, 91 *Mo.* 152; *Nashua Lock Co. v. Worcester & N. R. Co.*, 48 *N. H.* 339.

But a company may contract to carry goods beyond its line independently of the statute. *Burtis v. Buffalo & S. L. R. Co.*, 24 *N. Y.* 269.

Where a railroad company agrees to carry property beyond the terminus of its own road, and receives the goods under such an agreement, it is liable as a common carrier for the default of the road running in connection with it on the route to the place of delivery. The statute of 1847 (ch. 270, § 9) is a mere legislative authorization of such agreements. But where the company merely receives goods marked for a place beyond the termination of its own route, in the absence of proof of an undertaking, express or implied, to carry the goods to their final destination, or of a partnership between the carriers, the company is bound only for the due delivery of the goods to the next carrier on the route. The statute of 1847 has no application in such a case. *Root v. Great Western R. Co.*, 45 *N. Y.* 524; reversing 2 *Lans.* 199.—FOLLOWING *Burtis v. Buffalo & S. L. R. Co.*, 24 *N. Y.* 269.—FOLLOWED IN *Babcock v. Lake Shore & M. S. R. Co.*, 49 *N. Y.* 491; *King v. Macon & W. R. Co.*, 62 *Barb. (N. Y.)* 160. QUOTED IN *Wyman v. Chicago & A. R. Co.*, 4 *Mo. App.* 35.

The New York act of 1847, ch. 270, § 9, concerning the liability of railroad companies receiving freight for points on connecting roads, has no application where the connecting carrier is a steamboat line. *Green v. New York C. R. Co.*, 12 *Abb. Pr. N. S. (N. Y.)* 473, 4 *Daly* 553.

590. Under Missouri act of 1870.

—Under the provisions of Mo. Rev. St. of 1879, § 598, relating to common carriers, the carrier, when it receives property to be transported to a place beyond its terminus, is liable as such carrier to the place of the destination of the property, in the absence of a special contract to carry only to the terminus of its own route. *Dimmitt v. Kansas City, St. J. & C. B. R. Co.*, 46 *Am. & Eng. R. Cas.* 699, 103 *Mo.* 433, 15 *S. W. Rep.* 761.—DISTINGUISHING *Coates v. United States Exp. Co.*, 45 *Mo.* 238; *Snider v. Adams Exp. Co.*, 63 *Mo.* 376.—CRITICISED BUT FOLLOWED IN *Hill v. Missouri Pac. R. Co.*, 46 *Mo. App.* 517. FOLLOWED IN *Nines v. St. Louis, I. M. & S. R. Co.*, 107 *Mo.* 475. REVIEWED IN *Drew Glass Co. v. Ohio & M. R. Co.*, 44 *Mo. App.* 416.

Section 598 is constitutional. *Nines v. St. Louis, I. M. & S. R. Co.*, 107 *Mo.* 475, 18 *S. W. Rep.* 26.—FOLLOWING *Dimmitt v. Kansas City, St. J. & C. B. R. Co.*, 103 *Mo.* 433.

The statute is applicable to a contract

made in Missouri for the carriage of goods from a point in that state to a point beyond it. *Watkins v. St. Louis, I. M. & S. R. Co.*, 44 Mo. App. 245.—FOLLOWING *Heil v. St. Louis, I. M. & S. R. Co.*, 16 Mo. App. 363.

A railroad company that receives goods for transportation beyond the terminus of its line cannot, by contract, avoid its statutory liability for the loss of the goods through the negligence of the connecting carrier. *Orr v. Chicago & A. R. Co.*, 21 Mo. App. 333.—REVIEWING *Heil v. St. Louis, I. M. & S. R. Co.*, 16 Mo. App. 363.—LIMITED IN *Drew Glass Co. v. Ohio & M. R. Co.*, 44 Mo. App. 416. OVERRULED IN *Hill v. Missouri Pac. R. Co.*, 46 Mo. App. 517.

Notwithstanding the statute (Mo. Rev. St. 1889, § 944), a common carrier may agree to carry goods to the terminus of its own route only, and stipulate for a cessation of its liability as a common carrier beyond that point. *Historical Pub. Co. v. Adams Exp. Co.*, 44 Mo. App. 421.—FOLLOWING *Drew Glass Co. v. Ohio & M. R. Co.*, 44 Mo. App. 416.

501. Under Georgia Code, and Texas statute.—Under Ga. Rev. Code, § 2058, where goods are transported over more than one railroad, connected, but under different companies, each company is liable only to its own terminus and until a delivery to the connecting road. *Baugh v. McDaniel*, 42 Ga. 641.—DISTINGUISHED IN *Hawley v. Screven*, 62 Ga. 347. OVERRULED, AND DISSENTING OPINION FOLLOWED IN, *Falvey v. Georgia R. Co.*, 76 Ga. 597.

One railroad is not responsible for loss occurring on another; and it was not error to so charge, where it was doubtful from the evidence whether goods, for the loss of which suit was brought, were ever received by the road sued. *McCaffrey v. Georgia Southern R. Co.*, 69 Ga. 622.

A railroad company passed an order to the effect that, after a given date, no shipment of salt or other merchandise from Brunswick, in competition with Savannah, would be received for local stations on its line, or for passage over another road operated by it under lease, or for points beyond, unless charges were prepaid and shipments were delivered at the company's warehouse by drays as local business, and that local rates from that point would be assessed. A

firm shipped salt from Brunswick by a road connecting with the first-mentioned road; tendered it a large number of car-loads, which were refused, and the agent of the road bringing them inquired of the agent of the other road whether the above order was still in force and operative, and was informed that it was still in force. The shipper brought suit to recover damages for such refusal. *Held*: (1) that there was no error in permitting the plaintiffs to testify that they had sustained loss in their business by being compelled to sell the salt on hand at greatly reduced prices by reason of the conduct of the defendant, since under Ga. Code §§ 719 *g, q, s*, all the elements of real or actual damages which are admissible in other actions may be shown; (2) that there was no necessity to make the lessor of the road a party defendant to the action, and there was no error in refusing to dismiss the case because service was not perfected on the lessor company; (3) there was no error in charging that, if the railroad company had not complied with the law in section 719s of the Code, it was liable to the penalty prescribed in section 719q; (4) that the tender of the cars made to the refusing company was sufficient. *Central R. Co. v. Logan*, 30 Am. & Eng. R. Cas. 63, 77 Ga. 804, 2 S. E. Rep. 465.

A railroad company is not liable under Sayles' Tex. Civ. St. art. 4258a, § 3, fixing a penalty for detaining freight after payment of the charges, where it appears that the goods were not detained by defendant company, but by a connecting road to which the goods had been delivered. *Gulf, C. & S. F. R. Co. v. Adair*, 4 Tex. App. (Civ. Cas.) 55, 14 S. W. Rep. 1076.

502. Judicial knowledge of arrangement for through shipments.—Freight was shipped in Indiana for Orange, Tex., upon the Louisville, E. & St. L. Consol. R. Co. It was carried to Orange by the Texas & N. O. R. Co., defendant. In a suit for a penalty for non-delivery of the freight the court properly excluded testimony of a witness that the Louisville, etc., company had an arrangement with the Southern Pacific system for through rates. The court does not judicially know that the defendant railway is a part of that system. *Miller v. Texas & N. O. R. Co.*, 83 Tex. 518, 18 S. W. Rep. 954.

c. Power to Make Through Contracts.*

593. Power, generally.—The principle is well settled that railroad companies, as common carriers, may make valid contracts to transport property beyond the limits of their own roads, and when they do they are bound to deliver the property at its place of destination, according to their contract, and are liable for all injury to such property prior to its delivery, although such injury happens after the property has passed over their road on its way, and while in the charge of other carriers over whom they have no control. This contract may be either express or implied. *Morse v. Brainard*, 41 *Vt.* 550.—DISTINGUISHED AND QUOTED IN *Hadd v. United States & C. Exp. Co.*, 6 *Am. & Eng. R. Cas.* 443, 52 *Vt.* 335, 36 *Am. Rep.* 757.—*Woodward v. Illinois C. R. Co.*, 1 *Biss. (U. S.)* 493. *St. Louis & I. M. R. Co. v. Larned*, 6 *Am. & Eng. R. Cas.* 436, 103 *Ill.* 293. *Cummins v. Dayton & U. R. Co.*, (Ind.) 9 *Am. & Eng. R. Cas.* 36.—FOLLOWING *Ohio & M. R. Co. v. McCartney*, 96 *U. S.* 258. QUOTING *Ogdensburg & L. C. R. Co. v. Pratt*, 22 *Wall. (U. S.)* 123.—*Hill Mfg. Co. v. Boston & L. R. Co.*, 104 *Mass.* 122.—DISTINGUISHED IN *Washburn & M. Mfg. Co. v. Providence & W. R. Co.*, 113 *Mass.* 490; *Hartman v. Eastern R. Co.*, 114 *Mass.* 44. REVIEWED IN *Gray v. Jackson*, 51 *N. H.* 9.—*Grover & B. S. Mach. Co. v. Missouri Pac. R. Co.*, 70 *Mo.* 672, 35 *Am. Rep.* 444. *Schroeder v. Hudson River R. Co.*, 5 *Duer (N. Y.)* 55.—FOLLOWING *Hart v. Rensselaer & S. R. Co.*, 8 *N. Y.* 37.—REVIEWED IN *Gray v. Jackson*, 51 *N. H.* 9.—*Baltimore & P. Steamboat Co. v. Brown*, 54 *Pa. St.* 77. *Western & A. R. Co. v. McElwee*, 6 *Heisk. (Tenn.)* 208.—DISTINGUISHED IN *Merchants' Dispatch Transp. Co. v. Bloch*, 86 *Tenn.* 393, 6 *Am. St. Rep.* 847, 6 *S. W. Rep.* 881. REVIEWED IN *Louisville & N. R. Co. v. Weaver*, 16 *Am. & Eng. R. Cas.* 218, 9 *Lea (Tenn.)* 38.—*Noyes v. Rutland & B. R. Co.*, 27 *Vt.* 110.—FOLLOWED IN *Perkins v. Portland S. & P. R. Co.*, 47 *Me.* 573. QUOTED IN *Wheeler v. San Francisco & A.*

R. Co., 31 *Cal.* 46; *Fatman v. Cincinnati, H. & D. R. Co.*, 2 *Disney (Ohio)* 248.—*Houston & T. C. R. Co. v. Park*, 1 *Tex. App. (Civ. Cas.)* 142.

It is not *ultra vires* for a railway company to contract to carry goods beyond its own line by sea or by coach. *Wilby v. West Cornwall R. Co.*, 2 *H. & N.* 703, 4 *Jur. N. S.* 284, 27 *L. J. Ex.* 181.

In the case of a carrier contracting to deliver beyond its terminus, it may be held liable, if the contract was made with a proper representative of the company. *Moore v. Henry*, 18 *Mo. App.* 35.

A corporate carrier over a portion of a continuous line of transportation may (within reasonable limits and under such circumstances as are fairly incident to its legitimate corporate business) contract to carry from a point beyond its own terminus to its terminus, and thence over its own route, as well as to carry beyond the terminus of its own route, and such contract is not *ultra vires*. *Swift v. Pacific Mail Steamship Co.*, 30 *Am. & Eng. R. Cas.* 105, 106 *N. Y.* 206, 12 *N. E. Rep.* 583, 8 *N. Y. S. R.* 602; *affirming* 36 *Hun* 643, *mem.*

A railroad company has power to contract with another corporation to complete the transportation of goods whose destination is beyond the terminus of its own line. *Wiggins Ferry Co. v. Chicago & A. R. Co.*, 5 *Am. & Eng. R. Cas.* 1, 73 *Mo.* 389, 39 *Am. Rep.* 519; *reversing* 5 *Mo. App.* 347.

594. But proof of through contract should be clear.—A carrier may bind himself to transport goods beyond his own route and thus become responsible for the default of those he employs to carry the remainder of the distance; but the proof of the contract should be clear, especially when it would contradict the papers accompanying the transaction. *Pennsylvania R. Co. v. Berry*, 68 *Pa. St.* 272, 1 *Am. Ry. Rep.* 501.—FOLLOWING *Baltimore & P. Steamboat Co. v. Brown*, 54 *Pa. St.* 77.

595. May make through contracts unless restrained by charter.—Unless forbidden by their charters, railroad companies have the power to contract for shipments the entire distance over any connecting lines, and are liable upon the connecting lines for loss or injury as upon their own. *Ohio & M. R. Co. v. McCarthy*, 96 *U. S.* 258.—FOLLOWED IN *Cummins v. Dayton & U. R. Co.*, (Ind.) 9 *Am. & Eng. R. Cas.* 36. QUOTED IN *Lancaster Co. v. Cheraw & C.*

* Power of carrier to contract for transportation beyond its own line, see note, 72 *AM. DEC.* 230.

Power of railroad to contract with connecting lines to carry beyond its own termini, see note, 5 *AM. & ENG. R. CAS.* 22.

† Contract to transport beyond company's line, see note, 16 *AM. & ENG. R. CAS.* 217.

R. Co., 28 So. Car. 134, 5 S. E. Rep. 338; Texas & St. L. R. Co. v. Robards, 60 Tex. 545.

Where not restrained by their charters, it is a power incident to railway corporations to enter into arrangements and contracts with other connecting carriers by land or water, for through transportation; and such contracts, when made with the bona-fide purpose of regulating traffic in a reasonable and just manner, are good; and it is their duty, so far as they have authority, to increase their business by all usual and customary means, and to furnish the public with all needful facilities for safe, cheap, and speedy transportation. *Stewart v. Erie & W. Transp. Co.*, 17 Minn. 372 (Gil. 348), 5 Am. Ry. Rep. 333, 8 Am. Ry. Rep. 149.

596. May contract to carry beyond state or country.—A railroad company receiving goods for transportation may contract to carry them beyond the limits of its own road and of the state in which it is chartered, and may assume all the responsibilities incident to such an undertaking. In the absence of such contract it is only liable for the extent of its own route and the safe storage and delivery to the next carrier. *Lindley v. Richmond & D. R. Co.*, 9 Am. & Eng. R. Cas. 31, 88 N. Car. 547.—FOLLOWING *Phillips v. North Carolina R. Co.*, 78 N. Car. 294.—REVIEWED IN *Montgomery & E. R. Co. v. Culver*, 22 Am. & Eng. R. Cas. 411, 75 Ala. 587.

A common carrier (except in the case of an incorporated company disabled by the provisions of its charter) may by special contract bind itself to convey and deliver goods to points beyond its own lines and outside the limits of the state wherein its road lies. *Phillips v. North Carolina R. Co.*, 78 N. Car. 294.—DISTINGUISHED IN *Knott v. Raleigh & G. R. Co.*, 32 Am. & Eng. R. Cas. 481, 98 N. Car. 73.—*Ogdensburg & L. C. R. Co. v. Pratt*, 49 How. Pr. (N. Y.) 84.—NOT FOLLOWING *Converse v. Norwich & N. Y. Transp. Co.*, 33 Conn. 166. QUOTING *Michigan C. R. Co. v. Mineral Springs Mfg. Co.*, 16 Wall. (U. S.) 324.—*Atchison, T. & S. F. R. Co. v. Fletcher*, 24 Am. & Eng. R. Cas. 34, 35 Kan. 236, 10 Pac. Rep. 596.

597. No legal obligation to make through contracts.*—The common law

* Duty of company in receiving goods marked for destination beyond its line, see note, 9 L. R. A. 834.

Connecting lines; liability of company re-

only imposes on each common carrier the duty of safely carrying over its own line and safely delivering to the next carrier in the route; but each one may by contract extend its liability beyond its line. Such contracts must be clearly proved, and will not be inferred from doubtful expressions. *Michigan C. R. Co. v. Myrick*, 9 Am. & Eng. R. Cas. 25, 107 U. S. 102, 1 Sup. Ct. Rep. 425.—QUOTED IN *Savannah, F. & W. R. Co. v. Harris*, 26 Fla. 148.—*Baltimore & O. R. Co. v. Green*, 25 Md. 72. *Piedmont Mfg. Co. v. Columbia & G. K. Co.*, 16 Am. & Eng. R. Cas. 194, 19 So. Car. 353.—REVIEWING *Kyle v. Laurens R. Co.*, 10 Rich. (So. Car.) 382.

Ordinarily a railroad company is not bound to receive goods to be delivered at a terminus beyond its line; but it may be bound to do so by a special contract, or a course or custom of business which would warrant those dealing with it to presume that their goods would be delivered beyond the terminus of the initial carrier's line. *Cobb v. Illinois C. R. Co.*, 38 Iowa 601.

At common law a railroad common carrier is not bound to carry beyond its own line; and if it contracts to carry beyond it, it may, in the absence of statutory regulations, determine for itself what agencies it will employ; and there is nothing in the provisions of the constitution of Colorado which takes away such right or imposes any further obligation. *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.*, 16 Am. & Eng. R. Cas. 57, 110 U. S. 667, 4 Sup. Ct. Rep. 185; reversing 15 Fed. Rep. 650.

Where a railroad company does enter into such a contract it is bound by it, and is under the same obligation to furnish means of conveyance beyond the line of its road as it is upon it. *Bussey v. Memphis & L. R. Co.*, 4 McCrary (U. S.) 405, 13 Fed. Rep. 330.—DISTINGUISHED IN *Deming v. Norfolk & W. R. Co.*, 16 Am. & Eng. R. Cas. 232, 21 Fed. Rep. 25; *Deming v. Norfolk & W. R. Co.*, 17 Phila. (Pa.) 540.—*Coles v. Central R. & B. Co.*, 45 Am. & Eng. R. Cas. 328, 86 Ga. 251, 12 S. E. Rep. 749.

Whether a carrier has assumed such responsibility or not is a question of fact to be determined from the evidence in each case. *Illinois C. R. Co. v. Jonte*, 13 Ill. App. 424.

598. Duty to give through bookings under English statute.—A common carrier receiving goods to be transported beyond its own lines, see note, 3 AM. & ENG. R. CAS. 271.

pany received goods for conveyance from places on its own railway to places on the railway of another company. There was through communication between such places by a continuous line of railway. The sending company refused to book such goods through to their destination, and only invoiced them locally to the end of its railway, where they were rebooked to the stations on the forwarding company's line, to which they were directed to be delivered. *Held*, that the sending company must allow through booking from its stations to stations on the forwarding company's line; that through booking was a facility which railways may reasonably be required to afford, and as exhibiting the total charge made for conveyance from end to end was especially of use where doubts existed as to whether companies were making unequal or excessive charges. *Uckfield Local Board v. London, B. & S. C. R. Co., 2 Ry. & C. T. Cas. 214.*

Where a railway company makes a practice of regularly accepting goods of their customers on definite terms, to be conveyed from a station on their own system to a station on a foreign system, they are to be held to "book" to such foreign station, and cannot evade their duties and liabilities under this section by calling such acceptance of the traffic "quoting a rate" to such foreign station. *Pelsall C. & I. Co. v. London & N. W. R. Co., 7 Ry. & C. T. Cas. 1.*

500. Duty to transfer cars under Georgia statute.—Where cotton was delivered to a railroad company for shipment to its own terminus and thence to another point over a connecting line of the same gauge of track, but the initial company refused to issue through bills of lading on full car-load lots, though the shippers offered to pay commission rates for doing so, and upon this refusal the shippers took local bills of lading to the terminus of the initial company and then notified its agents to deliver the cotton to the connecting line all in car-load lots, and this not being done they were compelled to haul it on drays to the warehouse of the connecting line, there was no liability on the part of the initial company for damages or the penalty prescribed in the act of 1874, as amended by the act of 1883. *Coles v. Central R. & B. Co., 45 Am. & Eng. R. Cas. 328, 86 Ga. 251, 12 S. E. Rep. 749.*

The requirement of the statute that the

company shall, at its terminus or any intermediate point, switch off and deliver to the connecting road having the same gauge all cars passing over the line of the former or any portion of the same containing goods or freights consigned to any point over or beyond such connecting road, means that if the initial company receives cars from another line consigned to a point beyond its terminus, it shall deliver them to the connecting road running to that point; but there was no intention to compel one company to furnish its own cars to another without any compensation for their use. *Coles v. Central R. & B. Co., 45 Am. & Eng. R. Cas. 328, 86 Ga. 251, 12 S. E. Rep. 749.*

That the defendant in other instances did ship cars from its initial to its terminal point and thence over the connecting line, does not affect the case. *Coles v. Central R. & B. Co., 45 Am. & Eng. R. Cas. 328, 86 Ga. 251, 12 S. E. Rep. 749.*

600. Power of officers of a state road to make through contract.—The Western and Atlantic Railroad was sought to be made liable for the loss of eight bags of cotton sent from Atlanta to New York, and which the said road had delivered to the next connecting railroad on the line, and it appeared that the Western and Atlantic Railroad had given two receipts for two lots of cotton, portions of each of which lots were lost beyond their line. One of these receipts simply acknowledged the receipt of the cotton and that it was consigned to New York, by way of Johnsonville, and the other contained the same acknowledgment, but was headed, "Western and Atlantic Railroad, East Tennessee and Georgia Railroad, Virginia and Tennessee, and Orange and Alexandria Railroads," and had indorsed upon it, "Through freight contract." And it was evidenced by the shipper that the cotton was delivered to be shipped to New York; also in evidence by the railroad that there was an arrangement between it and other roads fixing the amount that each road would charge for the carriage of freight over its road, but no other arrangement, and that this was a through-freight contract. *Held*: (1) that the Western and Atlantic Railroad having been built by the state to carry freight and passengers between Atlanta and Chattanooga, it is a matter of grave doubt if its officers can charge the state with a contract to carry freight beyond its terminus to distant points

over other roads; (2) that at any rate such a contract will not be implied, but must appear to have been distinctly made; (3) that there is nothing in the evidence adduced in this case to make such a special contract, or to take the case out of the rule prescribed in section 2058 of the Revised Code, which is as follows: "Where there are several connecting roads under different companies, and goods are intended to be transported over more than one railroad, each company shall be responsible only to its own terminus and until the delivery to the connecting roads." *Baugh v. McDaniel*, 42 Ga. 641.

601. Cannot bind connecting carrier, except by consent.—A carrier cannot, without their consent, bind other carriers by a contract for transportation over their lines, but may bind itself by such contract. *Rome R. Co. v. Sullivan*, 25 Ga. 228.

d. What is a Through Contract, and How Made.*

602. Contract implied from acceptance of goods.†—When a common carrier receives and receipts for goods to be transported beyond the terminus of his own line, he undertakes to transport the goods to the point of destination, either by himself or competent agents, and if the goods are lost beyond the terminus of his own line he will be liable therefor. *Southern Exp. Co. v. Shea*, 38 Ga. 519.—FOLLOWING *Mosher v. Southern Exp. Co.*, 38 Ga. 37.—DISTINGUISHED IN *Cochran v. Southern Exp. Co.*, 53 Ga. 128. FOLLOWED IN *Cochran v. Southern Exp. Co.*, 45 Ga. 148.—*Falvey v. Georgia R. Co.*, 76 Ga. 597.—OVERRULING *Baugh v. McDaniel*, 42 Ga. 642, and following dissenting opinion.—*Wabash, St. L. & P. R. Co. v. Jaggerman*, 23 Am. & Eng. R. Cas. 680, 115 Ill. 407, 4 N. E. Rep. 641. *Wilcox v. Parmelee*, 3 Sandf. (N. Y.) 610.—REVIEWING *Muschamp v. Lancaster & P. J. R. Co.*, 8 M. & W. 421.—DISTINGUISHED IN *Alabama G. S. R. Co. v. Thomas*, 32 Am. & Eng. R. Cas. 464, 83 Ala. 343, 3 So. Rep. 802.—*Grand Trunk R. Co. v. McMillan*, 42 Am. & Eng. R. Cas. 468, 16 Can. Sup. Ct. 543.—DISTIN-

GUISHING *Zunz v. South Eastern R. Co.*, L. R. 4 Q. B. 539; *Kent v. Midland R. Co.*, L. R. 10 Q. B. 1. FOLLOWING *Bristol & E. R. Co. v. Collins*, 7 H. L. Cas. 194. RECONCILING *Fowles v. Great Western R. Co.*, 7 Ex. 699. REVIEWING *Aldridge v. Great Western R. Co.*, 15 C. B. N. S. 582; *Rennie v. Northern R. Co.*, 27 U. C. C. P. 153.

When the law imposes a duty it raises an implied promise to perform that duty; and acceptance of goods by a carrier marked to a particular point implies the duty of carrying them to that point. So where a shipping receipt is silent as to any agreement on the part of the carrier in relation to forwarding the goods to the place of destination, it must be construed with reference to these implied duties. *Illinois C. R. Co. v. Miller*, 32 Ill. App. 259.

Where a common carrier accepts goods directed to a place beyond the terminus of his route, the law, in the absence of special circumstances, implies an undertaking on his part to deliver them at the end of his route to the next succeeding carrier; if the latter refuses or neglects to receive them, the former, after a reasonable time, may store them, and thereafter his liability ceases as carrier and is simply that of warehouseman. *Rawson v. Holland*, 59 N. Y. 611; affirming 5 Daly 155, 47 How. Pr. 292.—APPROVED IN *Denver & R. G. R. Co. v. De Witt*, 1 Colo. App. 419.—*Brown v. Mott*, 22 Ohio St. 149.

603. Contract implied from acceptance of goods, unless otherwise provided.—When a common carrier receives goods consigned to a place beyond the terminus of his own line, and does not limit his liability by express contract, he assumes the duty and obligation to deliver them safely at the place of destination, and is liable for a loss occurring on any part of the route. *Louisville & N. R. Co. v. Meyer*, 27 Am. & Eng. R. Cas. 44, 78 Ala. 597.—FOLLOWING *Mobile & G. R. Co. v. Copeland*, 63 Ala. 219.—*East Tenn. & V. R. Co. v. Rogers*, 6 Heisk. (Tenn.) 143, 12 Am. Ry. Rep. 47.—QUOTING *Muschamp v. Lancaster & P. J. R. Co.*, 8 M. & W. 421; *East Tenn. & G. R. Co. v. Nelson*, 1 Coldw. (Tenn.) 276. REVIEWING *Carter v. Peck*, 4 Sneed (Tenn.) 205.—DISTINGUISHED IN *Alabama G. S. R. Co. v. Thomas*, 32 Am. & Eng. R. Cas. 464, 83 Ala. 343, 3 So. Rep. 802; *Merchants' Dispatch Transp. Co. v. Bloch*, 86 Tenn. 393, 6 Am. St. Rep. 847, 6 S. W. Rep.

* Contracts for through carriage, what are, and evidence and effect of, see note, 72 AM. DEC. 240; also 32 AM. & ENG. R. CAS. 496, *abstr.*

† Effect of receiving goods consigned to point beyond the initial carrier's terminus, see notes, 72 AM. DEC. 232, 42 AM. REP. 664.

881. FOLLOWED IN *Western & A. R. Co. v. McElwee*, 6 Heisk. (Tenn.) 208. QUOTED IN *Louisville & N. R. Co. v. Weaver*, 16 Am. & Eng. R. Cas. 218, 9 Lea (Tenn.) 38.—*Western & A. R. Co. v. McElwee*, 6 Heisk. (Tenn.) 208.—FOLLOWING *East Tenn. & V. R. Co. v. Hartsell*, 6 Heisk. (Tenn.) 143. QUOTING *Muschamp v. Lancaster & P. J. R. Co.*, 8 M. & W. 721; *Angle v. Mississippi & M. R. Co.*, 9 Iowa 487. REVIEWING *Carter v. Peck*, 4 Sneed (Tenn.) 203.—*Milwaukee & St. P. R. Co. v. Smith*, 74 Ill. 197.—FOLLOWING *Illinois C. R. Co. v. Frankenberg*, 54 Ill. 88.

Where goods are delivered to a common carrier to be carried to a designated place, and the charges for transportation to that place paid in full, and the goods are received by the carrier without any contract limiting its liability, such carrier is responsible for the delivery of the goods at the place designated, notwithstanding its line ends before reaching such place, and the goods are delivered to another carrier in good order at the termination of its line. *Adams Exp. Co. v. Wilson*, 81 Ill. 339.

Whether the goods were to be carried on the one road or the road of some other corporation was a question the shipper need not inquire into. In such case, if the receiving company wishes to limit its liability to its own road, it must so provide in the contract. *Foy v. Troy & B. R. Co.*, 24 Barb. (N. Y.) 382.

604. Contract not implied from acceptance of goods.—Receiving goods marked for a place beyond its own terminus does not import an agreement on the part of the initial carrier to carry to the destination named. *Ortl v. Minneapolis & St. L. R. Co.*, 36 Minn. 396, 31 N. W. Rep. 519. *Hunter v. Southern Pac. R. Co.*, 42 Am. & Eng. R. Cas. 501, 76 Tex. 195, 13 S. W. Rep. 190.

Where there is enough otherwise to show that the initial carrier only undertook to carry to the end of his line, and there delivered to the next carrier, a through contract will not be implied because it shows the ultimate place of destination to which the goods are marked, nor from the fact that a printed blank is used adapted to a through contract, and making the contract read ostensibly on behalf of all the carriers. *Babcock v. Lake Shore & M. S. R. Co.*, 49 N. Y. 491, 3 Am. Ry. Rep. 381; *reversing* 43 How. Pr. 317.—APPLYING *Maghee v.*

2 D. R. D.—15.

Camden & A. R. Co., 45 N. Y. 514; *Lamb v. Camden & A. R. & T. Co.*, 46 N. Y. 272. DISTINGUISHING *Bristol & E. R. Co. v. Cummings*, 5 H. & N. 969; *Muschamp v. Lancaster & P. J. R. Co.*, 8 M. & W. 421.—FOLLOWED IN *Edsall v. Camden & A. R. & T. Co.*, 50 N. Y. 661. REVIEWED IN *Hinkley v. New York C. & H. R. R. Co.*, 3 T. & C. (N. Y.) 281.

In an action against a railroad corporation to recover for the loss of goods directed to a place situated beyond the line of their road, neither the receiving of such goods for transportation, nor a receipt given by the corporation stating that the goods were so received, nor an advertisement by such corporation of the general facilities of transportation, is evidence of a special contract to carry such goods to the place to which they were directed; but only to deliver them at the end of said road, thence to be forwarded in the usual course of business. *Elmore v. Naugatuck R. Co.*, 23 Conn. 457.—FOLLOWING *Nutting v. Connecticut River R. Co.*, 1 Gray (Mass.) 502. NOT FOLLOWING *Muschamp v. Lancaster & P. J. R. Co.*, 8 M. & W. 421; *Watson v. Ambergate, N. & B. R. Co.*, 3 Eng. L. & Eq. 497. REVIEWING *Hood v. New York & N. H. R. Co.*, 22 Conn. 1, 502.—FOLLOWED IN *Naugatuck R. Co. v. Waterbury Button Co.*, 24 Conn. 468; *Converse v. Norwich & N. Y. Transp. Co.*, 33 Conn. 166. NOT FOLLOWED IN *Nashua Lock Co. v. Worcester & N. R. Co.*, 48 N. H. 339.

605. Contract implied from giving through receipt or way-bill.—Where a carrier receives goods to be delivered at a specified place beyond its line, a receipt agreeing to forward them to the place of destination will be considered as an express agreement to carry to the place of destination, and a failure to do so will render the company liable. *Illinois C. R. Co. v. Johnson*, 34 Ill. 389.—DISAPPROVED IN *Michigan C. R. Co. v. Myrick*, 9 Am. & Eng. R. Cas. 25, 107 U. S. 102. NOT FOLLOWED IN *Crawford v. Southern R. Assoc.*, 51 Miss. 222. REVIEWED IN *Gray v. Jackson*, 51 N. H. 9.

A way-bill showing the place of receipt of goods shipped and their destination is evidence of the contract of the carrier to transport the goods to the place of destination. *Beard v. St. Louis, A. & T. H. R. Co.*, 42 Am. & Eng. R. Cas. 509, 79 Iowa 527, 44 N. W. Rep. 803.

And where it recites that it is to carry from one designated place to another, which were respectively the places of receipt and final destination, it is sufficient to establish a through contract. *Ogdensburg & L. C. R. Co. v. Pratt*, 22 Wall. (U. S.) 123, 11 Am. Ry. Rep. 431.

606. When special contract not implied from arranging with other lines for through shipment, and giving through way-bill.—A special undertaking to carry beyond its terminus cannot be implied on the part of a railroad company by reason of the fact of its entry into an arrangement with a dispatch company and sundry other railroad companies whose lines communicate with its own, whereby it undertakes to carry all goods for the transportation of which the dispatch company shall contract, at the established tariff rates or at any special rates furnished by the railroad companies. *St. Louis Ins. Co. v. St. Louis, V., T. H. & I. R. Co.*, 3 Am. & Eng. R. Cas. 260, 104 U. S. 146.

Nor can such special undertaking be implied from the railroad company's giving a way-bill, whereon the fact that the goods in question are consigned beyond its terminus is mentioned, but which expressly purports to be a manifest of freight from one terminus of the road to the other. *St. Louis Ins. Co. v. St. Louis, V., T. H. & I. R. Co.*, 3 Am. & Eng. R. Cas. 260, 104 U. S. 146.

607. Contract implied from naming or receiving through charges, or giving benefit of insurance.—Where the carrier to whom the property is delivered by the owner for transportation to a point beyond that carrier's route receives, or contracts to receive, the entire freight he undertakes for its carriage and delivery at the place of destination, and the subordinate carriers are to be regarded as his agents. Having received, or contracted to receive, the whole reward, he is bound to perform the whole service, or rather to see that it is performed, at the peril of his liability as a common carrier in the event of loss. *Lamb v. Camden & A. R. & T. Co.*, 2 Daly (N. Y.) 454.

Where goods are accepted by a railroad as a member of an association of lines, under a contract of through carriage, proof that it accepted regular division of freights is sufficient to warrant a finding that it is liable on such contract, whether it was a member of the associated line or not. *Har-*

ris v. Cheshire R. Co., (R. I.) 16 Atl. Rep. 512.

A stipulation in the bill of lading that in case of loss or damage of any of the goods named therein, for which any carrier under the same might be liable, such carrier might have the benefit of any insurance by or on account of the owner—held, to confirm the view that it was a through contract. *Wahl v. Holt*, 26 Wis. 703.

It having been shown on the trial of a suit against a railroad company for damages alleged to have been occasioned by delay in delivering a car-load of fruit, that the defendant accepted the same for transportation and gave a receipt describing the car, stating it was consigned to a named party at a designated point, and containing the figures "62.20," the point named being in another state and beyond the defendant's line, there was no error in admitting evidence to prove that the "62.20" was the amount of the freight for the entire distance, and was prorated among all the railroad companies over whose lines the car was routed in order to reach its destination, nor in leaving the jury to determine whether or not the receipt, in the light of such evidence, constituted a through contract of shipment. *Central R. & B. Co. v. Georgia F. & V. Exch.*, 55 Am. & Eng. R. Cas. 606, 91 Ga. 389, 17 S. E. Rep. 904.

608. Through contract not implied from collecting through charges.—The payment of freight and passenger fare through to points beyond the termini of a railroad does not make it a common carrier over other roads to the point of destination. *Piedmont Mfg. Co. v. Columbia & G. R. Co.*, 16 Am. & Eng. R. Cas. 194, 19 So. Car. 353.

The giving a through rate to a shipper by a carrier is not of itself evidence of a special contract to carry beyond the latter's line. *McCarthy v. Terre Haute & I. R. Co.*, 9 Mo. App. 159.

But the receipt by him of the freight for the whole route has been held evidence of an undertaking by him to carry the goods the entire distance. *Crouch v. Louisville & N. R. Co.*, 42 Mo. App. 243.

609. Only bound by special contract.—In the absence of a special contract a common carrier of goods for a point beyond its line is liable only to the extent of its own route and for the safe storage and delivery to the next carrier; and mere proof

that the carrier accepted the goods, knowing that they were marked to a point beyond its route, and named a through-freight rate, is not sufficient to establish a special contract for through carriage. *Stewart v. Terre Haute & I. R. Co.*, 1 *McCrary (U. S.)* 312, 3 *Fed. Rep.* 768.

610. Receipt of goods prima-facie evidence of through contract.—The receipt of goods by a common carrier directed to a place beyond the terminus of the carrier's line, without any limitation of responsibility, is *prima-facie* evidence of an undertaking to carry the goods to the place to which they were directed, and renders the carrier liable for their carriage to that point. *Louisville & N. R. Co. v. Weaver*, 16 *Am. & Eng. R. Cas.* 218, 9 *Lea (Tenn.)* 38. —APPLYING *Muschamp v. Lancaster & P. J. R. Co.*, 8 *M. & W.* 421. QUOTING *East Tenn. & G. R. Co. v. Nelson*, 1 *Coldw. (Tenn.)* 276; *East Tenn. & V. R. Co. v. Rogers*, 6 *Heisk.* 143; *Louisville & N. R. Co. v. Campbell*, 7 *Heisk.* 253; *Memphis & C. R. Co. v. Holloway*, 9 *Baxt.* 188. REVIEWING *Western & A. R. Co. v. McElwee*, 6 *Heisk.* 208; *Railroad Co. v. Stockard*, 11 *Heisk.* 568.—DISTINGUISHED IN *Merchants' Dispatch Transp. Co. v. Bloch*, 86 *Tenn.* 393, 6 *Am. St. Rep.* 847, 6 *S. W. Rep.* 881.—*Illinois C. R. Co. v. Frankenberg*, 54 *Ill.* 88.—FOLLOWED IN *Milwaukee & St. P. R. Co. v. Smith*, 74 *Ill.* 197.—*Fortier v. Pennsylvania Co.*, 18 *Ill. App.* 260. *Beard v. St. Louis, A. & T. H. R. Co.*, 42 *Am. & Eng. R. Cas.* 509, 79 *Iowa* 527, 44 *N. W. Rep.* 803.

The issuance of a receipt or bill of lading for property to be carried to a point beyond the terminus of the route of the carrier is, under the statute, *prima-facie* evidence of a contract by such carrier to carry the property to the place of its destination. *Dimmitt v. Kansas City, St. J. & C. B. R. Co.*, 46 *Am. & Eng. R. Cas.* 699, 103 *Mo.* 433, 15 *S. W. Rep.* 761.

If the freight for the entire route is reckoned in one sum, or a receipt is given for the entire route, or the rate for the whole route is agreed upon and fixed by the carrier who receives the property from the owner, it is *prima-facie* evidence of an agreement to deliver it at the ultimate place of destination; but, like any other presumption, it may be overcome by proof that that was not the agreement. *Lamb v. Camden & A. R. & T. Co.*, 2 *Daly (N. Y.)* 454.

The mere receipt of goods marked for and destined to a place beyond the terminus of a carrier's route is not *prima-facie* evidence of a contract to carry to the place of destination. *Converse v. Norwich & N. Y. Transp. Co.*, 33 *Conn.* 166.—FOLLOWING *Hood v. New York & N. H. R. Co.*, 22 *Conn.* 1; *Elmore v. Naugatuck R. Co.*, 23 *Conn.* 457; *Naugatuck R. Co. v. Waterbury Button Co.*, 24 *Conn.* 468.—NOT FOLLOWED IN *Nashua Lock Co. v. Worcester & N. R. Co.*, 48 *N. H.* 339.

A railroad company whose line extends from Atlanta to West Point, Ga., having received at Atlanta goods for shipment consigned to Dallas, Tex., and having fixed by contract with the consignor the rate of freight for the whole distance, apportioning a part of the same among these carriers, itself included, to New Orleans, and assessing the balance for the transportation beyond New Orleans, the contract was, *prima facie*, a through contract, and bound the initial company for performance to Dallas, the point of destination. This was so notwithstanding the named rate was made subject to change without notice, the effect being to limit the agreed special rate to the particular shipments with reference to which the rate was established, but not to allow any change, either along or at the terminus of the route, which would affect these shipments. *Atlanta & W. P. R. Co. v. Texas Grate Co.*, 40 *Am. & Eng. R. Cas.* 130, 81 *Ga.* 602, 9 *S. E. Rep.* 600.

611. When for the jury—Instructions to jury.—When a common carrier receives express goods, the question whether the carrier contracts to carry said goods to their destination, or only to deliver them safely to the next carrier at the point nearest or most convenient to the destination, is one of fact for the jury, dependent upon the circumstances. *Philadelphia & R. R. Co. v. Ramsey*, 89 *Pa. St.* 474.

Proof that goods were billed through to a point on the line of a connecting carrier in accordance with the usual course of business on the receiving company's road, and of a receipt for through-freight charges, was, without further proof, sufficient to warrant a submission to the jury of the question whether or not the initial carrier undertook to transport the goods to the place of destination. *Mann v. Birchard*, 40 *Vt.* 326.

A railway company having received goods destined for a point beyond its line, and

having made out a bill therefor in the usual form of its way-bills—*held*, that there was evidence from which a jury might properly find a contract by it to carry the whole distance. *Webber v. Great Western R. Co.*, 4 H. & C. 582. *Webber v. Great Western R. Co.*, 3 H. & C. 771, 34 L. J. Ex. 170, 13 W. R. 755, 12 L. T. 498.

Where the only evidence of the contract to carry was that the foreman of the freight department at one of the defendants' stations agreed to have certain trees forwarded to a station not on the defendants' line, but on one connecting therewith—*held*, that this was evidence to be submitted to a jury of a contract to that effect binding the defendants, and that a nonsuit was wrong. *McGill v. Grand Trunk R. Co.*, 19 Ont. App. 245.—REVIEWING *Bickford v. Grand Junction R. Co.*, 12 M. & W. 766.

The main issue being whether or not a through contract of shipment to New York was made by the shipper and the carrier, it was error so to charge the jury as to take from them the consideration of that question, and substantially to instruct them that, whether a through contract was made or not, the carrier was liable under the common law if it failed to ship the goods to New York within a reasonable time. If there was no such contract, the carrier's duty was to deliver the goods in good order at either of its *termini* to the connecting carrier in due time, upon which delivery its liability ceased. If such contract was made, and the carrier failed to deliver the goods in New York within a reasonable time, and the goods were thereby damaged, the shipper was entitled to recover such damages as he sustained from the unreasonable delay, whether the shipment was to be made by one route or another. *Central R. & B. Co. v. Skellie*, 86 Ga. 686, 12 S. E. Rep. 1017.

612. Illustrations of what amounts to a through contract.—An intermediate road having connections at both ends contracted for the through carriage of cotton between points beyond each end of its road, and gave a bill of lading containing, among other conditions, one that the company should be exempt from liability by any loss from fire. The cotton was lost by fire before reaching the road of the contracting company. *Held*, that it was a contract for through carriage and that the exemption from liability for loss by fire applied to all of the connecting lines, and not merely to that

of the contracting company; therefore, it was not liable for the loss. *Evansville & C. R. Co. v. Androscoggin Mills*, 22 Wall. (U. S.) 594, 11 Am. Ry. Rep. 113.—APPROVED IN *Wyman v. Chicago & A. R. Co.*, 4 Mo. App. 35. DISTINGUISHED IN *Adams Exp. Co. v. Harris*, 40 Am. & Eng. R. Cas. 151, 120 Ind. 73, 21 N. E. Rep. 340.

Plaintiffs shipped by defendant, a common carrier, grain-sacks at San Francisco destined for Jacinto, in Colusa county. Defendant claimed that its route terminated at Knight's Landing. *Held*: (1) that the evidence in the case supported a finding by the jury that defendant's route extended to Jacinto; (2) that there being evidence showing that defendant had agents at Jacinto for the purpose of receiving goods at that point, and through the negligence of such agents the sacks were lost, defendant was liable to plaintiffs. *Dresbach v. California Pac. R. Co.*, 3 Am. & Eng. R. Cas. 281, 57 Cal. 462.

The conditions printed on a bill of lading contained the usual provisions to carry over the line of road receiving the goods and then deliver to the consignee or to a connecting line, and then contained the following: "The responsibility of this company as a common carrier, under this bill of lading, to commence on the removal of the goods from the depot on the cars of the company, and to terminate when unloaded from the cars at the place of delivery." The goods proceeded to their place of destination, over connecting lines, in the cars of the company receiving them. *Held*, that this was a through-freight contract, making the company liable beyond its own line. *Toledo, P. & W. R. Co. v. Merriman*, 52 Ill. 123.

A railroad company received cotton, "to be transported in turn to" the consignees at the place of ultimate destination, which would require it to pass over other roads after leaving its line. *Held*, that this was a contract for through shipment, and made the receiving carrier liable for a loss occurring after the cotton was delivered to a connecting road. *King v. Macon & W. R. Co.*, 62 Barb. (N. Y.) 160.

The defendants, as trustees, receivers, and managers of the Vermont & Canada and Vermont Central Railroads for the first-mortgage bondholders, having received property destined and directed to a point beyond the termination of said roads—*held*, that the facts as set forth, in the opinion of

the court, established and implied contract to deliver the property at such point; and that the defendants are liable for injuries received prior to its delivery beyond the termination of said roads. *Morse v. Brainard*, 41 *Vt.* 550.

A box was delivered to a railroad company for shipment, marked to a place beyond its line. A receipt was given which, after describing the goods by the name of the consignee and the place of destination, provided: "which the company promises to forward by its railroad and deliver to —, at its depot in —," the receipt being on a printed form and the above blanks printed therein. *Held*, that it was a contract to carry the goods to the place of destination. *Cutts v. Brainard*, 42 *Vt.* 566.—DISTINGUISHED IN *Alabama G. S. R. Co. v. Thomas*, 32 *Am. & Eng. R. Cas.* 464, 83 *Ala.* 343, 3 *So. Rep.* 802.

A railroad company receipted for flour as "agents and forwarders," and agreed to carry it from the place of shipment to the place of destination, which was beyond its line, for a certain fixed price. *Held*, that it was a contract for through shipment, and oral evidence was not admissible to show a contract only to be liable as common carriers for a part of the distance. *Peet v. Chicago & N. W. R. Co.*, 20 *Wis.* 594.

Where, under a bill of lading, goods shipped by the "C. Line of Propellers" were to be delivered "as addressed on the margin, or to his or their consignees, upon paying freight and charges as noted below," and the margin contained the words "G. F. W., Providence, care A. T. Co., Buffalo * * * Rate to Providence per 100 lbs., 45 cents; to be landed on India Wharf," signed by the agent of the "Commercial Line"—*held*, that this was a through bill of lading to Providence, there being nothing in the instrument limiting the first carrier's liability to its own route. *Wahl v. Holt*, 26 *Wis.* 703.—FOLLOWING *Peet v. Chicago & N. W. R. Co.*, 19 *Wis.* 118.—DISTINGUISHED IN *Tolman v. Abbot*, 78 *Wis.* 192.

In an action to recover damages for the destruction of goods shipped over defendant's line it appeared that the bill of lading was in the following terms: "Shipped by R. P. & Co., the following articles in good order to be delivered in like good order as addressed without unnecessary delay," "consigned to H. & K., Onekama, Mich." *Held*, that the contract entered into was a

contract for the carriage of the goods to Onekama, and that the defendant was not released from liability by the fact that the goods were warehoused at the termination of its road for the purpose of being forwarded by a connecting carrier. *Hanson v. Flint & P. M. R. Co.*, 37 *Am. & Eng. R. Cas.* 628, 73 *Wis.* 346, 41 *N. W. Rep.* 529.—DISTINGUISHED IN *Tolman v. Abbot*, 78 *Wis.* 192.

613. Transactions not amounting to a through contract.—(1) *In general*.—A receipt for goods "to be forwarded" to Birmingham, Ala., does not imply a contract to carry and deliver the goods at the place of destination, when it is shown that Birmingham, Ala., is beyond the terminus of the line of the railroad executing the receipt. *Crawford v. Southern R. Assoc.*, 51 *Miss.* 222.

Where a common carrier contracts for the transportation of freight over his route, and for the delivery thereof to another carrier to be forwarded over connecting lines to its ultimate destination, the fact that the contract fixes the price for the entire carriage does not make the contract a through contract, so as to entitle the succeeding carriers to the benefit of exceptions from liability contained in the contract. *Etna Ins. Co. v. Wheeler*, 49 *N. Y.* 616, 3 *Am. Ry. Rep.* 390; *affirming* 5 *Lans.* 480.—APPLYING *Camden & A. R. Co. v. Forsyth*, 61 *Pa. St.* 81. DISTINGUISHING *Maghee v. Camden & A. R. Co.*, 45 *N. Y.* 514.—FOLLOWED IN *Edsall v. Camden & A. R. & T. Co.*, 50 *N. Y.* 661.

A contract of shipment which acknowledges the receipt of the goods in good order, to be sent by the company subject to the terms and conditions stated in and on the back of the bill of lading—one of which is to the effect that where goods are addressed to consignees at points beyond places at which the company has stations, the delivery of the goods by the company will be considered complete, and all responsibility of the company shall cease when the other carrier shall have received notice that the company is prepared to deliver to such carrier said goods for further conveyance—is not a contract to deliver at a point beyond its line, but only to carry to the terminus of its road and to there forward the goods over other roads. *Harris v. Grand Trunk R. Co.*, 26 *Am. & Eng. R. Cas.* 323, 15 *R. I.* 371, 5 *All. Rep.* 305.—DISTIN-

GUISHING *Pereira v. Central Pac. R. Co.*, 18 Am. & Eng. R. Cas. 565, 66 Cal. 92; *Ogdensburg & L. C. R. Co. v. Pratt*, 22 Wall. (U. S.) 123; *Chicago & N. W. R. Co. v. Monfort*, 60 Ill. 175. REVIEWING *Knight v. Providence & W. R. Co.*, 13 R. I. 572.

(2) *Illustrations*.—In an action on the legal liability of a railroad as common carriers, to recover for the loss of goods directed to New York, a place beyond the terminus of such road, the declaration alleged that the defendants were common carriers to New York. On the trial it was alleged that the goods had been transported safely over the defendants' road and deposited on board a steamboat for New York, where they were burned. Plaintiffs gave in evidence defendants' charter, containing the permission aforesaid, also an advertisement stating that freight would be billed by the defendants to New York, and evidence that plaintiffs had been sending freight to New York over defendants' road from the time it went into operation, and that defendants had made no demands of plaintiffs for the freight of said goods. Defendants thereupon moved for a nonsuit, which was granted. *Held*, that such nonsuit ought not to be set aside. *Naugatuck R. Co. v. Waterbury Button Co.*, 24 Conn. 468.—FOLLOWING *Elmore v. Naugatuck R. Co.*, 23 Conn. 474; *Hood v. New York & N. H. R. Co.*, 22 Conn. 502.—FOLLOWED IN *Converse v. Norwich & N. Y. Transp. Co.*, 33 Conn. 166. NOT FOLLOWED IN *Cary v. Cleveland & T. R. Co.*, 29 Barb. (N. Y.) 35; *Nashua Lock Co. v. Worcester & N. R. Co.*, 48 N. H. 339.

In answer to inquiries from a prospective shipper, the superintendent of a road wrote a letter quoting rates for a through shipment over his road and certain connecting roads, closing with, "hoping to secure a liberal share of business," etc. *Held*, that this letter when acted on constituted a contract between the company and the person to whom it was addressed, but not as between the company and a third party to whom the letter was shown. *East Tenn. & G. R. Co. v. Montgomery*, 44 Ga. 278, 3 Am. Ry. Rep. 373.—DISTINGUISHED IN *Hawley v. Screven*, 62 Ga. 347.

Defendants, who were common carriers, received goods and gave a receipt, acknowledging their receipt "in good order, to be delivered in like good order." On the margin of the receipt were given the consignee's name and address, the latter a point be-

yond defendants' line, on a connecting railroad. Cards were put on the goods giving the name and address of the consignee and the name of the connecting road running to the place of destination. The course of business requiring the goods to pass through the hands of several carriers was well known. *Held*, that this did not constitute a contract for through carriage, and defendants were not liable for a loss beyond their own line. *Wright v. Boughton*, 22 Barb. (N. Y.) 561.

An agent of a railroad company received goods for transportation to a point beyond its terminus, and gave therefor a bill of lading: "Received from L., to be laden on the freight-cars, 1 bale bedding, J. F. Phillips, Monroe, La., marks, &c., as per margin (condition of contents unknown) to —, or assigns at — station," signed by the agent of defendant. At the time of receiving, the agent said to the shipper that the goods would reach Monroe in good condition and in a few days, etc. *Held*, that these facts were not evidence of a special contract on the part of the company to convey the goods to the point of destination and deliver them to plaintiff there. *Phillips v. North Carolina R. Co.*, 78 N. Car. 294, 16 Am. Ry. Rep. 206.

A shipping receipt recited that the goods were marked "F. M. P., Delavan, Wis., care W. W. A., Buffalo," and that they were to be delivered "as addressed." *Held*, considering the fact that the receipt was given by a canal-boat, which ran to Buffalo, and that the property was addressed to an intermediate consignee at that point, and that the amount fixed in the shipping bill only included the freight to that place, that the words "as addressed" had reference only to Buffalo, and that it was not a through contract. *Parmelee v. Western Transp. Co.*, 26 Wis. 439.

Defendants were charged with negligence and delay in the carriage of certain furs belonging to the plaintiff from Toronto to New York, in pursuance of their contract. Defendants' railway extended only to the suspension bridge, and it appeared that the goods were delivered to them, addressed to R. at New York, and a receipt given, which specified that they were received to be forwarded to such address, subject to their tariff, rules, and regulations. In these conditions it was stated that when goods were intended, after being conveyed by their rail-

way, to be forwarded by some other means to their destination, the company would not be responsible after they were so delivered. The goods were sent on by defendants to the suspension bridge and there delivered to the warehouse of the American customs until certain documents were procured, without which they could not be sent on. The plaintiff was asked by defendants for such papers, but they were not furnished for some time, and the furs were spoiled by the delay. *Held*, that defendants were not liable, for there was no contract by them to convey the goods to New York, as alleged, but their undertaking was only to carry the goods over their line and deliver them to the company which was to take them on. *Rogers v. Great Western R. Co.*, 16 U. C. Q. B. 389.

614. How contract determined where written and printed portions conflict.—The written portion of a contract must prevail over the printed portion, where there is any conflict between the language of the two. So where a bill of lading is given for goods beyond the initial carrier's line, and there are printed words indicating that it would only act as agents and forwarders beyond its line, but contains written words showing a through contract and a through rate, the initial carrier will be deemed as having contracted to carry the goods to the place of destination. *Peet v. Chicago & N. W. R. Co.*, 19 Wis. 118.—DISTINGUISHED IN *Detroit & M. R. Co. v. Farmers' & M. Bank*, 20 Wis. 122; *Tolman v. Abbot*, 78 Wis. 192. FOLLOWED IN *Candee v. Pennsylvania R. Co.*, 21 Wis. 582; *Wahl v. Holt*, 26 Wis. 703. REVIEWED IN *Gray v. Jackson*, 51 N. H. 9.

615. Upon delivery to next carrier, in absence of special contract to carry to destination.*—The obligation of the first or any succeeding carrier is discharged when he has safely delivered the goods to the next succeeding carrier to whom such delivery is required, in order to complete the transportation, unless such carrier has specially contracted to carry to the destination. *Rickerson Roller Mill Co. v. Grand Rapids & I. R. Co.*, 32 Am. & Eng. R. Cas. 487, 67 Mich. 110, 10 West. Rep. 888, 34 N. W. Rep. 269.—QUOTING *Detroit & B. C. R. Co. v. McKenzie*, 43 Mich.

* Duty of company to safely carry over its line and deliver to next connecting carrier, see notes, 13 L. R. A. 34; 9 Id. 450.

609.—*St. Louis Ins. Co. v. St. Louis, V., T. H. & I. R. Co.*, 3 Am. & Eng. R. Cas. 260, 104 U. S. 146. *Perkins v. Portland, S. & P. R. Co.*, 47 Me. 573.—NOT FOLLOWING *Muschamp v. Lancaster & P. J. R. Co.*, 8 M. & W. 421; *Watson v. Ambergate, N. & B. R. Co.*, 3 Eng. L. & Eq. 497; *Wilson v. Y. N. & B. R. Co.*, 18 Eng. L. & Eq. 557; *Crouch v. London & N. W. R. Co.*, 25 Eng. L. & Eq. 287.—QUOTED IN *Wheeler v. San Francisco & A. R. Co.*, 31 Cal. 46. REVIEWED IN *Gray v. Jackson*, 51 N. H. 9.—*Jennings v. Grand Trunk R. Co.*, 49 Am. & Eng. R. Cas. 98, 127 N. Y. 438, 28 N. E. Rep. 394, 40 N. Y. S. R. 318; *affirming* 52 Hun 227, 23 N. Y. S. R. 15, 5 N. Y. Supp. 140. *Marshall v. New York C. R. Co.*, 45 Barb. (N. Y.) 502; *affirmed* (P.) 48 N. Y. 660, mem. *Mullarkey v. Philadelphia, W. & B. R. Co.*, 9 Phila. (Pa.) 114.—FOLLOWING *Gray v. Jackson*, 51 N. H. 9; *Jennison v. Chicago & A. R. Co.*, 5 Clark (Pa.) 409. REVIEWING *Pennsylvania C. R. Co. v. Schwarzenberger*, 45 Pa. St. 208.

And this is so though the agent told the shipper that the goods would go right through, and it was not necessary for him to be at the end of the road to attend to re-shipping. *Dillon v. New York & E. R. Co.*, 1 Hilt. (N. Y.) 231.—REVIEWING *Weed v. Saratoga & S. R. Co.*, 19 Wend. (N. Y.) 534; *Hart v. Rensselaer & S. R. Co.*, 8 N. Y. 37.—REVIEWED IN *Gray v. Jackson*, 51 N. H. 9.

The giving of a through rate by the receiving carrier does not create a liability extending beyond its own line, nor does its receipt which shows that the goods were consigned to a point beyond his line. *Goldsmith v. Chicago & A. R. Co.*, 12 Mo. App. 479.

Where, however, the carrier contracts to transport the goods to the place of destination, unless relieved by some limitation of liability in his contract, he is responsible for the consequences of any default or want of reasonable diligence on the part of the carrier on any part of the route. *Jennings v. Grand Trunk R. Co.*, 49 Am. & Eng. R. Cas. 98, 127 N. Y. 438, 28 N. E. Rep. 394, 40 N. Y. S. R. 318; *affirming* 52 Hun 227, 23 N. Y. S. R. 15, 5 N. Y. Supp. 140.

e. When Initial Carrier's Liability Ceases.

616. Illustrations.—The defendants, who were common carriers between P. & B., carried from P. to B. a parcel directed to R., a place beyond their route, and deliv-

ered it to the next carrier, according to the usage of the business, and the parcel was lost beyond B. The judge who tried the facts did not find an undertaking of the defendants for carriage beyond B., and therefore gave a general verdict for the defendants. *Held*, that there was no ground for setting aside the verdict. *Gray v. Jackson*, 51 N. H. 9.—APPROVING *Mus-champ v. Lancaster & P. J. R. Co.*, 8 M. & W. 421. QUOTING *Farmers' & M. Bank v. Champlain Transp. Co.*, 23 Vt. 186. REVIEWING *Hyde v. Trent & M. Nav. Co.*, 5 T. R. 389; *Watson v. Ambergate, N. & B. R. Co.*, 15 Jur. 448, 3 Eng. L. & Eq. 497; *Fowles v. Great Western R. Co.*, 7 Ex. 699; *Scotthorn v. South Staffordshire R. Co.*, 8 Ex. 341; *Collins v. Bristol & E. R. Co.*, 11 Ex. 790; *Wilby v. West Cornwall R. Co.*, 2 H. & N. 703; *Mytton v. Midland R. Co.*, 4 H. & N. 615; *Coxon v. Great Western R. Co.*, 5 H. & N. 274; *Great Western R. Co. v. Blake*, 7 H. & N. 987; *Webber v. Great Western R. Co.*, 3 H. & C. 771; *Keys v. Belfast R. Co.*, 8 Ir. C. L. 167; *Perkins v. Portland, S. & P. R. Co.*, 47 Me. 573; *Knight v. Portland, S. & P. R. Co.*, 56 Me. 234; *Nashua Lock Co. v. Worcester & N. R. Co.*, 48 N. H. 339; *Nutting v. Connecticut River R. Co.*, 1 Gray (Mass.) 502; *Najac v. Boston & L. R. Co.*, 7 Allen (Mass.) 329; *Darling v. Boston & W. R. Co.*, 11 Allen (Mass.) 295; *Gass v. New York, P. & B. R. Co.*, 99 Mass. 220; *Burroughs v. Norwich & W. R. Co.*, 100 Mass. 26; *Pendergast v. Adams Exp. Co.*, 101 Mass. 120; *Hill Mfg. Co. v. Boston & L. R. Co.*, 104 Mass. 122; *Bostwick v. Champion*, 11 Wend. (N. Y.) 571, 18 Wend. (N. Y.) 175; *Weed v. Saratoga & S. R. Co.*, 19 Wend. (N. Y.) 534; *Hart v. Rensselaer & S. R. Co.*, 8 N. Y. 37; *Wibert v. New York & E. R. Co.*, 12 N. Y. 245; *Schroeder v. Hudson River R. Co.*, 5 Duer (N. Y.) 55; *Hunt v. New York & E. R. Co.*, 1 Hilt. (N. Y.) 228; *Dillon v. New York & E. R. Co.*, 1 Hilt. (N. Y.) 231; *Foy v. Troy & B. R. Co.*, 24 Barb. (N. Y.) 382; *Hempstead v. New York C. R. Co.*, 28 Barb. (N. Y.) 485; *Cary v. Cleveland & T. R. Co.*, 29 Barb. (N. Y.) 35; *Bradford v. South Carolina R. Co.*, 7 Rich. (So. Car.) 201, 10 Rich. (So. Car.) 221; *Kyle v. Laurens R. Co.*, 10 Rich. (So. Car.) 382; *Rome R. Co. v. Sullivan*, 25 Ga. 228; *Cincinnati, H. & D. R. Co. v. Spratt*, 2 Duv. (Ky.) 4; *United States Exp. Co. v. Rush*, 24 Ind. 403; *Illinois C. R. Co. v. Copeland*, 24 Ill. 332; *Illinois C. R. Co. v. Johnson*, 34 Ill. 389; *Candee*

v. Pennsylvania R. Co., 21 Wis. 582; *Peet v. Chicago & N. W. R. Co.*, 19 Wis. 118; *Detroit & M. R. Co. v. Farmers' & M. Bank*, 20 Wis. 122; *Angle v. Mississippi & M. R. Co.*, 9 Iowa 487.—FOLLOWED IN *Mullarkey v. Philadelphia, W. & B. R. Co.*, 9 Phila. (Pa.) 114.

Where goods directed to Cleveland, Ohio, were shipped with defendant at New York, without any other directions than that they were to be forwarded by a particular line, and he was engaged as a carrier only from New York to Troy—*held*, that his liability as common carrier ended at Troy. *Jacobs v. Hooker*, 1 Edm. Sel. Cas. (N. Y.) 472.

Cotton was shipped under a contract providing that for all loss or damage the legal remedy should be against the particular carrier or forwarder only in whose custody the cotton might actually be at the time of the happening thereof. *Held*, that the responsibility of the receiving company ceased when it had transported the cotton over its own road and had delivered it into the custody of a connecting line. *Lamb v. Camden & A. R. & T. Co.*, 2 Daly (N. Y.) 454.

A box of goods, marked and directed to B., at Boston, was delivered by B.'s agent at Saratoga Springs to a railroad company, to be transported over their road on its way to Boston. The defendants gave a receipt therefor in these words: "Received, Saratoga Springs, September 17, 1855, from B., in apparent good order, one box, to forward to Castleton, for B., Boston, Mass., at freight of — per 100 lbs. weight." It appeared that Castleton was the terminus of their road toward Boston, and that with the Rutland & Washington R. Co., with which it connected at Castleton, and other roads a line of railroad communication was formed between Saratoga Springs and Boston. *Held*, that the defendants were only liable for the safe delivery of the box of goods at the end of their own road in Castleton, and that it was their duty there to deliver it over to the railroad forming the next chain in the line to Boston; and that it was sufficient to establish *prima facie* a right of recovery on the part of B. in an action on the case against the defendants for negligence as common carriers for the loss of the box of goods, to show its delivery to them, and that it had not arrived at Boston and was lost. *Brintnall v. Saratoga & W. R. Co.*, 32 Vt. 665.—REVIEWED IN *Peterson v. Chicago, R. I. & P. R. Co.*, 80 Iowa 92, 45 N.

W. Rep. 573; *Laughlin v. Chicago & N. W. R. Co.*, 28 Wis. 204.

617. Rule does not apply where owner is to remove goods at end of first line.—One who receives goods to be transported over his route, and thence by other carriers to the place of destination, generally remains liable as a common carrier until he has delivered the goods to the next carrier; but this rule does not apply where the goods are shipped to a certain point from which they are to be removed by the owner; but his liability is regulated by those rules which govern at the place of destination. *Fenner v. Buffalo & S. L. R. Co.*, 44 N. Y. 505; *reversing 46 Barb.* 103.—**QUOTED IN** *Conkey v. Milwaukee & St. P. R. Co.*, 31 Wis. 619.

618. What is a sufficient delivery.*—An understanding or agreement existed between connecting roads for an interchange of through freights, and that the first carrier should deposit freights intended for further shipment over the line of the second carrier in a certain part of its freight depot without giving special notice, where they would be regularly taken up and carried on. *Held*, that such deposit was a sufficient delivery by the first carrier to terminate its liability, where the goods were destroyed by the burning of the depot of the second carrier. *Pratt v. Grand Trunk R. Co.*, 95 U. S. 43.

A railroad company and steamboat company had a common wharf and depot at their common terminus, the established usage being for the steamboat company to land goods for the railroad in the night, upon a particular place, where they were taken by the railroad company the next morning. Freight was so landed by the steamboat company during the night of Saturday, and the depot was burned Sunday, the railroad company having done no act in the meantime accepting delivery. *Held*, that the steamboat company was not liable for the loss of the goods. *Converse v. Norwich & N. Y. Transp. Co.*, 33 Conn. 166.—**APPLIED IN** *Hot Springs R. Co. v. Trippe*, 18 Am. & Eng. R. Cas. 562, 42 Ark. 465, 48 Am. Rep. 65; *Hooper v. Chicago & N. W. R. Co.*, 27 Wis. 81. **QUOTED IN** *Ogdensburg & L. C. R. Co. v. Pratt*, 49

How. Pr. (N. Y.) 84. **REVIEWED IN** *Ætna Ins. Co. v. Wheeler*, 49 N. Y. 616.

Where two connecting railroads are under a mutual agreement that no freight shall be considered as delivered for transportation from one to the other unless the freight is prepaid, or guaranteed by indorsement on the way-bill, one of them cannot relieve itself from liability for injury to freight by placing the car in which it was stowed on a track used in common by both railroads, and notifying the through railroad thereof, without payment or guarantee of payment of the freight. *Palmer v. Chicago, B. & Q. R. Co.*, 35 Am. & Eng. R. Cas. 629, 56 Conn. 137, 6 N. Eng. Rep. 470, 13 Atl. Rep. 818.

As to the delivery of peaches to a connecting company at the connection of their routes by the defendants, under the separate arrangements made with the two companies for the purpose, the moment the cars of the defendants reached the points of connection between the two companies and the engine was detached or cut loose from the train, the delivery of them was complete, and the defendants' duty ended and the duties and responsibilities of the connecting company commenced and continued until they had delivered them at their proper point of delivery in Jersey City, and the defendants are in no respect whatever liable or responsible for any loss or damage which the plaintiff may have sustained by reason of the misconduct, negligence, or default of that or any other company concerned after that in the transportation and delivery of them. *Truax v. Philadelphia, W. & B. R. Co.*, 3 Houst. (Del.) 233.

Where a railroad company accepts goods to be shipped to a point beyond the terminus of its line, it is bound to convey them to such terminus with safety and dispatch, and to deliver them within a reasonable time to some other carrier at that point, to be transported to their destination. Such delivery may be made by a transfer of the goods to a car of the subsequent carrier, or by the delivery of the car itself containing the goods, in good order, to the subsequent carrier. To deliver the car in bad order is not sufficient, if the subsequent carrier refuses to receive it; and to delay the car containing the goods for repairs, before delivery, renders the company liable for damages caused by such delay. *Hewett v. Chicago, B. & Q. R. Co.*, 18 Am. & Eng. R.

*Through carriage. What constitutes delivery to succeeding carrier, see note, 72 AM. DEC. 237.

Cas. 568, 63 *Iowa* 611, 19 *N. W. Rep.* 799.

Cotton was shipped to pass over two roads. The first road carried it to the end of its line on open cars and placed it on a side-track which belonged to the second road, but which was used by various connecting lines, and while on the side-track it was burned. The question was as to which road was liable, there being a dispute as to what constituted a delivery by one road to the other; but there was a preponderance of evidence tending to show that the delivery was not regarded as complete till the car containing the freight was delivered at the platform of the receiving road and the freight examined and checked off by a bill of lading by a clerk of the receiving road. *Held*, sufficient to render the first carrier liable for the loss. *Kentucky M. & F. Ins. Co. v. Western & A. R. Co.*, 8 *Baxt.* (Tenn.) 268.

610. Under South Carolina statute.—The act (Gen. St. So. Car. § 1513) which provides that an initial railroad company may discharge itself from liability for the loss of through freight transported "over its own and connecting roads" only by producing "a receipt in writing" for such freight "from the corporation to whom it was its duty to deliver said articles in the regular course of transportation" should be construed liberally; and, so construed, it requires the initial railway company to produce the proper receipt from "a steamship company" to whom the freight was delivered as the next connecting line of transportation; especially so when the bill of lading provides that the initial company shall be released when the freight is "delivered to connecting railroads or steamship lines by which it is to be carried to its destination." *Miller v. South Carolina R. Co.*, 33 *So. Car.* 359, 11 *S. E. Rep.* 1093.

But this requirement of the statute was not so free from doubt as to charge the initial road with "wilful failure or refusal" to furnish such proper receipt, where in reply to a demand from the consignor for a receipt from the corporation to which the goods were delivered, it procured and furnished the receipt only of the railroad company to which the intermediate steamboat carrier had made delivery. And there having been no such "wilful failure or refusal," the initial company when sued for these goods could produce at the trial in its de-

fense the receipt of the steamship company. *Miller v. South Carolina R. Co.*, 33 *So. Car.* 359, 11 *S. E. Rep.* 1093.

Any written acknowledgment which identifies the goods and admits their delivery by the initial road is a sufficient "receipt in writing" under this statute. *Miller v. South Carolina R. Co.*, 33 *So. Car.* 359, 11 *S. E. Rep.* 1093.

620. When liability ceases upon unloading.—Goods were delivered to a railroad company for a point beyond its line and a receipt given reciting that "the responsibility of the company is to terminate when the goods are unloaded from the cars and that goods intended for all-rail must be marked 'through by rail,' and river goods via W. or P. must be marked on this ticket." *Held*, that the responsibility of the company ceased upon the unloading of the cars at the terminus of its road, the provision that the goods might in certain contingencies be transported part of the distance by boat forbidding that the words "unloading of the cars," could mean unloading them at the place of destination. *McCann v. Baltimore & O. R. Co.*, 20 *Md.* 202.

621. Liability while awaiting delivery to next carrier—Right to warehouse.—The common-law liability of any one carrier of through goods continues until it has carried the goods and safely delivered them to the next connecting carrier; and if they are placed in a depot while awaiting such delivery, it still remains liable as common carrier. *Petersen v. Case*, 18 *Am. & Eng. R. Cas.* 578, 21 *Fed. Rep.* 885.—**DISTINGUISHING** *Helliwell v. Grand Trunk R. Co.*, 10 *Biss. (U. S.)* 170. **FOLLOWING** *Michigan C. R. Co. v. Mineral Springs Mfg. Co.*, 16 *Wall. (U. S.)* 318.

Storing in a warehouse is not enough, and until they are delivered or an attempt made to deliver them, or at least notice given of their arrival, the first carrier is not relieved from liability though the goods be destroyed by the act of God. *Dunson v. New York C. R. Co.*, 3 *Lans. (N. Y.)* 265.—**FOLLOWING** *McDonald v. Western R. Corp.*, 34 *N. Y.* 497.

If the first carrier stores the freight in a warehouse of its own, where the other is in the habit of taking it at its convenience, and the freight while so stored is destroyed, the first carrier is answerable for its value. *Condon v. Marquette, H. & O. R. Co.*, 18

Am. & Eng. R. Cas. 574, 55 *Mich.* 218, 21 *N. W. Rep.* 321, 54 *Am. Rep.* 367.—QUOTING *McDonald v. Western R. Corp.*, 34 *N. Y.* 497; *Ladue v. Griffith*, 25 *N. Y.* 364.—APPROVED IN *Bennitt v. Missouri Pac. R. Co.*, 46 *Mo. App.* 656.

But if there be no means of transportation beyond his line, his liability ceases by delivering the goods to a wharfinger at the end of his route, unless there be some usage otherwise. *Hermann v. Goodrich*, 21 *Wis.* 536.

If the initial carrier of through goods carries them to the end of its line and gives notice to the next connecting carrier, who fails to receive them, the former carrier may after a reasonable time place them in a warehouse, after which it will only be liable as warehouseman. *Wood v. Milwaukee & St. P. R. Co.*, 27 *Wis.* 541, 2 *Am. Ry. Rep.* 342.—APPROVED IN *Bennitt v. Missouri Pac. R. Co.*, 46 *Mo. App.* 656. OVERRULED IN *Conkey v. Milwaukee & St. P. R. Co.*, 31 *Wis.* 619.

Although the connecting carrier refuses or unreasonably delays to receive the goods, the first carrier will still hold them as carrier until, by warehousing them or otherwise, he does some unequivocal act indicative of a purpose to change his office from that of a carrier for transportation to a mere custodian for safe-keeping. *Bennitt v. Missouri Pac. R. Co.*, 46 *Mo. App.* 656.—APPROVING *McDonald v. Western R. Corp.*, 34 *N. Y.* 497; *Mills v. Michigan C. R. Co.*, 45 *N. Y.* 622; *Hooper v. Chicago & N. W. R. Co.*, 27 *Wis.* 92; *Wood v. Milwaukee & St. P. R. Co.*, 27 *Wis.* 552; *Conkey v. Milwaukee & St. P. R. Co.*, 31 *Wis.* 619; *Michigan C. R. Co. v. Mineral Springs Mfg. Co.*, 16 *Wall. (U. S.)* 318; *Condon v. Marquette H. & O. R. Co.*, 55 *Mich.* 221.

It was the custom of a railroad to carry goods to the end of its line and there deliver to a warehouseman, who in turn delivered to a steamboat line for further carriage. Cotton was shipped, and while in the warehouse was destroyed by fire. Held, that the railroad company could not contract with the warehouseman so as to relieve him from his own negligence; and if there was an unreasonable delay in forwarding the cotton, and it was exposed to fire, he was liable to the shipper; but not if he did not know of such exposure, and there was no unreasonable delay. *Merchants' Wharf-*

boat Assoc. v. Wood, 64 *Miss.* 661, 2 *So. Rep.* 76.

622. Second carrier has a reasonable time in which to receive.—The liability of one carrier of through goods continues until they are carried to the end of its line and for a reasonable time thereafter for the next carrier to receive them. *Wood v. Milwaukee & St. P. R. Co.*, 27 *Wis.* 541, 2 *Am. Ry. Rep.* 342.—FOLLOWING *Wood v. Crocker*, 18 *Wis.* 345. REVIEWING *Lawrence v. Winona & St. P. R. Co.*, 15 *Minn.* 390.—APPROVED IN *Dunham v. Boston & A. R. Co.*, 46 *Hun (N. Y.)* 245, 11 *N. Y. S. R.* 472.

The "reasonable time" during which the initial carrier's liability continues at the end of its route for the next carrier to receive the goods means the earliest practicable time after the initial carrier is ready to deliver them; and such time is not to be measured by any peculiar circumstances in the situation or condition of the next carrier, rendering necessary for its convenience that a longer time should be given. *Wood v. Milwaukee & St. P. R. Co.*, 27 *Wis.* 541, 2 *Am. Ry. Rep.* 342.

623. Obligation to transfer over branch track connecting roads.—When a railroad company or other common carrier receives goods consigned beyond the terminus of its own road, under an agreement to deliver them to a connecting line, the contract imposes not only the duty to carry safely over its own road but also to safely deliver to the next connecting carrier. *Alabama G. S. R. Co. v. Thomas*, 89 *Ala.* 294, 7 *So. Rep.* 762.

The liability of the first carrier in such case does not necessarily terminate with the arrival of the goods at its own terminal depot when there is a further duty to carry the goods over an intermediate short line between its own terminal depot and the other connecting road, especially when the intermediate short line is a part of its own road. *Alabama G. S. R. Co. v. Thomas*, 89 *Ala.* 294, 7 *So. Rep.* 762.

A railroad company having safely carried goods to their place of destination, where the freight charges were paid by the consignee after inspection of the goods, its liability as a common carrier is terminated, and it is under no obligation to transfer them to another carrier in the city for ultimate delivery to the consignee at his

place of business, unless a valid usage or custom to that effect is proved. *Melbourne v. Louisville & N. R. Co.*, 88 Ala. 443, 6 So. Rep. 762.—DISTINGUISHING *Alabama G. S. R. Co. v. Mt. Vernon Co.*, 84 Ala. 173; *London & N. W. R. Co. v. Bartlett*, 7 H. & N. 400.

An agreement by the railroad company, after the goods have been safely carried to their destination, to transfer them to another carrier, for convenient ultimate delivery at the consignee's place of business in the city, is *nudum pactum*, and imposes no obligation to do so; yet if it enters on the performance of such agreement, and performs it so negligently that the goods are thereby lost or injured, as by the failure to give notice to the transferee in pursuance of a custom or usage between them, it is liable for the loss or injury as a bailee without reward. *Melbourne v. Louisville & N. R. Co.*, 88 Ala. 443, 6 So. Rep. 762.

3. Rights, Duties, and Liabilities of Second or Intermediate Carriers.

624. Generally.—A second carrier is not liable for damages to goods carried while in the hands of the first carrier, unless under the terms of the bill of lading the first carrier would be liable; i. e., the second carrier will not be liable unless it has recourse upon the first carrier. *East Tenn., V. & G. R. Co. v. Wright*, 76 Ga. 532.

The owners of goods delivered to an express and forwarding line are bound by any contract in force between such forwarders and the common carriers whom they employ. Such owners, therefore, cannot maintain any action against such carriers, except such as could have been maintained by the forwarders. *Stoddard v. Long Island R. Co.*, 5 Sandf. (N. Y.) 180.—FOLLOWING *New Jersey S. Nav. Co. v. Merchants' Bank*, 6 How. (U. S.) 344.—CRITICISED IN *Lamb v. Camden & A. R. & T. Co.*, 2 Daly (N. Y.) 454.

The mere receiving and forwarding freight delivered from a connecting line of railway is not evidence of a ratification of a through-freight contract made by the railway company receiving the property from the shipper. The law compels such acts. *Ft. Worth & D. C. R. Co. v. Williams*, 42 Am. & Eng. R. Cas. 464, 77 Tex. 121, 13 S. W. Rep. 637.

625. When liability begins.—As between connecting carriers, the liability of second carrier does not commence until

that of the first terminates, which is upon a complete delivery to the second carrier; and, in case of a shipment of a considerable quantity of goods, the liability of the first carrier is not ended until the whole of them are delivered to the second carrier. *Gass v. New York, P. & B. R. Co.*, 99 Mass. 220.—APPROVING *Darling v. Boston & W. R. Co.*, 11 Allen (Mass.) 295. DISTINGUISHING *Fitchburg & W. R. Co. v. Hanna*, 6 Gray (Mass.) 539; *Champion v. Bostwick*, 18 Wend. (N. Y.) 176.—FOLLOWED IN *Nashua Lock Co. v. Worcester & N. R. Co.*, 48 N. H. 339. REVIEWED IN *Gray v. Jackson*, 51 N. H. 9.—*Vannatta v. Central R. Co.*, 154 Pa. St. 262, 26 Atl. Rep. 384.—QUOTING *Spisak v. Baltimore & O. R. Co.*, 152 Pa. St. 283.

Where there is an agreement between two common carriers, operating connecting lines, for the carriage of freight over both routes at an agreed price, to be divided between them, and where they have, at the point of connection, a warehouse used in common for the transfer of freight from one line to the other, the expenses of handling being paid in common, a delivery of freight at the warehouse by one carrier destined to pass over the line of the other, with notice to the latter of its arrival and ultimate destination, places it in the possession of the latter and imposes upon him the duties and liabilities of a common carrier in reference thereto. *Aetna Ins. Co. v. Wheeler*, 49 N. Y. 616, 3 Am. Ry. Rep. 390; affirming 5 Lans. 480.—REVIEWING *Coyle v. Western R. Co.*, 47 Barb. (N. Y.) 152; *Converse v. Norwich & N. Y. Transp. Co.*, 33 Conn. 166.

626. Notice by first carrier—Duty to receive goods in reasonable time after notice.—Where goods are received by a carrier for transportation, marked for a destination beyond the terminus of such carrier's route, the notice to the next carrier of their arrival and readiness for delivery need not be actually brought home to the knowledge of such next carrier; but where the uniform custom of doing business between them was for the first carrier to deposit such notice in a special box in its own depot, to which the next carrier had constant access and was accustomed to look for notices, such deposit is sufficient. *Mills v. Michigan C. R. Co.*, 45 N. Y. 622.—APPROVED IN *Bennett v. Missouri Pac. R. Co.*, 46 Mo. App. 656. FOLLOWED IN *Shelton*

v. Merchants' Dispatch Transp. Co., 59 N. Y. 258.

But, in addition to the giving of notice of arrival to the carrier next in the line, a reasonable time must elapse for him to take away, and on his neglect to do so a storage must be made, or some act, indicating a renunciation of the relation of carrier, be done by the first carrier, to relieve him from a common carrier's liability. And where the first carrier was a railroad company and the next a propeller line on the great lakes, and it was the custom to ship the goods by the first vessel of the line that could take them after their arrival at the railroad terminus—*held*, that the reasonable time which must elapse after notice did not expire until a vessel which, in the ordinary course of business, could receive the goods had failed to do so. *Mills v. Michigan C. R. Co.*, 45 N. Y. 622.

627. Sufficiency of delivery to.—Considering the fact that freight cars of one road are constantly being used by others, mere proof that the initial carrier delivered goods into the car of the second carrier is not sufficient to establish delivery and notice to it that they were to be carried over the second road. *Patten v. Union Pac. R. Co.*, 29 Fed. Rep. 590.

The fact that a railroad company receiving cotton for shipment put the car upon the side-track of defendant railroad company, according to the custom existing between the two companies and an agreement for the shipment of freight over each other's road, and that defendant's agent reported the car to the car accountant, does not raise a presumption that defendant accepted the car as a carrier, where it is not shown that it had received any shipping directions from the other company, or that it knew the consignee or the destination of the car. *Alabama G. S. R. Co. v. Mt. Vernon Co.*, 35 Am. & Eng. R. Cas. 657, 84 Ala. 173, 4 So. Rep. 356.—DISTINGUISHED IN *Melbourne v. Louisville & N. R. Co.*, 88 Ala. 443, 6 So. Rep. 762.

628. When liable for loss or injury on its own road.—Where goods are shipped to be transported over several lines of connecting carriers, the particular carrier in whose hands they are lost or injured is liable to the owner for such loss or injury. *Conkey v. Milwaukee & St. P. R. Co.*, 31 Wis. 619, 2 Am. Ry. Rep. 353.—OVERRULLED IN *Wood v. Milwaukee & St. P. R. Co.*,

37 Wis. 341. QUOTING *Fenner v. Buffalo & S. L. R. Co.*, 44 N. Y. 505.—*Knazes v. Pittsburgh, Ft. W. & C. R. Co.*, 4 Biss. (U. S.) 466. *International & G. N. R. Co. v. Tisdale*, 74 Tex. 8, 11 S. W. Rep. 900.—LIMITED IN *Missouri Pac. R. Co. v. Edwards*, 78 Tex. 307.

Where freight is carried over connecting railroads, each road is liable for loss or injury occurring through its own negligence, even although the first carrier may also by express contract have assumed a responsibility for losses occurring on the lines of succeeding carriers. *Algen v. Boston & M. R. Co.*, 6 Am. & Eng. R. Cas. 426, 132 Mass. 423. *Johnson v. East Tenn., V. & G. R. Co.*, 90 Ga. 810, 17 S. E. Rep. 121.—DISTINGUISHING *Southern Exp. Co. v. Shea*, 38 Ga. 519; *Mosher v. Southern Exp. Co.*, 38 Ga. 37. QUOTING *Cohen v. Southern Exp. Co.*, 53 Ga. 128.

The remedy of the owner of goods is not limited to an action against the carrier with whom he contracted, but he may sue the particular carrier in whose custody and by whose negligence the property was lost or injured, in which case the action is not upon the contract, but upon the obligation and duty which that carrier assumed from the public nature of his employment, and through the omission or neglect of which the injury is presumed to have occurred, unless he shows that it arose from the act of God or the public enemy. *Lamb v. Camden & A. R. & T. Co.*, 2 Daly (N. Y.) 454. *Barter v. Wheeler*, 49 N. H. 9.—APPROVING *New Jersey S. Nav. Co. v. Merchants' Bank*, 6 How. (U. S.) 344. DISAPPROVING *Muschamp v. Lancaster & P. J. R. Co.*, 8 M. & W. 421. EXPLAINING *Van Santvoord v. St. John*, 6 Hill (N. Y.) 157. REVIEWING *Bradford v. South Carolina R. Co.*, 7 Rich. (So. Car.) 201; *Nashua Lock Co. v. Worcester & N. R. Co.*, 48 N. H. 339; *Bostwick v. Champion*, 11 Wend. (N. Y.) 575; *Fairchild v. Slocum*, 19 Wend. (N. Y.) 329; *Hart v. Rensselaer & S. R. Co.*, 8 N. Y. 37; *Smith v. New York C. R. Co.*, 43 Barb. (N. Y.) 225.

An intermediate carrier not a party to the original shipping contract is liable, it seems, only as an ordinary carrier for loss or damage arising while the goods are in his possession. This gives the owner his election, in case of loss or damage, to sue the carrier with whom the original undertaking was entered into, or the particular

carrier in whose hands the loss or injury occurred. *Smith v. New York C. R. Co.*, 43 *Barb. (N. Y.)* 225; *affirmed in 41 N. Y.* 620.

629. When liable as common carrier.—Public policy in this country of long routes and frequent transshipment forbids any intertendment which would favor an intermediate carrier in divesting himself of that character and assuming the more limited responsibility of a forwarder. *Ladue v. Griffith*, 25 *N. Y.* 364—FOLLOWED IN *Lamb v. Camden & A. R. & T. Co.*, 2 *Daly (N. Y.)* 454. QUOTED IN *Condon v. Marquette, H. & O. R. Co.*, 55 *Mich.* 218.

The fact that the carrier receiving the goods is an intermediate carrier and not the carrier to whom the goods were delivered does not alter the rule, and such intermediate carrier is liable for injuries to the goods through the negligence of a connecting line to which they were subsequently delivered. *Beard v. St. Louis, A. & T. H. R. Co.*, 42 *Am. & Eng. R. Cas.* 509, 79 *Iowa* 527, 44 *N. W. Rep.* 803.

A railroad company receiving cars from a connecting line of road for transportation over its line becomes, in the absence of a special contract, a common carrier of such cars as well as of the freight therein. *Peoria & P. U. R. Co. v. United States Rolling Stock Co.*, 136 *Ill.* 643, 27 *N. E. Rep.* 59; *reversing 28 Ill. App.* 79.—ADHERING TO *Peoria & P. U. R. Co. v. Chicago, R. I. & P. R. Co.*, 109 *Ill.* 135.

630. Liability for diverting goods from route.—An intermediate carrier, one of several connecting roads, maintained an office at a seaport city and contracted for a through carriage of goods. In accordance with its custom when goods were shipped over the first carrier from the point where it maintained the office, on presentation of a bill of lading from such carrier it took up the bill of lading from plaintiffs and gave a through bill over the various connecting lines. *Held*, that it was liable where the goods were diverted from the regular line of connecting carriers to another and were lost, in the absence of anything showing that the miscarriage of the goods was under circumstances which would relieve it from liability. *Le Sage v. Great Western R. Co.*, 1 *Daly (N. Y.)* 366.

631. Liability for storing without notice.—If an intermediate carrier stores goods at the end of his route, without no-

tice to the connecting carrier, and they are destroyed by fire while in his warehouse, he is responsible to the owner. *McDonald v. Western R. Corp.*, 34 *N. Y.* 497.—APPROVED IN *Bennett v. Missouri Pac. R. Co.*, 46 *Mo. App.* 656. FOLLOWED IN *Irish v. Milwaukee & St. P. R. Co.*, 19 *Minn.* 376 (*Gil.* 323); *Lamb v. Camden & A. R. & T. Co.*, 2 *Daly (N. Y.)* 454. NOT FOLLOWED IN *Eaton v. St. Louis, I. M. & S. R. Co.*, 12 *Mo. App.* 386. QUOTED IN *Condon v. Marquette, H. & O. R. Co.*, 55 *Mich.* 218; *Nashua Lock Co. v. Worcester & N. R. Co.*, 48 *N. H.* 339; *Conkey v. Milwaukee & St. P. R. Co.*, 31 *Wis.* 619. REVIEWED IN *Spears v. Spartanburg, U. & C. R. Co.*, 11 *So. Car.* 158.

632. Liability while goods are held awaiting bills from preceding carrier—Back charges.—If an arrangement or course of business exist between two railroad companies whose roads are upon the same general routes but do not actually connect with each other, by which goods, which have been carried to the termination of one road and are destined to some point upon or beyond the line of the other, are delivered to the second company with a bill of the expenses already incurred, from which, if found to be correct, a way-bill is made out, the second company are only responsible as warehousemen, and not as common carriers, for goods so received and stored by them, until the delivery of the bill of expense. *Judson v. Western R. Co.*, 4 *Allen (Mass.)* 520.—DISTINGUISHED IN *Barter v. Wheeler*, 49 *N. H.* 9.

The questions whether the sending of way-bills by the first to the succeeding carrier did not put upon it the responsibility of taking charge of the goods and of seeing that they were forwarded, and whether there was unreasonable delay on its part—the custom of sending such way-bills on the arrival of goods at the terminus of the first carrier being proved—are for the jury. *Livingston v. New York C. & H. R. Co.*, 76 *N. Y.* 631.

When goods are delivered to a railroad company by a connecting railroad company to be transported to the owners, and the same are received by such company for that purpose, it becomes its duty to send them off immediately; and it cannot justify the detention of the goods on the ground that, by its regulations, goods received from a connecting road are not to be forwarded until the receipt of a bill of back charges,

and that no such bill accompanied the goods. *Michaels v. New York C. R. Co.*, 30 N. Y. 564.—FOLLOWED IN *Root v. Great Western R. Co.*, 45 N. Y. 524.—*Dunham v. Boston & M. R. Co.*, 70 Me. 164.—FOLLOWING *Michaels v. New York C. R. Co.*, 30 N. Y. 564.

Appellant cannot be held liable for delay which was caused by its connecting lines, in the absence of proof of negligence on its own part. But if appellant wrongfully refused to receive and forward appellee's goods to their destination when they were tendered to it at St. Louis, thus causing the delay, it would be liable. *Missouri Pac. R. Co. v. Weisman*, 2 Tex. Civ. App. 86, 21 S. W. Rep. 426.—FOLLOWING *Gulf, C. & S. F. R. Co. v. Baird*, 75 Tex. 256.

Goods were shipped to pass over two roads. The second road received them from the first, but held them for some time awaiting the settlement of certain claims for back charges claimed to be due it from the first road, and while so detained they were injured by an unusual and extraordinarily high water. Held, that it was negligent in detaining the goods, and this having contributed to the injury, the carrier could not claim the exemption that the law would otherwise have given where a loss occurs from such cause. *Michaels v. New York C. R. Co.*, 30 N. Y. 564.

633. When not liable.—If fruit trees and shrubbery are destroyed by the cold, in the hands of an intermediate carrier, by reason of negligence or unreasonable delay, or if, by such delay in transportation or in delivering to the next carrier in the line the latter cannot, by reasonable efforts, transport and deliver before they are destroyed by cold weather, the former carrier will be liable for the loss. *Michigan C. R. Co. v. Curtis*, 80 Ill. 324.

The last paragraph of section 9, N. Y. act of 1847, ch. 270, relating to the liability of connecting railroads, does not apply to intermediate railroads, but only to the road which first receives the goods. *Root v. Great Western R. Co.*, 45 N. Y. 524; *reversing 2 Lans.* 199.

Where goods are delivered to a company to be shipped over its road and another, and are prepaid, the remedy of the shipper for a failure to carry the goods is against the receiving company and not the second carrier, where it has not, at the time of the injury, received its part of the charges, nor

been informed of the reception of the goods by the other company. *Randall v. Richmond & D. R. Co.*, 49 Am. & Eng. R. Cas. 74, 108 N. Car. 612, 13 S. E. Rep. 137.

In the absence of a partnership or agency to bind one another, carriers over whose lines freight is to pass are but the agencies employed by the contracting carrier receiving the freight for through shipment upon such lines. *Ft. Worth & D. C. R. Co. v. Williams*, 42 Am. & Eng. R. Cas. 464, 77 Tex. 121, 13 S. W. Rep. 637.—FOLLOWING *Gulf, C. & S. F. R. Co. v. Baird*, 75 Tex. 256.

Where a railway company accepts goods to be carried to a station off its line and on the line of another company, and accepts the freight charges for the whole distance, an action will not lie against a connecting company to recover compensation for the loss of the goods by fire while on its line. *Bristol & E. R. Co. v. Collins*, 7 H. L. Cas. 194, 5 Jur. N. S. 1367, 29 L. J. Ex. 41.

634. Liability for unavoidable delay.—In case of a through shipment of goods, where an interruption of an extraordinary nature, such as storms, floods, earthquake, or war, renders it impossible to send the goods forward, or makes considerable delay in the transportation necessary, the carrier in whose hands the goods are may give the owner or consignee immediate notice and thus absolve himself from liability as a carrier. *Conkey v. Milwaukee & St. P. R. Co.*, 31 Wis. 619, 2 Am. Ry. Rep. 353.—APPLIED IN *Petersen v. Case*, 18 Am. & Eng. R. Cas. 578, 21 Fed. Rep. 885. APPROVED IN *Bennitt v. Missouri Pac. R. Co.*, 46 Mo. App. 656.

635. Liability for refusing to carry.—The wrongful refusal of a connecting company to accept freight when tendered does not justify the shipper in abandoning his property or leaving it exposed to the rain and mud; but he can recover from the carrier the reasonable expense incurred in caring for the property, together with the damages resulting from the delay. *St. Louis, A. & T. R. Co. v. Neel*, 55 Am. & Eng. R. Cas. 428, 56 Ark. 279, 19 S. W. Rep. 963.

In the absence of any contract between connecting roads, one cannot maintain an action against the other for refusing to receive goods carried by the first and offered to the second for carriage over its road, simply because the owner of the goods has

contracted with the first road for a through shipment. *Wilmington, C. & A. R. Co. v. Greenville & C. R. Co.*, 9 So. Car. 325.

A way-bill of iron rails, to be transported over several successive lines of transportation by railroad, made out by the agents of the first line in this form—"Way-bill of merchandise transported by the F. R. R. from C. to B., Nov. 27, 1852 (Consignees) Ogdensburg R. R. (Description of articles) rails, part lot," is sufficient to show to the intermediate carriers that the rails are to be carried and delivered to the Ogdensburg Railroad at B, and to exonerate the first carrier from liability, although the rails are detained and used by one of the intermediate railroad companies, which at the same time is receiving other similar rails over the same route for its own use. *Northern R. Co. v. Fitchburg R. Co.*, 6 Allen (Mass.) 254.

636. When liability ceases.—In the absence of any special agreement or custom which enters into the contract, where goods are delivered to a common carrier for transportation directed to a point between the terminus of his route, between which and the place of destination of the goods there are other succeeding connecting lines of transportation by common carriers, the intermediate carrier is bound to transport the goods safely to the end of his route and deliver them to the next carrier on the route beyond, and in such case he is not relieved from his liability as insurer of the goods by simply unloading the goods at the end of his route and storing them in a warehouse, without delivery or notice, or any attempt to deliver to the next carrier. *Irish v. Milwaukee & St. P. R. Co.*, 19 Minn. 376 (Gil. 323) 19 Am. Ry. Rep. 89.—**DISTINGUISHING** *Gar-side v. Trent Nav. Co.*, 4 T. R. 581. **FOLLOWING** *McDonald v. Western R. Corp.*, 34 N. Y. 497. **QUOTING** *Lawrence v. Winona & St. P. R. Co.*, 15 Minn. 390 (Gil. 313).

The liability fixed by Ga. Code, § 2084 applies where goods pass over all the lines on the same car, or are at any terminal point transferred or loaded from the car of one line to that of another; and it makes no difference whether the goods go all the way on the same bill of lading or whether new ones are substituted. *Central R. Co. v. Rogers*, 66 Ga. 251.

Where an intermediate carrier receives goods from a preceding one for a destination beyond its line, in the absence of an

express contract to carry to the place of destination its full duty is discharged by carrying to the end of its line and there delivering to a responsible carrier for further transportation, and giving to such connecting carrier proper instructions as to the further carriage; and in the absence of evidence to the contrary it will be presumed that such instructions were given. *Hempstead v. New York C. R. Co.*, 28 Barb. (N. Y.) 485.—**REVIEWED IN** *Gray v. Jackson*, 51 N. H. 9.

Where goods are shipped, under a contract with a common carrier, to be carried over several independent but connecting lines to their destination, at an agreed through rate, each carrier to receive and carry to the end of his route and there forward by the next connecting line, and they are lost at the terminus of the route of an intermediate carrier while in his possession and before delivery to the next carrier—held, such intermediate carrier undertakes not only to carry, but to forward; and, as a common carrier, he is liable for loss at the end of his route before the goods are delivered to the next carrier, unless he is exempted from such loss by the terms of his contract. *Erie R. Co. v. Lockwood*, 28 Ohio St. 358, 14 Am. Ry. Rep. 143.

637. Duty to carry and deliver to next carrier.—The intermediate carrier is bound to deliver the goods to the carrier whose line of transportation is next in the route over which the goods are to be carried, and it is not relieved of responsibility by storing them in a warehouse at the terminus of its own route. *Bancroft v. Merchants' Despatch Transp. Co.*, 47 Iowa 262. *Deming v. Norfolk & W. R. Co.*, 17 Phila. (Pa.) 540. *Philadelphia, W. & B. R. Co. v. Lehman*, 6 Am. & Eng. R. Cas. 194, 56 Md. 209, 40 Am. Rep. 415.

638. Presumption as to condition of goods.—When goods are delivered in good order to the first carrier the presumption will be indulged that they continue in that condition until the contrary is shown; and in such cases the burden is upon the carrier in whose hands the goods are found in a damaged condition to show they were damaged before he received them. *Lake Erie & W. R. Co. v. Oakes*, 11 Ill. App. 489.—**NOT FOLLOWING** *Darling v. Boston & W. R. Corp.*, 11 Allen (Mass.) 295; *Marquette*,

* See also *post*, 653, 695.

H. & O. R. Co. v. Kirkwood, 45 Mich. 51.
—*Central R. Co. v. Rogers*, 66 Ga. 251.

Where an action for an injury to goods transported by successive carriers is brought against one of them, it is error to charge that if the goods were delivered in good order to the first carrier it is inferable, in the absence of evidence, that they continued so until received by defendant. *Marquette, H. & O. R. Co. v. Kirkwood*, 9 Am. & Eng. R. Cas. 85, 45 Mich. 51, 7 N. W. Rep. 209.

The non-delivery, or delivery in bad condition, by the last of the lines controlled by and connecting with the defendant, by which the goods ought to have been carried after they left defendant's hands, is *prima-facie* evidence of default in the defendant. *Lindley v. Richmond & D. R. Co.*, 9 Am. & Eng. R. Cas. 31, 88 N. Car. 547.—REVIEWING *Horne v. Midland R. Co.*, L. R. 7 C. P. 583.

639. Rights and liabilities as to charges.—If goods received from a prior carrier are apparently in good order, a carrier is not obliged to open the packages for further examination, but has, for the back charges paid, a lien on the goods. *Knight v. Providence & W. R. Co.*, 9 Am. & Eng. R. Cas. 90, 13 R. I. 572, 43 Am. Rep. 46.

Where goods are delivered to a carrier for shipment to a destination beyond the route of the carrier, the freight being prepaid, such carrier becomes the forwarding agent of the owner, and succeeding carriers to whom the goods are delivered by the first carrier are not bound by the contract between the owner and the first carrier as to freight charges of which they have no knowledge, unless such want of knowledge is due to the negligence of the succeeding carriers. *Moses v. Port Townsend Southern R. Co.*, 5 Wash. 595, 32 Pac. Rep. 488.

When goods are carried by several successive carriers, under a contract made with the first to carry the goods the whole distance, the intermediate and last carriers are, in the absence of special conditions, the agents of the first, and there is no privity between them and the consignor or consignee, and therefore they cannot claim freight, either by implied contract or lien, beyond the amount contracted for by the first carrier. *Trotter v. Red River Transp. Co., Man. (T. Wood)* 255.

A railway company which receives goods consigned to a point on its line, in the usual course of business, from a connecting carrier which has carried the goods to its ter-

minus, is entitled to its reasonable freight charges, though the consignor had directed that the goods should be carried from the terminus of the first carrier to their destination by another carrier than the one to which they were delivered, where there is no evidence that the latter knew of such direction. *Price v. Denver & R. G. R. Co.*, 37 Am. & Eng. R. Cas. 626, 12 Colo. 402, 21 Pac. Rep. 188.

Where one railroad contracts for transportation to a point on another connecting road, and the owners demanded a delivery of the goods to them at the point where they were to be delivered to the connecting road, such connecting road has no right to retain the goods, convey them to the point of destination on its road, and charge freight therefor, in the absence of any interest in the contract for through transportation made by the first road. *Withers v. Macon & W. R. Co.*, 35 Ga. 273.

An intermediate consignee or carrier, in the absence of a special authority, whose only duties are to care for the goods and forward them, has no power to adjust the matter of injury to the goods, and cannot insist upon such adjustment as a condition of paying the freight charges to the preceding carrier. *Canfield v. Northern R. Co.*, 18 Barb. (N. Y.) 586.

If such intermediate carrier receives the goods he becomes primarily liable to the next preceding carrier as on an implied assumpsit for the amount of freight charges earned thereon. *Canfield v. Northern R. Co.*, 18 Barb. (N. Y.) 586.

Defendant, a steamship company, gave a bill of lading in connection with other connecting carriers providing that it should not be liable for "loss or damage, on any article or property, by fire or other casualty while in transit or while in deposit or places of transshipment, or at depots or landings, and at all points of delivery." Held, that it was not liable to a connecting railroad for freight charges on goods carried and placed on a wharf preparatory to delivery to it, but which were destroyed by fire before delivery to the steamship company. In the absence of evidence of the usage or settled course of business to pay such charges, it was not liable until the goods were actually on board its steamer. *New York, L. E. & W. R. Co. v. National Steamship Co.*, 17 N. Y. Supp. 28; former appeal, 14 N. Y. Supp. 253.

640. When not entitled to benefit of insurance.—When a contract is made for the carriage of goods partly by rail and partly by vessel, and a stipulation that a carrier liable for loss or damage shall have full benefit of any insurance that may have been effected upon the goods is inserted in the midst of the terms and conditions defining the liability of the railroad companies and is omitted in those defining the liability of the steamship company, the latter company can claim no benefit therefrom. *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 37 *Am. & Eng. R. Cas.* 681, 129 *U. S.* 397, 9 *Sup. Ct. Rep.* 469.

641. Right to transfer goods to own cars.—Except where the cars of a receiving company of connecting lines are all in use, or where the freight would suffer by being transferred, the question whether the freight should be so received or should be transferred to the cars of the receiving company is a rule dependent upon contracts between the companies or upon circumstances such as the condition and equipment of the cars and the road over which they are to be transported, the determination of the matter resting with the receiving company and the amount received in one way or the other constantly varying. There is no controlling custom to receive from a connecting line and transport freight in the cars in which it is tendered. *Oregon S. L. & U. N. R. Co. v. Northern Pac. R. Co.*, 51 *Am. & Eng. R. Cas.* 145, 51 *Fed. Rep.* 465.

A custom to take cars from a connecting carrier without changing the goods in them, when their safety demands it, affords no justification for injury to the goods, as the custom itself is based upon negligence. *Beard v. Illinois C. R. Co.*, 42 *Am. & Eng. R. Cas.* 445, 79 *Iowa* 518, 7 *L. R. A.* 280, 44 *N. W. Rep.* 800.

642. Liability for defects in cars of connecting carrier.*—A second carrier cannot avoid liability for injury to goods caused by the defective condition of a car on the ground that the car belonged to the first carrier. *Wallingford v. Columbia & G. R. Co.*, 30 *Am. & Eng. R. Cas.* 40, 26 *So. Car.* 258, 2 *S. E. Rep.* 19.—REVIEWING Piedmont Mfg. Co. v. Columbia & G. R. Co., 19 *So. Car.* 353.

* Liability of railroad company transporting cars of another company, see notes, 32 *Am. & Eng. R. Cas.* 524; 18 *Id.* 511.

643. Charter liability of Michigan Central road.—The provisions of the charter of the Michigan Central Railroad with reference to storage at its depots and exemption from liability, except as warehousemen—held, not to affect their liability as an intermediate carrier in such a case. *Mills v. Michigan C. R. Co.*, 45 *N. Y.* 622.—DISTINGUISHED IN *Michigan C. R. Co. v. Lantz*, 32 *Mich.* 502.

4. Rights, Duties, and Liabilities of Final Carrier.

644. Liability for loss or injury on its own road.—Where goods are shipped over a connecting line of railroads, the last road of the line receiving them "as in good order" for transportation is liable to the consignee for damages. *Georgia R. Co. v. Gann*, 68 *Ga.* 350.

The fact that the carrier received butter from a connecting carrier in a sealed car, does not protect him from liability, as he is vested with full power, if necessary for the protection of the goods, to enter the car. *Beard v. Illinois C. R. Co.*, 42 *Am. & Eng. R. Cas.* 445, 79 *Iowa* 518, 7 *L. R. A.* 280, 44 *N. W. Rep.* 800.

Where a second carrier receives goods and negligently holds them in its warehouse, where they are injured, it is liable as a common carrier; and the fact being established that such negligence caused the injury, it is proper for the court to instruct the jury that the only question to be considered is the question of damages. *Michaels v. New York C. R. Co.*, 30 *N. Y.* 564.—FOLLOWED IN *Dunham v. Boston & M. R. Co.* 70 *Me.* 164; *Condict v. Grand Trunk R. Co.*, 54 *N. Y.* 500.

The liability of the last of connecting railroads is for its own acts, or for injuries which freight receives while it is in its custody for the purpose of transportation, and not for the acts of other companies which may have previously injured such freight. *Smith v. New York C. R. Co.*, 43 *Barb. (N. Y.)* 225; affirmed in 41 *N. Y.* 620.

A railroad company which for a reasonable compensation receives into its exclusive custody and control and draws over its railroad the cars of another and connecting railroad company, with their passengers and freight, is, in the absence of any special contract to the contrary, liable as a common carrier for any injury to the cars so received while the same are in transit over its road.

Vermont & M. R. Co. v. Fitchburg R. Co.,
14 *Allen (Mass.)* 462.

Where a railroad company receives loaded cars from another road for transportation, it is liable as a common carrier in case they are destroyed *en route* by fire. If destroyed by fire after delivery to the consignee, or after they have been tendered to him, the company is not liable if not in fault. In the latter case its duties are only those of a warehouseman. *Semble*, that no implied contract to return cars arises where they are received loaded for transportation and delivery to a consignee. *Missouri Pac. R. Co. v. Chicago & A. R. Co.*, 23 *Am. & Eng. R. Cas.* 718, 25 *Fed. Rep.* 317.—FOLLOWING *Peoria & P. U. R. Co. v. Chicago, R. I. & P. R. Co.*, 109 *Ill.* 135.—COMMENTED ON IN *Peoria & P. U. R. Co. v. United States Rolling Stock Co.*, 136 *Ill.* 643.

Goods in transit passed over two lines of railroad. The second road admitted receiving them all, and at the place of destination undertook to deliver them to the consignee through a cartage company who were incorporated common carriers, but some of the goods were lost. *Held*, that an action would lie against the second line of road. *Roach v. Canadian Pac. R. Co.*, 1 *Man.* 158.

645. Liability for loss or injury on preceding road.—Where one common carrier receives goods from another in apparent good order, and subsequent to the delivery to the consignee it appears that the goods had been previously wet and injured by some other carrier, the carrier who last received the goods is not liable for the injury they received while in charge of a previous carrier, with whom he had no connection. *Carson v. Harris*, 4 *Greene (Iowa)* 516.

When goods are delivered to a carrier for transportation beyond the terminus of his line, and they are there delivered to another carrier to be forwarded, the latter is not liable for any damage to the goods, except upon proof that the injury occurred while they were in his custody; and it makes no difference that he received freight as agent for the other lines in addition to his own charges for transportation. *Hunt v. New York & E. R. Co.*, 1 *Hill. (N. Y.)* 228.

The provision of the New York statute that "whenever two or more railroads are connected together, any company owning

either of said roads receiving freight to be transported to any place on the line of either of said roads shall be liable as common carriers for the safe delivery of such freight at such place," was intended to apply only to the company originally receiving and undertaking to convey and deliver the freight, and not to create any liability against any other company for an injury sustained by goods while in the possession of the company originally receiving them. *Smith v. New York C. R. Co.*, 43 *Barb. (N. Y.)* 225; *affirmed in* 41 *N. Y.* 620.—REVIEWED IN *Bärter v. Wheeler*, 49 *N. H.* 9.

A second carrier is not liable for a loss of goods on proof showing a delivery to the first carrier, consigned to a point on the second carrier's line, but where there is no proof that the goods came to the possession of the second carrier, or of any joint contract between the two roads for the carrying of through freights. *South Carolina R. Co. v. Bradford*, 10 *Rich. (So. Car.)* 307.

Appellant had adopted a regulation that it would not receive goods that had been damaged while in the hands of other roads unless it was indemnified against a liability for such damages. Appellee's freight was damaged when tendered to appellants by the Wabash road. That road could not force appellant to receive the goods and take the risk of suit by the consignee. The regulation was reasonable, and appellee's loss by delay arose through the fault of other lines, for whose acts and omissions appellant is not responsible, and appellee cannot recover. *Missouri Pac. R. Co. v. Weisman*, 2 *Tex. Civ. App.* 86, 21 *S. W. Rep.* 426.

Goods were shipped to be carried over connecting lines. The clerk of the first line represented to the second that the goods had arrived at the latter's warehouse, whereupon the latter gave the former a receipt; but as a fact the goods were not in the warehouse but had gone astray through a mistake in marking the car. *Held*, as both had been negligent, the owner could recover of the second company and allow the two companies to settle the ultimate liability between themselves. *Northern Transp. Co. v. McClary*, 66 *Ill.* 233.

646. Liability under Georgia Code.—Notwithstanding the provision of Ga. Code, § 2084—that where there are several connecting railroads under different companies, the last company which has re-

ceived the goods in "good order" shall be responsible to the consignee for any damage, open or concealed, done to the goods, and such companies shall settle among themselves the question of ultimate liability—the company sued for injury sustained by goods in transportation can rebut the presumption of its *prima-facie* liability therefor by evidence going to show that the damage was not done to the goods on either of the lines of railroad over which the goods were carried, but was done before the goods were received by either of the connecting railroads. The statute cited evidently contemplates damage done to the goods by one or other of the railroad companies, and not damage done to the goods before the same were received by the railroad companies, or either of them. *Central R. & B. Co. v. Rogers*, 57 Ga. 336.

A custom between connecting railroads that when the cars of one road are switched off upon the track of the other the latter is responsible for the freight, although receipts are not given until the freight has been examined, is a good and valid custom as between the roads, but does not bind the owner of the goods. The company last receipting for the goods is liable to the owner thereof. *Wallace v. Rosenthal*, 40 Ga. 419.

Section 2084 of the Code does not change the rule of liability of railroad companies as common carriers, as it existed at the time of the adoption of that section of the Code. It only declares the rule of liability to be the same as that theretofore existing, where there was no contract, expressed or implied, general or special, by the first carrier, to transport the goods to their final destination, and it gives a cumulative remedy to the consignee. *Falvey v. Georgia R. Co.*, 76 Ga. 597.

On a shipment from Boston to Atlanta the last road named on a bill of lading, which runs into Atlanta, cannot avoid its liability, under § 2084, as the last of several connecting roads, by the simple fact that it pushed the cars to the track of another railroad in Atlanta and got that road to haul them with its engine 2½ miles and deliver them to the place to which they were shipped. *Western & A. R. Co. v. Exposition Cotton Mills*, 35 Am. & Eng. R. Cas. 602, 81 Ga. 522, 7 S. E. Rep. 916, 2 L. R. A. 102.

A declaration alleging that defendant was only one of connecting railroads of a continuous line, and received from another

railroad named certain machinery easily injured by exposure, which it negligently transported in open cars, states a common-law action, and is not sufficient to raise the question of defendant's liability, under § 2084. A plaintiff relying on the provisions of this statute for recovery should put defendant on notice of his intention thereof by proper allegation in his declaration, as the proof and the liability thereunder are entirely different from that of a common-law action. *Western & A. R. Co. v. Exposition Cotton Mills*, 35 Am. & Eng. R. Cas. 602, 81 Ga. 522, 7 S. E. Rep. 916, 2 L. R. A. 102.

The suit being for delay in delivering the goods and not for damage to them, § 2084 was not applicable. *East Tenn., V. & G. R. Co. v. Johnson*, 85 Ga. 497, 11 S. E. Rep. 809.

A declaration against a common carrier alleged the delivery to it of a lot of bacon, and through its negligence, and while in its custody, the same became unsound and damaged; and upon plaintiff refusing to receipt for the same in good condition the carrier converted it to its own use. The evidence showed that the goods were received from a connecting carrier, and almost conclusively that the injury occurred before reaching defendants. *Held*, that it was error to give in charge § 2084 of the Code. *Columbus & W. R. Co. v. Tillman*, 79 Ga. 607, 5 S. E. Rep. 135.—DISTINGUISHING *Georgia R. Co. v. Gann*, 68 Ga. 350.

647. Liability as between carriers.—If a carrier undertakes to transport goods to a given point, and at the end of its line delivers the same to a packet company, who agrees to deliver the same at a certain point to a railway company, which it does, and the goods are lost by the fault of the latter company, and the first carrier is compelled to pay, it cannot recover over from the packet company, but must look to the railway company to whom they were last delivered. *Chicago & N. W. R. Co. v. Northern L. Packet Co.*, 70 Ill. 217.

A railroad company contracted with another company owning a connecting line to draw over their own road all the passenger and freight cars of the latter company, with their contents, the latter company agreeing to save the former harmless from all claims and expenses arising from any injury to passengers, or loss or damage of baggage, goods, and freight while in transit over their

road, unless occasioned by the negligence or default of the transporting company, in which case the loss or damage should be borne by the latter. During the transportation of certain cars under this contract, they were injured by a defect in the track of the transporting company, arising from a cause beyond their control. *Held*, that the transporting company were liable to the other company therefor, either as common carriers or upon the contract. *Vermont & M. R. Co. v. Fitchburg R. Co.*, 14 Allen (Mass.) 462.

648. Liability as affected by want of privity of contract.—Where the contract of a common carrier contemplates the employment of a connecting carrier to complete the transportation, the mere reception of the property by the latter will create sufficient privity between it and the shipper to enable him to maintain an action against it on the contract, and in such case the connecting carrier will be entitled to the benefit of all valid limitations upon the carrier's liability provided in the contract; but in order to avail itself of them they must be specially pleaded. *Halliday v. St. Louis, K. C. & N. R. Co.*, 6 Am. & Eng. R. Cas. 433, 74 Mo. 159, 41 Am. Rep. 309.—DISTINGUISHED IN *Adams Exp. Co. v. Harris*, 40 Am. & Eng. R. Cas. 151, 120 Ind. 73, 21 N. E. Rep. 340.

Where plaintiffs purchased fertilizers in Charleston, to be shipped to them at a station on defendant's railroad, and the fertilizers were delivered in Charleston to a railroad company, which gave a bill of lading undertaking to ship them to the station named, but making no mention of the defendant company, which had no privity or contractual relation with the initial railroad company (so far as appeared) and no connection with the shipment until the fertilizers were delivered to it in Atlanta by an intermediate railroad company, it was error to charge that if the defendant was one of the connecting lines over which the goods were to be shipped it would be liable for unreasonable delay of the shipment, whether such delay occurred on its own line or not. *East Tenn., V. & G. R. Co. v. Johnson*, 85 Ga. 497, 11 S. E. Rep. 809.—FOLLOWING *Shea v. Southern Exp. Co.*, 38 Ga. 519; *Cohen v. Southern Exp. Co.*, 45 Ga. 148. QUOTING *Cohen v. Southern Exp. Co.*, 53 Ga. 130.

Goods were shipped which must pass over two roads to reach the consignee, the de-

fendant road being the second. The first road carried the goods to the end of its line and notified defendants, and requested them to forward them. Owing to an accumulation of freights defendants could not at once transport them, and the next day they were burned while in possession of the first company. *Held*, that suit could not be maintained against defendants. Whatever contract existed for through carriage was based on the shipping receipt of the first company, which created no privity of contract between plaintiff and defendant company. The over-accumulation of freights was also a sufficient reason for not receiving the goods. *Crawford v. Great Western R. Co.*, 18 U. C. C. P. 510.

Plaintiff could not in any case recover more than nominal damages, if even that, as the value of the goods which had been destroyed by fire would not be the damages which would naturally flow from a breach of contract, or refusal to carry, in disregard of defendants' common-law obligation to do so; for that the loss by fire arose from the omission to insure, and it would by no means follow that even if defendants had received the property, it might not have been on the express condition of exemption from liability in that event. *Crawford v. Great Western R. Co.*, 18 U. C. C. P. 510.

Goods were sent by another railway company and were carried by it to its crossing point with defendants' line, when the goods were delivered over to defendants to be carried to the plaintiff. *Held*, that an action for the loss of the goods was not maintainable by plaintiff against defendants, as there was no privity of contract between them. *Richardson v. Canadian Pac. R. Co.*, 45 Am. & Eng. R. Cas. 413, 19 Ont. 369.

649. Liability as to perishable freight.—A second carrier of apples is not liable for their loss simply because they are delivered frozen, where there is no evidence that they were delivered to it before freezing, and there is evidence that the weather was cold before it received them from the next preceding carrier. *Sweetland v. Boston & A. R. Co.*, 102 Mass. 276.

If the owner of fruit which is liable to be injured by freezing chooses to send it at a season of the year when it is exposed to such a risk, in the absence of a special contract he takes the risk himself, and not the carrier, who is only bound to take reason-

able care of the fruit. *Sweetland v. Boston & A. R. Co.*, 102 *Mass.* 276.

650. Liability to preceding carrier for charges.—In the absence of a written agreement a steamship company cannot be held liable for advanced charges for the transportation of goods which were burned on its dock, where they had been placed by a railroad company, such charges having been paid by the railroad company, which was the last one of a line of connecting carriers engaged in transporting such goods, according to the custom of such connecting railroad companies to pay to the company from which the goods were received its proportion of freight charges, although such steamship company was one of the connecting carriers, where it appeared to be the custom that the steamship companies never assumed the liability for land charges until the goods had been laden on the vessels, *New York, L. E. & W. R. Co. v. National Steamship Co.*, 55 *Am. & Eng. R. Cas.* 438, 137 *N. Y.* 23, 32 *N. E. Rep.* 993.

651. Liability for wrongful delivery.—A carrier who receives goods from another carrier, to be delivered to the consignee, is not presumed to know that they are the property of the person who ships them, the presumption of law being that they are the property of the consignee. *Bingham v. Lamping*, 26 *Pa. St.* 340.

It seems that a carrier receiving goods from another carrier is not justified in a delivery to the wrong person without a bill of lading, where one was made, although the delivery was in accordance with the papers received from the preceding carrier, in which a different consignee is named from the one named in the bill. *Furman v. Union Pac. R. Co.*, 32 *Am. & Eng. R. Cas.* 500, 106 *N. Y.* 579, 13 *N. E. Rep.* 587, 11 *N. Y. S. R.* 192; reversing 35 *Hun* 669, *mem.*

When goods are consigned deliverable to the order of the consignor, and the bill of lading with a draft for the price, drawn on the goods, attached, is forwarded for collection, the purchaser has no title to the goods until the draft is paid and the bill of lading is indorsed to him; and a previous sale of the goods to arrive, is void as against a person advancing the money to pay the draft to whom the bill of lading was indorsed by the drawee as soon as he obtained possession; and a second carrier who receives the goods from the first carrier to transport

to their destination, with knowledge on whose account they are carried, though without knowledge of the bill of lading, is liable to the holder of the bill of lading if he delivers the goods to such a purchaser. *Alderman v. Eastern R. Co.*, 115 *Mass.* 233. —*FOLLOWING Newcomb v. Boston & L. R. Co.*, 115 *Mass.* 230.

652. Liability where one road acts as agent of the other.—When two carriers connect at a point where the one is accustomed to receive, for the purpose of completing transportation, goods carried by the other and destined to points on its line, the goods in question being thus received, and the only evidence of their relation to each other is that they do not *pro rate* freight, the one carrier will be held to be the agent of the other carrier and of the consignor and consignee for the transportation of goods to their destination. *Southern Exp. Co. v. Hess*, 53 *Ala.* 19.

In such a case, the receipt given for the goods by the carrier at the place of shipment will be evidence against the last carrier for the purpose of showing the goods delivered, their condition at the time of delivery, and the terms of the shipment. *Southern Exp. Co. v. Hess*, 53 *Ala.* 19.

Where a contract for transportation of goods over connecting lines of railway is made with one railway company as agent of the other, and the latter company transports the goods and at the end of a trip presents a bill for the charges, it cannot, when sued for injury to the goods by its servants, deny the agency. *Norfolk & W. R. Co. v. Read*, 87 *Va.* 185, 12 *S. E. Rep.* 395.

The defendant entered into an agreement with a narrow-gauge railway company to furnish to the latter facilities for running its engines and cars over defendant's track between Rob Roy and Pine Bluff stations of defendant's line; plaintiff shipped cotton over the narrow-gauge road, consigned to himself at Pine Bluff, and took bills of lading therefor. In consequence of defendant's failure to comply with its contract, the narrow-gauge railway company was unable to carry the cotton to Pine Bluff, and was compelled to throw it off at Rob Roy, where it was exposed to the rain and mud, and thereby loss was incurred for which plaintiff seeks damages. *Held*: (1) that the contract between the two railway companies did not constitute a partnership nor make the nar-

row-gauge railway company the agent of defendant for receiving freight; (2) that if it be conceded that the plaintiff might recover for a violation of a contract to which he was not a party, he cannot recover in this case, because the proximate cause of the injury complained of was, not the violation by defendant of its contract with the narrow-gauge railway company, but the exposure of the cotton to the rain and mud. *St. Louis, A. & T. R. Co. v. Neel*, 55 Am. & Eng. R. Cas. 428, 56 Ark. 279, 19 S. W. Rep. 963.

653. Presumption as to condition of goods.*—(1) *General rule*.—When goods received by one of several connecting carriers for shipment beyond its line are properly packed or loaded when thus received, and are delivered by the terminal carrier in a damaged condition, the presumption is, in the absence of proof to the contrary, that the goods were damaged on the line of such terminal carrier. *Flynn v. St. Louis & S. F. R. Co.*, 43 Mo. App. 424.

The last carrier will be held liable if it does not show that the loss or injury occurred on some preceding line, on the presumption that the goods delivered to the first carrier were also delivered to the last, and in the same condition in which they were started. *Savannah, F. & W. R. Co. v. Harris*, 42 Am. & Eng. R. Cas. 457, 26 Fla. 148, 71 So. Rep. 544.—**APPROVING** *Knight v. Providence & W. R. Co.*, 9 Am. & Eng. R. Cas. 90, 13 R. I. 572.—*Smith v. New York C. R. Co.*, 43 Barb. (N. Y.) 225; *affirmed in* 41 N. Y. 620. *Shriver v. Sioux City & St. P. R. Co.*, 24 Minn. 506.—**FOLLOWING** *Smith v. New York C. R. Co.*, 43 Barb. (N. Y.) 225; *Laughlin v. Chicago & N. W. R. Co.*, 28 Wis. 204.

This rule is not changed by the fact that the last carrier transports them over its line in the foreign car in which it received them. *Leo v. St. Paul, M. & M. R. Co.*, 12 Am. & Eng. R. Cas. 35, 30 Minn. 438, 15 N. W. Rep. 872.

When goods are shipped in a sealed car from N. to B. under a through bill of lading, and an action is brought against the last carrier for loss or damage, the presumption is, in the absence of proof of loss or damage on the route, that the contents of the car when received by him were in the same condition as when shipped from N.,

and a recovery cannot be had against him for the contents of a barrel which was found empty when the car was opened, when the evidence does not show how many barrels were delivered in N. nor in what condition they were. *Cooper v. Georgia Pac. R. Co.*, 92 Ala. 329, 9 So. Rep. 159.

(2) *Illustrations*.—The plaintiff delivered goods to a road in New York, which were put in a car to be transported in that car over several roads to a point in Florida. The car was received by defendant and taken over its road to Jacksonville, an intermediate point, and there unloaded by defendant. When the next and last carrier made delivery at the point of destination some of the goods were missing and others injured. The evidence did not show that the lost goods were in the car when it was unloaded or that defendant delivered them to the next carrier, but did show that some of the goods were injured when taken out. *Held*, that the presumption which applies to a last carrier, that the goods were delivered to it as they were started, applies to intermediate carriers and to defendant, and that defendant, having failed to show delivery of the lost goods to the next carrier and that those injured were in the condition in which it received them, was liable. *Savannah, F. & W. R. Co. v. Harris*, 42 Am. & Eng. R. Cas. 457, 26 Fla. 148, 7 So. Rep. 544.

Goods were billed from St. Louis, Mo., to Athens, Ga. As far as Atlanta, Ga., through rates of freight were paid, and from Atlanta to Athens local rates were charged. *Held*, that even if this did not make the Georgia railroad (from Atlanta to Athens) liable as the last road of a through line, still the receipt by it of the goods for transportation without exception was impliedly a receipt as in good order, and would render that road liable for damages occurring thereto. *Georgia R. Co. v. Gann*, 68 Ga. 350.—**DISTINGUISHED** in *Columbus & W. R. Co. v. Tillman*, 79 Ga. 607, 5 S. E. Rep. 135.

Where goods in a box were shipped by three successive carriers, and when delivered to the consignee (although there were no external indications of the fact) the box was found to have been opened and certain goods abstracted therefrom—*held*, that the jury might presume, in the absence of evidence to the contrary, that the box remained unopened until it came into the possession of the last carrier, and that the

* See also *ante*, 638; *post*, 675.

loss occurred through its fault. *Laughlin v. Chicago & N. W. R. Co.*, 28 Wis. 204, 5 Am. Ry. Rep. 323.—QUOTING *Nashua Lock Co. v. Worcester & N. R. Co.*, 48 N. H. 339. REVIEWING *Brintnall v. Saratoga & W. R. Co.*, 32 Vt. 665.—DISAPPROVED IN *Marquette, H. & O. R. Co. v. Kirkwood*, 9 Am. & Eng. R. Cas. 85, 45 Mich. 51. FOLLOWED IN *Shriver v. Sioux City & St. P. R. Co.*, 24 Minn. 506. REVIEWED IN *Peterson v. Chicago, R. I. & P. R. Co.*, 80 Iowa 92, 45 N. W. Rep. 573.

654. Burden of proof.—In an action for injuries against the connecting carrier the burden is on the plaintiff to show that the injury occurred after the freight came into the possession of the defendant. *Western R. Co. v. Harwell*, 97 Ala. 341, 11 So. Rep. 781. *Lake Erie & W. R. Co. v. Oakes*, 11 Ill. App. 489.

The presumption is that goods shipped in good order continue in that condition until delivery to a connecting carrier, and the burden rests on such connecting carrier to show that they were not in good condition when received by him. *Beard v. Illinois C. R. Co.*, 42 Am. & Eng. R. Cas. 445, 79 Iowa 518, 7 L. R. A. 280, 44 N. W. Rep. 800. *Mobile & O. R. Co. v. Tupelo F. Mfg. Co.*, 42 Am. & Eng. R. Cas. 497, 67 Miss. 35, 7 So. Rep. 279. *Smith v. New York C. R. Co.*, 43 Barb. (N. Y.) 225; affirmed in 41 N. Y. 620.—FOLLOWED IN *Shriver v. Sioux City & St. P. R. Co.*, 24 Minn. 506. QUOTED IN *Peterson v. Chicago, R. I. & P. R. Co.*, 80 Iowa 92, 45 N. W. Rep. 573.

Where the last of connecting carriers receives goods and receipts for them as in good order, it is liable if they are delivered in a damaged condition, unless it proves that the injury in fact occurred while in the hands of a previous carrier; and the burden of proof to show this is on the last carrier. *Dixon v. Richmond & D. R. Co.*, 74 N. Car. 538, 13 Am. Ry. Rep. 99.

The last of a series of connecting lines of railroad is responsible for a loss of goods occurring during the transportation, subject to the limitations contained in the contract between the shipper and the company to which the goods were delivered, unless the company sued can show that the loss did not occur on its road. *Memphis & C. R. Co. v. Holloway*, 9 Baxt. (Tenn.) 188.—QUOTED IN *Louisville & N. R. Co. v. Weaver*, 16 Am. & Eng. R. Cas. 218, 9 Lea

(Tenn.) 38.—*Faison v. Alabama & V. R. Co.*, 69 Miss. 569, 13 So. Rep. 37.

This presumption is not overcome by proof that the car into which all the cases were loaded by the preceding carrier came "under seals" of that carrier, and that it had no end windows, it appearing that on arrival at destination it was for the first time noted that one case had been somewhere recovered, and it not being shown when, where, or how the missing case was lost, or that such seals were sufficient to bar all access, and continued unbroken throughout the journey. *Faison v. Alabama & V. R. Co.*, 69 Miss. 569, 13 So. Rep. 37.

655. Prima-facie evidence of default.—Upon proof that goods "in good order," or "in apparent good order," or "as in good order," are received on any railroad of a line in connection with which "the last company" runs its road, the presumption will arise that such condition of the goods continued up to the time when the last company received them, and the last company will be responsible to the consignee, unless it shows that the goods were not received by it in such good order, or apparent good order; but there must be some legal evidence to show either that the last company received the goods as in good order, or that some other railroad company connecting with it so received them; and in the absence of any legal evidence of either fact, a nonsuit was properly awarded, especially as in this case there was no proof that defendant received the corn from any other carrier, or how it was received, after the indorsement upon the bill of lading by the agent was rejected as evidence. *Evans v. Atlanta & W. P. R. Co.*, 56 Ga. 498.

656. Lien for freights advanced or earned.*—When the consignor delivers goods to one carrier to be carried over his route and thence over the route of another carrier, he makes the first carrier his forwarding agent, and the second carrier has a lien, not only for the freight over his own part of the route, but also for any freight on the goods paid by him to the first carrier. *Potts v. New York & N. E. R. Co.*, 3 Am. & Eng. R. Cas. 424, 131 Mass. 455, 41 Am. Rep. 247.

* Lien of connecting carriers for freight charges, see notes, 40 AM. & ENG. R. CAS. 148; 55 *Id.* 416.

If a carrier, having no line of its own to the point of destination, deliver the goods to another carrier having a line nearest to said destination (in doing which it performs its duty), it is the duty of the carrier last named to receive the property; and it has the right to pay the back charges thereon and is entitled to a lien on the goods for the repayment of the same, as well as for its own freight bills. *Moore v. Henry*, 18 Mo. App. 35.

The initial carrier acts in the absence of special instructions from the owner to the succeeding carriers, as his forwarding agent, in giving directions to them as to the transportation of the goods; and in case of a mistake made by the first carrier in directing the goods, or in the bills, by reason of which they are sent to the wrong place, the last carrier has a lien upon them for the freight earned by him, and also for the sums paid by him for the freight from the commencement of the transportation. *Briggs v. Boston & L. R. Co.*, 6 Allen (Mass.) 246.

If a railroad company which has received goods for transportation to an extra-terminal point, with directions to forward the same thereto upon a specified line of railway, delivers the same to a connecting carrier other than that specified by the shipper, and such connecting carrier receives the goods in the usual course of business, without notice of the special directions, the latter carrier is entitled to charge reasonable freight rates for the carriage of the goods and has a lien therefor. *Price v. Denver & R. G. R. Co.*, 37 Am. & Eng. R. Cas. 626, 12 Colo. 402, 21 Pac. Rep. 188.

Where one carrier company receives goods at the end of the initial carrier company's line, and the initial company neglects to inform it that the freight was paid, it is not responsible for the omission, and has the right to retain the goods in its possession for a reasonable time, until it can inquire into and ascertain the facts. *Union Exp. Co. v. Shoop*, 85 Pa. St. 325.

The last carrier may, as agent for the first, with whom the contract was made, collect the freight due to the first either under the contract or by asserting a lien on the goods. *Trottier v. Red River Transp. Co., Man. (T. Wood)* 255.

After some parcels had been delivered to the consignees by the P. & W. R. R. Co. and found damaged they directed the company to receive no more parcels of the lot.

Held, that after such direction the company had no authority to receive the other parcels or to pay any back freight upon them. *Knight v. Providence & W. R. Co.*, 9 Am. & Eng. R. Cas. 90, 13 R. I. 572, 43 Am. Rep. 46.

If goods are delivered to a carrier to be forwarded by a specified connecting line and the receiving carrier fraudulently diverts them to a rival line which receives them in the knowledge of the fact that specific directions to ship by another line had been given, the connecting carrier actually receiving the goods has no lien for freight earned or advanced. *Denver & R. G. R. Co. v. Hill*, 40 Am. & Eng. R. Cas. 145, 13 Colo. 35, 4 L. R. A. 376, 21 Pac. Rep. 914.

657. Demanding more than the agreed rate.—If a carrier receives goods for shipment over several connecting lines and guarantees a through rate, where no joint rate has been agreed upon by such connecting lines, the last carrier has a lien on the goods for its own regular charges, together with the charges due the prior connecting lines advanced by it in ignorance of the guaranty, though the amount so paid, added to its charges, exceeded the guaranteed rate. *Loewenberg v. Arkansas & L. R. Co.*, 56 Ark. 439, 19 S. W. Rep. 1051.

Where goods are delivered to a carrier under a contract which does not purport to bind the contracting carrier as a carrier for the whole distance, but contemplates delivery to other carriers not specified, a connecting carrier to which the goods are delivered for transportation to their destination has a lien for unpaid freight, although the consignor paid to the contracting carrier a sum intended to be in full payment thereof, but which in point of fact was less than the usual rate. *Crossan v. New York & N. E. R. Co.*, 40 Am. & Eng. R. Cas. 136, 149 Mass. 196, 21 N. E. Rep. 367.—NOT FOLLOWING *Marsh v. Union Pac. R. Co.*, 3 McCrary (U. S.) 236.

A carrier receiving goods from another carrier, and discovering that the articles are such that the rates are higher than those named in the bill of lading issued by the first carrier, may transport them to their destination and collect the increased rate. *Sumner v. Southern R. Assoc.*, 9 Am. & Eng. R. Cas. 18, 7 Baxt. (Tenn.) 345.

The first and the last carrier being independent carriers, and having between them

no contract relation, and the bill of lading issued by the former being silent as to any contract to ship the goods as "released" or at a reduced rate, and the last carrier having paid charges and earned freight without notice of any contract outside of the bill of lading, the right to hold the goods for payment of the charges advanced and freight earned, on the basis of ordinary rates, was not affected by such secret outside contract. There can be no recovery for damage to the goods sustained without fault or negligence of the last carrier, whilst they were rightfully detained to await payment as preliminary to making a delivery to the consignee. *Georgia R. & B. Co. v. Murray*, 45 *Am. & Eng. R. Cas.* 334, 85 *Ga.* 343, 11 *S. E. Rep.* 779.

Where, pursuant to an agreement between connecting railroads, freight is received by one, to be delivered at a point on the other for a sum less than the aggregate regular charges of both, the latter, upon receiving such freight, must deliver it at such point to the consignee, upon his tendering such sum to the proper agent of the latter. *Evansville & C. R. Co. v. Marsh*, 57 *Ind.* 505, 18 *Am. Ry. Rep.* 482.

Tender of the agreed freight for transportation of goods over connecting roads, contracted for as an entirety, entitles the consignee to receive the goods from the last company in the line, irrespective of arrangements between the two companies for division of such charges, or of whether it is enough to satisfy the usual separate charges of both companies or not. *Evansville & C. R. Co. v. Marsh*, 57 *Ind.* 505, 18 *Am. Ry. Rep.* 482.

An action for damages to nursery stock by freezing was instituted by the consignee against the carrier to whose care one of the connecting lines had delivered the property, and the plaintiff's evidence tended to show that the damage to the stock occurred after the goods arrived at their destination and while they were wrongfully withheld by the defendant on a charge for transportation which it had no right to make, a through guaranteed contract at a much less rate having been accepted by the original carrier at the time of the consignment. This evidence made out a sufficient *prima-facie* case to entitle the plaintiff to go to the jury. A judgment of nonsuit therefore was erroneous. *Milton v. Denver & R. G. R. Co.*, 1 *Colo. App.* 307, 29 *Pac. Rep.* 22.

658. Right of transfer company to charges.—Where goods come by the hands of successive carriers to the depot of the last one, in the city where the consignee lives, the carriage ends, and if a transfer company, without special authority from the consignee, or authority warranted from usage known to and acquiesced in by the consignee, takes the goods from the depot to the consignee's warehouse, the consignee incurs no obligation to him. *Kansas City Transfer Co. v. Neiswanger*, 18 *Mo. App.* 103.—*QUOTING Rankin v. Pacific R. Co.*, 55 *Mo.* 167; *Eaton v. St. Louis, I. M. & S. R. Co.*, 12 *Mo. App.* 386.

If a transfer company has been for a considerable time in the habit of hauling freight belonging to consignees from the depot to their place of business, and paying charges thereon and collecting them from the consignees, and this is recognized by the consignees and is in accordance with the custom between them, the transfer company has a right to continue in said habit or custom until notified by the consignees to desist therefrom. *Kansas City Transfer Co. v. Neiswanger*, 18 *Mo. App.* 103.

659. Delay in delivering*—Holding for bill of back charges.—Where a railroad company receives goods on a contract made with the owner, or his agent, to carry them to their destination, beyond the terminus of that company's line, and while in the course of transportation they come into the hands of a connecting railroad company, by whose negligence there is unreasonable delay in delivering them at destination, the latter is liable in an action of tort for the delay, although there be no contract relations between the two companies, nor any contract between the owner of the goods and the company causing the damage. *Johnson v. East Tenn., V. & G. R. Co.*, 55 *Am. & Eng. R. Cas.* 446, 90 *Ga.* 810, 17 *S. E. Rep.* 121.

660. Statutory duty to receive from connecting line—Strikes and boycotts.—A railroad doing business as a common carrier has no right to refuse to deliver to or receive from a connecting railroad cars of such connecting line, either loaded or empty, or freight of any kind which is ordinarily transported between

* Liability of last carrier for delay in a through shipment, see 45 *AM. & ENG. R. CAS.* 332, *abstr.*

railroad companies according to the proper and usual course of business; and it is no excuse for the action of a railroad company in so refusing cars or freight properly offered that the receiving of them might or probably would involve the company in a strike and boycott of employes, which exists on and against the road from which it so refuses to receive the cars or freight. *Beers v. Wabash, St. L. & P. R. Co.*, 35 Am. & Eng. R. Cas. 646, 34 Fed. Rep. 244.

A strike of locomotive engineers on plaintiff's road and the prospect that it would extend to defendant's road if plaintiff's cars were accepted, is no defense to a suit for a mandatory injunction to compel defendant, under the Interstate Commerce Act and the laws of Iowa, to receive freight and passengers from plaintiff's connecting road. *Chicago, B. & Q. R. Co. v. Burlington, C. R. & N. R. Co.*, 34 Fed. Rep. 481.—FOLLOWED IN *Payne v. Kansas & A. V. R. Co.*, 47 Am. & Eng. R. Cas. 228, 46 Fed. Rep. 546; *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.*, 53 Am. & Eng. R. Cas. 307, 54 Fed. Rep. 730.

661. Penalty under Arkansas statute for failure to deliver.—

Under a joint traffic arrangement between three connecting lines of railway, a carload of flour was forwarded from Verona, Mo., via Nichols, Mo., and Jonesboro, Ark., to Clarendon, Ark. By mistake the intermediate carrier transported the flour beyond Jonesboro, where it should have been delivered to the last carrier, to Hopefield, Ark., and delivered it to a carrier not a party to the traffic arrangement, by which it was delivered to the last carrier above mentioned at Brinkley, Ark., a station situated between Jonesboro and Clarendon. In actions to recover the statutory penalty from the last carrier for refusing to deliver the flour upon tender of the charges shown by the bill of lading and to recover possession of the flour—*held*: (1) that where the bill of lading does not show all of the charges that are legally demandable by the carrier, the statutory penalty is not recoverable from the carrier upon its failure to deliver freight on tender of the charges shown by bill of lading; (2) that, the last carrier not being responsible for the additional charges, the consignee is not entitled to recover the goods carried upon tendering the charges in the bill of lading, but will be required to pay

the additional charges made by the connecting line that was not a party to the traffic arrangement. *Fordyce v. Johnson*, 56 Ark. 430, 19 S. W. Rep. 1050.—FOLLOWED IN *Loewenberg v. Arkansas & L. R. Co.*, 56 Ark. 439.

662. Pleadings.—Plaintiff, in an action against the second of two connecting carriers for the loss of baggage, does not state a cause of action where he fails to state that the carriers were joint contractors, or that the second carrier received the baggage. The sale of a through ticket is not evidence of a joint contract by which the second carrier is liable for such loss by the first. *Felder v. Columbia & G. R. Co.*, 27 Am. & Eng. R. Cas. 264, 21 So. Car. 35, 53 Am. Rep. 656.—DISTINGUISHED IN *Wallingford v. Columbia & G. R. Co.*, 30 Am. & Eng. R. Cas. 40, 26 So. Car. 258, 2 S. E. Rep. 19.

663. Evidence.*—Where evidence shows that a certain quantity of paper was shipped over a railroad as through freight, was in good order at an intermediate point before coming over the defendant road to its destination, and that the packages had been afterward broken open, together with evidence that plaintiff weighed it and that it failed to be as much as was charged and paid for, these facts will justify a judgment for plaintiff for such deficiency. *Southwestern R. Co. v. Cohen*, 49 Ga. 627.

On the trial of an action against three railroad corporations, whose roads form a continuous line, to recover for goods delivered on the several roads for transportation over the line and destroyed by fire on the third road in the course of transportation, evidence of declarations of a master of transportation employed by the second and third corporations, not accompanying or forming part of any official act, nor within the scope of his authority, is inadmissible against either defendant. *Pratt v. Ogdensburg & L. C. R. Co.*, 102 Mass. 557.—FOLLOWED IN *Holsapple v. Rome, W. & O. R. Co.*, 3 Am. & Eng. R. Cas. 487, 86 N. Y. 275.

A box containing a theatre drop-curtain was injured by water while being carried from one place to another. The carriage was performed by several connecting lines of road. *Held*, that evidence that it did not rain while the box was in transit over de-

* Evidence as to loss of goods shipped over connecting lines, see note, 55 AM. & ENG. R. CAS. 450.

fendant's road tended to prove that it did not get wet while in its custody; and an instruction that the jury might consider this fact in connection with other evidence was proper. *Burwell v. Raleigh & G. R. Co.*, 25 Am. & Eng. R. Cas. 410, 94 N. Car. 451.

664. Estoppel.*—Where a carrier gave a bill of lading for goods in good order and the consignee required him to pay damages which they agreed the goods had sustained, and the consignee gave to the carrier a certificate that the goods must have been wet when received by the carrier, to induce the intermediate consignees to find out where the goods became wet, the carrier having sued the consignee, first named, to set aside their settlement, alleging fraud, etc., it was held that the latter was not merely not concluded by his said certificate of opinion, but that the *prima-facie* case made in his favor by the settlement was not affected thereby, there being no evidence that the settlement was not a real transaction. *Austin v. Talk*, 20 Tex. 164.

5. Limitation of Liability as Between Connecting Lines.

665. Initial carrier liable to place of destination, unless express limitation.†—Where a carrier receives goods marked to a point beyond its line, in the absence of proof to the contrary it will be deemed as having agreed to deliver at the place of destination. If, in such case, it desires to limit its liability to injuries occurring upon its own road, it must provide for such limitation by contract. *Foy v. Troy & B. R. Co.*, 24 Barb. (N. Y.) 382.—QUOTED IN *Nashua Lock Co. v. Worcester & N. R. Co.*, 48 N. H. 339. REVIEWED IN *Gray v. Jackson*, 51 N. H. 9.

Where several common carriers are associated in a continuous line of transportation, and in the course of the business goods are carried through the connected line for one price, under an agreement by which the freight money is divided among the associated carriers, in proportions fixed by the agreement; if the carrier at one end of the line receives goods to be transported through marked for a consignee at the

other end of the line, and on delivery of the goods takes pay for transportation through, the carrier who so receives the goods is bound to carry them, or see that they are carried, to their final destination, and is liable for an accidental loss happening in any part of the connected line. *Nashua Lock Co. v. Worcester & N. R. Co.*, 48 N. H. 339.—FOLLOWING *Goss v. New York, P. & B. R. Co.*, 99 Mass. 220. NOT FOLLOWING *Hood v. New York & N. H. R. Co.*, 22 Conn. 1; *Elmore v. Naugatuck R. Co.*, 23 Conn. 457; *Naugatuck R. Co. v. Waterbury Button Co.*, 24 Conn. 468; *Converse v. Norwich & N. Y. Transp. Co.*, 33 Conn. 166; *Perkins v. Portland, S. & P. R. Co.*, 47 Me. 573. QUOTING *Foy v. Troy & B. R. Co.*, 24 Barb. (N. Y.) 382; *McDonald v. Western R. Corp.*, 34 N. Y. 501; *Wibert v. New York & E. R. Co.*, 12 N. Y. 256; *Bradford v. South Carolina R. Co.*, 7 Rich. (So. Car.) 201; *Farmers' & M. Bank v. Champlain Transp. Co.*, 23 Vt. 186; *Weed v. Saratoga & S. R. Co.*, 19 Wend. (N. Y.) 534; *Cincinnati, H. & D. R. Co. v. Spratt*, 2 Duv. (Ky.) 4; *Hyde v. Trent & M. Nav. Co.*, 5 T. R. 389; *Burtis v. Buffalo & S. L. R. Co.*, 24 N. Y. 269; *Choteaux v. Leach*, 18 Pa. St. 224; *Nutting v. Connecticut River R. Co.*, 1 Gray (Mass.) 502. REVIEWING *Darling v. Boston & W. R. Co.*, 11 Allen (Mass.) 297.—DISTINGUISHED IN *Alabama G. S. R. Co. v. Thomas*, 32 Am. & Eng. R. Cas. 464, 83 Ala. 343, 3 So. Rep. 802. FOLLOWED IN *Burke v. Concord R. Co.*, 61 N. H. 160. REVIEWED IN *Barter v. Wheeler*, 49 N. H. 9; *Gray v. Jackson*, 51 N. H. 9; *Conkey v. Milwaukee & St. P. R. Co.*, 31 Wis. 619.

666. When no limitation allowed as to through shipments.*—When a carrier undertakes to carry goods not only over his own route but over connecting lines, he cannot contract that his responsibility shall cease at the end of his own line. He will still be held responsible, not only for the negligence of himself and his own servants, but of the connecting lines, they being considered his agents for carrying out the particular contract. *Galveston, H. & H. R. Co. v. Allison*, 12 Am. & Eng. R. Cas. 28, 59 Tex. 193.—REVIEWING *Stewart v. Merchants' Dispatch Transp. Co.*, 47 Iowa 229.—REVIEWED IN *McCarn v. International & G. N. R. Co.*, 84 Tex. 352.

* Estoppel of terminal company to deny authority of other companies to make through contract of shipment, see 45 AM. & ENG. R. CAS. 331, *abstr.* See also *post*, 722.

† See also *ante*, 44.

* See also *post*, 677.

667. Benefit of limitation lost by changing cars.—An agreement by a railway company to forward cars upon which fruit was loaded on its line of road and on lines connecting with it, and to deliver the cars thus loaded and forwarded to the agent of the shipper at Chicago, is in effect a contract that the freight shall go through upon those cars over the entire route without change. *Galveston, H. & H. R. Co. v. Allison*, 12 Am. & Eng. R. Cas. 28, 59 Tex. 193.

A railway company in receiving freight stipulated against responsibility for damage beyond its own line, but agreed to forward the goods through to Chicago in the cars in which they were loaded. *Held*, that by changing the cars after they left the road of the company it assumed the risk of the safe transportation of the goods, notwithstanding the stipulation against liability for damage beyond its own line. *Galveston, H. & H. R. Co. v. Allison*, 12 Am. & Eng. R. Cas. 28, 59 Tex. 193.

668. When benefit of limitation confined to initial carrier.*—A common carrier which receives goods from a connecting line is not entitled to the benefit of any limitation upon its common-law liability contained in an express contract entered into between the latter and the consignor, in its own behalf and for its own protection only. *Bancroft v. Merchants' Dispatch Transp. Co.*, 47 Iowa 262. *Crawford v. Great Western R. Co.*, 13 U. C. C. P. 510.

Where a contract is made with a common carrier for the transportation of goods, no intermediate carriers being designated, and containing no provisions that its stipulations shall enure to the benefit of all the carriers, an intermediate carrier, by accepting the goods for transportation, is bound by the ordinary rules, in the absence of a special contract, and cannot claim the benefit of the provisions of the original contract. *Adams Exp. Co. v. Harris*, 40 Am. & Eng. R. Cas. 151, 120 Ind. 73, 21 N. E. Rep. 340.—**DISTINGUISHING** *United States Exp. Co. v. Harris*, 51 Ind. 127; *St. Louis, I. M. & S. R. Co. v. Weakly*, 50 Ark. 397; *Halliday v. St. Louis, K. C. & N. R. Co.*, 74 Mo. 159, 41 Am. Rep. 309; *Evansville & C. R. Co. v. Androscoggin Mills*, 22 Wall. (U.

S.) 594; *Maghee v. Camden & A. R. Co.*, 45 N. Y. 514; *Lamb v. Camden & A. R. & T. Co.*, 46 N. Y. 271.

Where a contract for through transportation of goods contains a clause limiting the carrier's liability, in the absence of anything to show that the limitation is to apply to all subsequent carriers it will be construed as applying to the initial carrier only. *Babcock v. Lake Shore & M. S. R. Co.*, 43 How. Pr. (N. Y.) 317.—**NOT FOLLOWING** *Camden & A. R. Co. v. Forsyth*, 61 Pa. St. 81; *Bristol & E. R. Co. v. Cummings*, 5 H. & C. 969; *Muschamp v. Lancaster & P. J. R. Co.*, 8 M. & W. 421.—*Wallingford v. Columbia & G. R. Co.*, 30 Am. & Eng. R. Cas. 40, 26 So. Car. 258, 2 S. E. Rep. 19.

The receipt given by a carrier for goods contained restrictions upon its liability and provided that the same should enure to the benefit of any connecting carrier. A connecting carrier, on receiving the goods, gave to the first carrier a receipt containing different provisions. *Held*, that the liability of the connecting carrier for the loss of the goods depended upon the terms of the latter receipt, and it could not avail itself of the provisions of the former one. *Browning v. Goodrich Transp. Co.*, 78 Wis. 391, 47 N. W. Rep. 428.

Plaintiffs bought goods in the United States to be shipped to a point in Canada. The bill of lading issued by the road first receiving the goods contained a clause exempting that road and the roads and boats with which it connected from loss by fire, and purported to give a through rate, but which in fact was only to the border of the United States on one of the great lakes. From there to the place of destination it was to be carried by defendant road under a special contract that contained no exemption from fire. *Held*, that defendants were liable for a loss of the goods by fire while on their road. *Gordon v. Great Western R. Co.*, 25 U. C. C. P. 488.

669. Power of first and second carriers to contract for.—Where a carrier delivers goods to a forwarder, who is its agent and the agent of the company to whom the same are delivered, and he gives a bill of lading limiting the duty of the latter to deliver the goods to another company, this will make the bill of lading a contract, binding upon the first and second carriers; and the second carrier will not be responsible for the delivery of the goods to

*When subsequent carrier not entitled to benefit of provisions limiting initial carrier's common-law liability, see note, 72 Am. Dec. 242.

the consignee by the last carrier. *Chicago & N. W. R. Co. v. Northern L. Packet Co.*, 70 Ill. 217.

Where freight is shipped under a special contract limiting the carrier's common-law liability, by which the initial carrier only undertakes to carry to the end of his line and there to deliver to the next carrier, the first carrier has no authority to enter into a special contract on behalf of the shipper with the next carrier restricting his liability. *Babcock v. Lake Shore & M. S. R. Co.*, 49 N. Y. 491, 3 Am. Ry. Rep. 381; reversing 43 How. Pr. 317.—FOLLOWING *Root v. Great Western R. Co.*, 45 N. Y. 524.

Oil was shipped without any specific agreement as to the limitation of the carrier's liability, but upon delivery to the next carrier a receipt was given providing that it would be further carried at owner's risk of loss by fire or leakage. Held, that the initial carrier was the shipper's agent in delivering the oil to the second carrier; therefore the exemption was valid, and the second carrier not liable for a loss coming within the terms of the exemption. *Hinkley v. New York C. & H. R. R. Co.*, 3 T. & C. (N. Y.) 281; affirmed in 60 N. Y. 644, mem.—APPROVING *Camden & A. R. Co. v. Forsyth*, 61 Pa. St. 86. REVIEWING *Babcock v. Lake Shore & M. S. R. Co.*, 49 N. Y. 491.

In establishing the right of the second carrier to make such exemption it was competent for it to prove a uniform custom that it only held itself out as a carrier of oil, where the same was shipped at owner's risk as to losses by fire or leakage. *Hinkley v. New York C. & H. R. R. Co.*, 3 T. & C. (N. Y.) 281; affirmed in 60 N. Y. 644, mem.

670. Reduced rates sufficient consideration for.—Reduced rates given for the transportation of freight is a sufficient consideration to support a shipper's promise to release the connecting lines from liability as common carriers for points beyond the receiving carrier's line. *Western R. Co. v. Harwell*, 97 Ala. 341, 11 So. Rep. 781.

671. When benefit of limitation extends to subsequent carriers.*—A railroad company which receives freight from another company under an agreement between the latter and the consignor is lia-

ble for any loss resulting from a failure on its part to perform the contract, and is entitled to any valid limitation of liability therein contained. *St. Louis, I. M. & S. R. Co. v. Weakly*, 35 Am. & Eng. R. Cas. 635, 50 Ark. 397, 7 Am. St. Rep. 104, 8 S. W. Rep. 134.—FOLLOWING *St. Louis, I. M. & S. R. Co. v. Lesser*, 46 Ark. 236.—DISTINGUISHED IN *Adams Exp. Co. v. Harris*, 40 Am. & Eng. R. Cas. 151, 120 Ind. 73, 21 N. E. Rep. 340.

Where the plaintiff declares against a carrier for breach of the contract made with a connecting carrier acting as his agent, he can only recover for a breach of duty under such contract as a whole; and when such contract contains an exemption from river risks in regard to goods shipped, plaintiff will be bound by its terms. *Southern Exp. Co. v. Palmer*, 48 Ga. 85.

In the absence of proof that the shipper made any contract with the connecting line other than the one made by the receiving carrier, and proof being made that the freight was transported in the same car in which it was shipped by the receiving carrier, and under the same way-bill, that the shipment was at the owner's risk, and the freight charged was the established released rates when shipments were made at owner's risk, it appears that the connecting line accepted the terms of the contract made by the shipper with the receiving carrier, and entitles the connecting carrier to the benefit thereof. *Western R. Co. v. Harwell*, 97 Ala. 341, 11 So. Rep. 781.

Where a railroad company receives goods for a point beyond its line, reciting in the bill of lading that they are to be shipped at "the owner's risk," connecting lines are entitled to the benefit of the exemption, and no one of the lines is liable, unless the damage arose from the negligence of the one sought to be charged. *Kiff v. Atchison, T. & S. F. R. Co.*, 18 Am. & Eng. R. Cas. 618, 32 Kan. 263, 4 Pac. Rep. 401.

A provision in a bill of lading exempting the initial carrier and its connecting lines from liability for loss by fire enures to the benefit of connecting carriers. But where the shipment is delayed beyond a reasonable time and the goods are thereby lost, the carrier is liable notwithstanding the limitation. *Whitworth v. Erie R. Co.*, 13 J. & S. (N. Y.) 602.

Where goods are destroyed by fire while in the hands of a second carrier, it is en-

* When contracts limiting liability enure to benefit of connecting carriers, see notes, 32 Am. & Eng. R. Cas. 474; 18 Id. 596; 16 Id. 241. See also ante, 44.

titled to the benefit of a provision in the bill of lading, made by a transportation company first receiving the goods, to the effect that the company shall not be liable for loss or damage by fire while the goods are in depots. *Manhattan Oil Co. v. Camden & A. R. & T. Co.*, 54 N. Y. 197, 6 Am. Ry. Rep. 189; *affirming* 52 Barb. 72, 5 Abb. Pr. N. S. 289.

Where a shipper enters into an agreement with the initial carrier, with a limitation of the carrier's liability, the limitation enures to the benefit of an intermediate carrier; but unless the initial carrier has authority from the shipper to do so, such intermediate carrier cannot by a special agreement limit its liability upon receiving the goods from the first carrier. *Lamb v. Camden & A. R. & T. Co.*, 2 Daly (N. Y.) 454.—CRITICISING *Stoddard v. Long Island R. Co.*, 5 Sandf. (N. Y.) 188; *New Jersey S. Nav. Co. v. Merchants' Bank*, 6 How. (U. S.) 344. QUOTING *Ladue v. Griffith*, 25 N. Y. 364; *McDonald v. Western R. Corp.*, 34 N. Y. 500.

672. Illustrations.—Where a railway company, having printed blanks for receipts for transporting goods over its road, and by other companies, to one place, received goods to be carried to a different place and at its terminus to be delivered to a different company, receipted for the goods, and, without erasing the names of the other companies, used words of exemption from liability, they being "between the shipper and the above-named companies"—*held*, that the company receiving the goods from the railway company, not being one of "the above-named companies," could not take the benefit of the exemptions in the receipt given. *Merchants' Despatch Transp. Co. v. Bolles*, 80 Ill. 473.

A railroad company received merchandise to be transported to a point beyond its own line of railroad, over its own and other lines of railroad connecting with it, and gave to the shipper its receipt, stating that the merchandise was shipped "at owner's risk." *Held*, that this receipt is a special contract limiting the liability of the carrier, and that such connecting lines of railroad are entitled to the benefits of the exemption from liability specified in it, and that neither of the companies owning such connecting lines is liable for damages to the merchandise transported, unless it is shown that such damages arose from the negligence of the

company sought to be charged. *Kiff v. Atchison, T. & S. F. R. Co.*, 18 Am. & Eng. R. Cas. 618, 32 Kan. 263, 4 Pac. Rep. 401.—REVIEWED IN *Witting v. St. Louis & S. F. R. Co.*, 28 Mo. App. 103.

A contract made by a railroad corporation to transport and deliver goods at a point beyond the terminus of its own line contained the following clause: "Unavoidable accidents of the railroad and of fire in the depot excepted." *Held*, that in the absence of proof of any other or new contract, this exception would be held to extend to every other connecting carrier who shared the freight specified in the bill of lading, and that, in an action against such connecting carrier, the goods having been lost while in its possession, he could claim the benefit of it. *Maghee v. Camden & A. R. Co.*, 45 N. Y. 514.—APPLIED IN *Babcock v. Lake Shore & M. S. R. Co.*, 49 N. Y. 491. DISTINGUISHED IN *Adams Exp. Co. v. Harris*, 40 Am. & Eng. R. Cas. 151, 120 Ind. 73, 21 N. E. Rep. 340; *Cochran v. Dinsmore*, 49 N. Y. 249; *Ætna Ins. Co. v. Wheeler*, 49 N. Y. 616. FOLLOWED IN *King v. Macon & W. R. Co.*, 62 Barb. (N. Y.) 160. QUOTED IN *Robinson v. Merchants' Despatch Transp. Co.*, 45 Iowa 470.

673. Acceptance by subsequent carrier of terms of contract.—When it is stipulated by the shipper in a contract for transportation with the receiving carrier "and its connecting lines," that the carriers are to be released from damages, except when caused by their negligence, and providing that its terms shall enure to connecting lines, unless they stipulate otherwise, the connecting lines receiving and transporting freight under such contract are entitled to the benefit of these exemptions, notwithstanding no rate for the entire distance is fixed. *Western R. Co. v. Harwell*, 97 Ala. 341, 11 So. Rep. 781.

The mere fact that the connecting carrier receives and forwards the freight does not raise the presumption that it did so under such contract, but to avail as a defense to an action for damages for injury to such freight it must show a ratification of such contract. *Western R. Co. v. Harwell*, 97 Ala. 341, 11 So. Rep. 781.

A plea that the way-bill showed that the freight was shipped at a released rate, which was a reduced rate of freight, is insufficient to show that the connecting line accepted the terms of the contract made with the re-

ceiving line. *Western R. Co. v. Harwell*, 97 Ala. 341, 11 So. Rep. 781.

674. Power of initial carrier to limit liability to own line.*—The right of a company as a common carrier to limit its liability to carriage over its own road is settled law. *Coles v. Louisville, E. & St. L. R. Co.*, 41 Ill. App. 607. *Black v. Ashley*, 42 Am. & Eng. R. Cas. 428, 80 Mich. 90, 44 N. W. Rep. 1120. *International & G. N. R. Co. v. Campbell*, 1 Tex. Civ. App. 509, 20 S. W. Rep. 845.—FOLLOWING *Harris v. Howe*, 74 Tex. 534; *Gulf, C. & S. F. R. Co. v. Baird*, 75 Tex. 256.—DISTINGUISHED IN *International & G. N. R. Co. v. Anderson*, 3 Tex. Civ. App. 8.

When a railroad company gives a bill of lading for goods received for transportation, to be delivered at a place beyond the terminus of its own road, it is bound to deliver them safely at their ultimate destination, and is liable for their loss at any point on the route; but it may, by express agreement or stipulation in the bill of lading, limit its liability to loss or injury suffered on its own line. *Jones v. Cincinnati, S. & M. R. Co.*, 45 Am. & Eng. R. Cas. 321, 89 Ala. 376, 8 So. Rep. 61. *Taylor v. Little Rock, M. R. & T. R. Co.*, 32 Ark. 393, 17 Am. Ry. Rep. 251. *Erie R. Co. v. Wilcox*, 84 Ill. 239, 16 Am. Ry. Rep. 457. *Wabash, St. L. & P. R. Co. v. Jaggerman*, 23 Am. & Eng. R. Cas. 680, 115 Ill. 407, 4 N. E. Rep. 641. *Ohio & M. R. Co. v. Emrich*, 24 Ill. App. 245. *Nines v. St. Louis, I. M. & S. R. Co.*, 107 Mo. 475, 18 S. W. Rep. 26. *Cincinnati, H. & D. R. Co. v. Pontius*, 19 Ohio St. 221. *Detroit & M. R. Co. v. Farmers' Bank*, 20 Wis. 122.—DISTINGUISHING *Peet v. Chicago & N. W. R. Co.*, 19 Wis. 118.

And such contract will be presumed from the fact that a clause thus limiting the liability is to be found printed in the bill of lading, even though the shipper's attention was not called to it, if it appears that he had previously shipped like articles and taken like bills of lading. *East Tenn., V. & G. R. Co. v. Brumley*, 6 Am. & Eng. R. Cas. 356, 5 Lea (Tenn.) 401.—DISTINGUISHED IN *Merchants' Dispatch Transp. Co. v. Bloch*, 86 Tenn. 393, 6 Am. St. Rep. 847, 6 S. W. Rep. 881.

A common carrier is not bound to issue a

bill of lading for the transportation of freight beyond its terminus, and if it does so there is no reason why it may not stipulate, as a condition of the undertaking, that its liability shall extend only to injuries occurring upon its own line of railroad. *Richmond & D. R. Co. v. Shomo*, 90 Ga. 496, 16 S. E. Rep. 220. *Grand Trunk R. Co. v. McMillan*, 42 Am. & Eng. R. Cas. 468, 16 Can. Sup. Ct. 543; allowing appeal 15 Ont. App. 14, which affirms 12 Ont. 103.—DISTINGUISHING *Vogel v. Grand Trunk R. Co.*, 11 Can. Sup. Ct. 612; *Zunz v. South Eastern R. Co.*, L. R. 4 Q. B. 539.

At common law a carrier is under no obligation to receive goods to be carried beyond its own line; so Ill. Rev. St. 1874, ch. 114, § 82, providing that common carriers shall not limit their common-law liability, does not apply where goods are received for a point beyond the initial carrier's line. *Chicago & N. W. R. Co. v. Church*, 12 Ill. App. 17.

A carrier may by contract protect itself against liability for loss not occurring on its own line, whether the shipment be wholly within the state or interstate. *McCarn v. International & G. N. R. Co.*, 55 Am. & Eng. R. Cas. 406, 84 Tex. 352, 19 S. W. Rep. 547.

A freight contract that the carrier shall not be held or deemed liable beyond its own line, excepting to protect the through rate of freight named, is legal, and will be enforced by the courts. *McCarn v. International & G. N. R. Co.*, 84 Tex. 352, 19 S. W. Rep. 547.—DISTINGUISHING *Bank of Ky. v. Adams Exp. Co.*, 93 U. S. 174. FOLLOWING *Texas & P. R. Co. v. Adams*, 78 Tex. 372; *Gulf, C. & S. F. R. Co. v. Baird*, 75 Tex. 256; *Ft. Worth & D. C. R. Co. v. Williams*, 77 Tex. 121; *Hunter v. Southern Pac. R. Co.*, 76 Tex. 195; *Harris v. Howe*, 74 Tex. 537. QUOTING *Michigan C. R. Co. v. Myrick*, 107 U. S. 106. RECONCILING *Muschamp v. Lancaster & P. J. R. Co.*, 8 M. & W. 421. REVIEWING *Gulf, C. & S. F. R. Co. v. Vaughn*, (Tex.) 16 S. W. Rep. 775; *Galveston, H. & H. R. Co. v. Allison*, 59 Tex. 193; *Stewart v. Merchants' Despatch Transp. Co.*, 47 Iowa 229.

A railway company is not liable for the detention of goods on a connecting line where a special contract signed by the shipper relieves it from all liability in respect to goods after they have been delivered to another carrier for further conveyance.

* Limitation of liability to carrier's own line, see notes, 45 AM. & ENG. R. CAS. 323; 16 Id. 231; 72 AM. DEC. 231. See also ante, 43.

Aldridge v. Great Western R. Co., 15 C. B. N. S. 582, 33 L. J. C. P. 161.

675. Illustrations.—Where a special contract was made and signed between a railroad company and a consignor for a shipment of watermelons, in which it was stipulated that the liability of each company over whose lines shipment should be made should cease as a common carrier at the station where delivered to the next carrier or to the consignee, such a contract was binding; and where the evidence showed that the melons were delivered by the first railroad to the next road in the connecting line in good condition, and were transferred by another railroad in the connecting line from the cars in which they were shipped to other cars, and were tendered to the consignee in a bruised and damaged condition, the first road in the line was not liable therefor, especially where one of the stipulations of the contract was that the railroad company should not be liable for "losses occurring from the perishable nature or inherent defects of the property shipped." *Central R. & B. Co. v. Avant*, 32 Am. & Eng. R. Cas. 475, 80 Ga. 195, 5 S. E. Rep. 78.

Where a railroad company receives goods for a destination beyond its line, but makes no express agreement to transport to such point, but does expressly provide that it is not to be responsible as carrier beyond its line, and that its liability is to terminate upon a delivery of the goods to the connecting carrier, it is not liable beyond its own line. *Berg v. Atchison, T. & S. F. R. Co.*, 16 Am. & Eng. R. Cas. 229, 30 Kan. 561, 2 Pac. Rep. 639.

A railroad company receiving goods for a destination beyond its line, and agreeing to carry the same to the end of its line, "ready to be delivered to the party entitled to the same," and expressly providing that it will not be liable for loss or injury by any other carrier or after the goods have left its road, will not be rendered liable for a loss or injury occurring beyond its road simply because it is a member of an association of roads over which the goods are transported, where the roads and the cars thereon are not owned in common, and the freight receipts are divided *pro rata* per mile. *Irwin v. New York C. R. Co.*, 1 T. & C. (N. Y.) 473; *affirmed in* 59 N. Y. 653, *mem.*

A carrier received goods and gave a receipt for through shipment at a fixed rate, 2 D. R. D.—17.

stating on its face to be subject to their tariff, and "under conditions stated on the other side." On the back of the receipt was a printed notice that goods to go beyond the carrier's line would be forwarded by public carriers, but that the responsibility of the company should cease when such connecting carrier received the goods for further conveyance, and that it would not be liable for loss or damage which might occur beyond its line. *Held*, that such printed conditions were a part of the shipping receipt and did not constitute a contract for through carriage, but to carry to the end of its own line and to deliver to the next carrier. *Detroit & M. R. Co. v. Farmers' & M. Bank*, 20 Wis. 122.—*EXPLAINING Falvey v. Northern Transp. Co.*, 15 Wis. 129.—*REVIEWED IN Gray v. Jackson*, 51 N. H. 9.

One of the conditions in a contract by the G. T. R. Co. to carry goods to a place beyond the terminus of their line provided that the company "should not be responsible for any loss, misdelivery, damage or detention that might happen to goods sent by them, if occurring after said goods arrived at the stations or places on their line nearest to the points or places which they were consigned to, or beyond their said limits." *Held*, not to relieve the company from liability for loss or damage occurring during the transit, even if such loss occurred beyond the limits of the company's own line. *Grand Trunk R. Co. v. McMillan*, 42 Am. & Eng. R. Cas. 468, 16 Can. Sup. Ct. 543; *allowing appeal* 15 Ont. App. 14, which *affirms* 12 Ont. 103.

Held, per Strong and Taschereau, JJ., that the loss having occurred after the transit was over and the goods delivered at their destination, and the liability of the company as carriers having ceased, this condition reduced the contract to one of mere bailment as soon as the goods were delivered, and also exempted the company from liability as warehousemen, and the goods were from that time in custody of the company on whose line Portage la Prairie was situated, as bailees for the shipper. (Fournier and Gwynne, JJ., dissenting.) *Grand Trunk R. Co. v. McMillan*, 42 Am. & Eng. R. Cas. 468, 16 Can. Sup. Ct. 543; *allowing appeal* 15 Ont. App. 14, which *affirms* 12 Ont. 103.—*RECONCILING Fitzgerald v. Grand Trunk R. Co.*, 4 Ont. App. 601.

Plaintiff signed a paper requesting the defendants to forward certain goods re-

ceived from him at T. to I., "subject to their tariff and under the conditions stated on the other side." On the other side, headed "General Notices and Conditions of Carriage," the company "gave public notice" that in certain events specified they would not be responsible. The tenth paragraph, after stating the course which would be pursued by them with respect to goods addressed to consignees resident beyond the places at which defendants had stations, proceeded, "And the company hereby further give notice that they will not be responsible for any loss, damage, or detention" to goods beyond their limits. It was found by the jury that all the goods had been delivered by defendants to a railway connecting at D. with their line, and running to I. *Held*, that the latter part of the sentence could not be regarded as a notice as distinguished from a condition; and that, whether a notice or a condition, it formed part of a special contract on which defendants received the goods, and by which they were exempted from liability. *La Pointe v. Grand Trunk R. Co.*, 26 U. C. Q. B. 479.

Plaintiff was at I. when the goods (except the missing box sued for) arrived there, and remained until some time in the month following. *Held*, that he was a resident there within the condition, and that having named himself as the consignee at that place he was estopped from denying such residence. *La Pointe v. Grand Trunk R. Co.*, 26 U. C. Q. B. 479.

676. Under Missouri statute.—Under Rev. St. 1889, § 944, a railway carrier, receiving goods in this state to be shipped over its own and connecting lines to the point of destination, may stipulate in the contract of shipment against damages to the goods occasioned by the negligence of the connecting carrier. *Hill v. Missouri Pac. R. Co.*, 46 Mo. App. 517.—CRITICISING BUT FOLLOWING *Dimmitt v. Kansas City, St. J. & C. B. R. Co.*, 103 Mo. 433. **OVERRULING** *Heil v. St. Louis, I. M. & S. R. Co.*, 16 Mo. App. 363; *Orr v. Chicago & A. R. Co.*, 21 Mo. App. 336; *Baker v. Missouri Pac. R. Co.*, 34 Mo. App. 112; *Craycroft v. Atchison, T. & S. F. R. Co.*, 18 Mo. App. 488.

When a railway company receives goods consigned to a point beyond its own route, but issues a bill of lading to its own terminal point only, expressly stating therein that it will carry the goods no further, and limiting its liability to loss or damage

occurring on its own line, this limitation of liability is valid, notwithstanding the statute. *Drew Glass Co. v. Ohio & M. R. Co.*, 44 Mo. App. 416.—**LIMITING** *Heil v. St. Louis, I. M. & S. R. Co.*, 16 Mo. App. 363; *Orr v. Chicago & A. R. Co.*, 21 Mo. App. 333; *Craycroft v. Atchison, T. & S. F. R. Co.*, 18 Mo. App. 487. **QUOTING** *Coxon v. Great Western R. Co.*, 5 H. & N. 274. **REVIEWING** *Dimmitt v. Kansas City, St. J. & C. B. R. Co.*, 103 Mo. 433.—**FOLLOWED IN** *Historical Pub. Co. v. Adams Exp. Co.*, 44 Mo. App. 421.

Prior to the enactment of the statute of 1879, Mo. Rev. St., § 598, a common carrier could not relieve itself of liability on account of its own negligence, and that rule of law has not been changed or at all modified by this statute; but on the contrary, the statute not only declares its liability for damage caused by its negligence, but also "by the negligence of any other common carrier, railroad, or transportation company to which such property may be delivered, or over whose line such property may pass," and provides a remedy over to the first carrier against the forwarding carrier. *Craycroft v. Atchison, T. & S. F. R. Co.*, 18 Mo. App. 487.—**LIMITED IN** *Drew Glass Co. v. Ohio & M. R. Co.*, 44 Mo. App. 416. **OVERRULING** *Hill v. Missouri Pac. R. Co.*, 46 Mo. App. 517.

677. Right to contract against negligence of connecting carrier.—Common carriers cannot contract against their negligence, but may as to other carriers to whom the goods may be delivered in course of transit, in which case the initial carrier is liable only for reasonable care and diligence in selecting proper connecting carriers. *American Exp. Co. v. Second Nat. Bank*, 69 Pa. St. 394.

Where a contract of shipping releases the first carrier from damages resulting from the negligence or default of connecting lines, the first carrier is not liable for delays not occurring on its own lines. *Mobile & O. R. Co. v. Francis, (Miss.)* 9 So. Rep. 508.

Where a railway company receives goods for carriage under a condition that it will not be responsible for loss or damage beyond the limit of its line, and that the delivery by it is to be considered complete when a connecting carrier receives the goods, it is not liable for damage to the goods through the negligence of a servant of the connecting line, although it made

one charge for the entire distance. *Fowles v. Great Western R. Co.*, 7 Ex. 699, 7 Railw. Cas. 421, 17 Jur. 214, 22 L. J. Ex. 76.

A stipulation in a bill of lading that the contracting carrier shall not be responsible for the negligence of a connecting carrier on the line of transportation is void, as against public policy, and contrary to the statute, and cannot be enforced in favor of the contracting carrier. *Baker v. Missouri Pac. R. Co.*, 34 Mo. App. 98.—OVERRULED IN *Hill v. Missouri Pac. R. Co.*, 46 Mo. App. 517.—*Cincinnati, H. & D. R. Co. v. Pontius*, 19 Ohio St. 221.—FOLLOWED IN *Baltimore & O. R. Co. v. Campbell*, 36 Ohio St. 647.

678. Right to contract for absolute exemption.—A stipulation in a bill of lading that the carrier shall be absolutely exempt from liability on account of loss or damage, being void as against public policy, does not preclude the shipper from recovering the value of goods; and the connecting carrier into whose hands the release came is chargeable with notice of the illegality of the transaction. *Woodburn v. Cincinnati, N. O. & T. P. R. Co.*, 42 Am. & Eng. R. Cas. 514, 40 Fed. Rep. 731.

679. Shipper must enter into contract knowingly.—The carrier may, by express contract, limit his liability to losses or damage occurring on his own route; but such limitation must be shown to have been brought to the notice of the consignor, and to have been accepted by or acquiesced in by him. *Louisville & N. R. Co. v. Meyer*, 27 Am. & Eng. R. Cas. 44, 78 Ala. 597.

Where a shipper takes a receipt restricting such liability, with full knowledge of the conditions therein contained, intending to assent to them, it becomes his contract as fully as if he had signed it; but such assent is a question of fact. *Chicago & N. W. R. Co. v. Montfort*, 60 Ill. 175, 12 Am. Ry. Rep. 332.—DISTINGUISHED IN *Harris v. Grand Trunk R. Co.*, 15 R. I. 371.—*Fortier v. Pennsylvania Co.*, 18 Ill. App. 260.

If the shipper accepts and acts on a bill of lading containing such provision, in the absence of fraud or mistake it will be conclusively presumed that he had knowledge of its terms; and he will not be permitted to show that he was ignorant of its contents. *Mulligan v. Illinois C. R. Co.*, 36 Iowa 181, 2 Am. Ry. Rep. 322.—FOLLOWING *Muschamp v. Lancaster & P. J. R. Co.*, 8 M. & W. 421; *Angle v. Mississippi & M. R. Co.*,

9 Iowa 487. NOT FOLLOWING *American Merchants' Union Exp. Co. v. Schier*, 55 Ill. 140.—REVIEWED IN *St. Louis, K. C. & N. R. Co. v. Cleary*, 16 Am. & Eng. R. Cas. 122, 77 Mo. 634, 46 Am. Rep. 13.

680. Duty of initial carrier to transmit necessary instructions.—Where a bill of lading provides that in forwarding goods beyond its line the company will act as agent only, and not as carrier, it is its duty as such agent to give correct information and instructions to the next carrier as to the delivery of the property; and if it fails to give such instructions it is liable for any loss that may occur by reason thereof. *Dana v. New York C. & H. R. R. Co.*, 50 How. Pr. (N. Y.) 428.

681. Cannot limit by bill of lading given after shipment.—If the consignor, contemporaneously with the delivery of the goods to the carrier, receives a bill of lading limiting the liability of the carrier to losses occurring on his own route, "possibly he would be conclusively presumed to have read it and to have acquiesced in it;" but this principle does not apply where it is shown that the carrier, receiving the freight for the entire route, made out a bill of lading which, being incomplete as to the amount of the charges, was not delivered to the consignor at the time, but was afterwards forwarded to him by mail at the place of destination. *Louisville & N. R. Co. v. Meyer*, 27 Am. & Eng. R. Cas. 44, 78 Ala. 597.

A carrier undertook to carry goods from New York to a point in Iowa over a route passing through Chicago, and gave a shipping-receipt which entitled the shipper to a bill of lading. The goods reached Chicago one day and were destroyed there by fire on the following day. Some ten days thereafter the shipping-receipt was surrendered and a bill of lading was given which contained provisions undertaking to carry the goods to Chicago only, and relieving the company from liability for loss by fire, the company knowing at the time that the goods had already been destroyed, but which was not known to the shipper. *Held*, that the conditions of the bill of lading did not affect the common-law liability of the carrier. *Wilde v. Merchants' Despatch Transp. Co.*, 47 Iowa 247.—DISTINGUISHING *Shelton v. Merchants' Despatch Transp. Co.*, 59 N. Y. 258.

682. Right to limit liability to road on which loss or injury occurs.

—It is competent for an association of roads to limit the liability of each one to such loss or injury of goods as occurs while they are on its own road. *Weinberg v. Albemarle & R. R. Co.*, 18 Am. & Eng. R. Cas. 597, 91 N. Car. 31.—DISTINGUISHING *Phillips v. North Carolina R. Co.*, 78 N. Car. 294. FOLLOWING *Phifer v. Carolina C. R. Co.*, 89 N. Car. 311.—*Shiff v. New York C. & H. R. R. Co.*, 16 Hun (N. Y.) 278, 52 How. Pr. 91; affirmed in 81 N. Y. 638, mem.—REVIEWING *Ricketts v. Baltimore & O. R. Co.*, 59 N. Y. 637.

When a railroad company receives goods for transportation, consigned to a point on another connecting road, the bill of lading containing a stipulation that each carrier shall only be liable for losses or injuries while the goods are in its control; if the goods fail to reach their destination, the onus is on the receiving carrier to show that they were safely carried over its own road, and safely delivered to the connecting road. *Georgia Pac. R. Co. v. Hughart*, 90 Ala. 36, 8 So. Rep. 62.

The Merchants' Despatch Transportation Company contracted to carry butter from Ontario to England, the butter to be carried by the G. W. R. Co. to Suspension Bridge where it was to be received by the M. D. T. Co. and carried to New York and there delivered to a steamship company for carriage to England. The bill of lading provided that if damaged during transit, the sole liability for the loss should be on the company having the custody of the goods at the time. On its arrival at New York the butter was placed in lighters owned by the M. D. T. Co. to be conveyed to the steamer "Dorset," belonging to the S. S. Co. On arriving at the pier where the steamer lay the lighter could not get near enough to unload, and the stevedore in charge of the steamer had it towed across the river, with instruction for it to remain until sent for. The "Dorset" sailed without the butter, which was sent by another steamer of the S. S. Co. some five days later, and was damaged by the heat while in the lighter. Held, that the M. D. T. Co. having made a through contract for the carriage of the goods, they were liable to H. for the damage, and even under the bill of lading were not relieved from liability, as the butter was never delivered to and received by the

S. S. Co., but was in the custody of the M. D. T. Co. when the damage occurred. *Merchants' Despatch Transp. Co. v. Hatley*, 14 Can. Sup. Ct. 572; affirming 12 Ont. App. 201, which affirms 4 Ont. 723.

683. Under Georgia Code.—Georgia Code, § 2055, providing that in case of through shipment of goods each company shall be responsible only to the terminus of its own road, and until delivery to the next connecting road, and making the last company receiving the goods in good order liable for damages thereto, was intended to limit the liability of a railroad company to its own terminus, where the contract was a general one, merely depending upon delivery of the goods to be transported, with directions to carry beyond such terminus. It does not affect the liability of the company beyond the borders of the state; neither does it prevent a corporation doing business in the state from making any such contract. *King v. Macon & W. R. Co.*, 62 Barb. (N. Y.) 160.

Under Georgia Code, § 2041, providing that a common carrier may make an express contract for the transportation of goods, and will then be governed thereby, such express contract is made where the company receives cotton for transportation in that state, and agrees to transport the same to New York, and limits its liability for loss by fire to a burning on the cars. *King v. Macon & W. R. Co.*, 62 Barb. (N. Y.) 160.

684. Limitations against loss by fire.—Provisions in a bill of lading that "no carrier shall be liable for loss by fire from any cause, on land or water," or that "no carrier shall be liable for a loss by fire while the goods are awaiting transshipment at any port," will release the carrier from liability for loss while the goods are awaiting transshipment from one road to another. *Brown v. Louisville & N. R. Co.*, 36 Ill. App. 140.

When a contract is sued on by a consignee in Illinois, which is made in New York, containing a provision that none of the connecting lines over which the goods are to be shipped shall be liable for loss by fire while in transportation, the consignor will be deemed the agent of the consignee in shipping the goods and in agreeing upon the terms of the carrier's liability, and the defendant road will not be liable for a loss occurring within the terms of the bill of

lading. *Brown v. Louisville & N. R. Co.*, 36 Ill. App. 140.

A railroad company, being one of a connecting line of carriers, received certain cotton from a preceding carrier on the line for transmission. The bill of lading contained a clause exempting the company from liability for loss by fire occurring either while the cotton was in actual transit or in store awaiting transit. The company speedily and safely transported the cotton, and tendered it at the wharf of the steamship company next in the line of carriers. The company had no knowledge that the steamship company could not at once transport the cotton, but placed it at the latter's request on the latter's wharf and in its warehouse, places equally as convenient for shipping as the place where delivery had been originally tendered. While so stored the cotton caught fire and was destroyed. *Held*, that the railroad company was not liable for the loss. *Deming v. Norfolk & W. R. Co.*, 16 Am. & Eng. R. Cas. 232, 21 Fed. Rep. 25.—DISTINGUISHING *Michigan C. R. Co. v. Mineral Springs Mfg. Co.*, 16 Wall. (U. S.) 318.

Plaintiffs delivered certain cotton to a dispatch company to be carried from Memphis to Liverpool, under bills of lading which contained a clause exempting the company and its connections from liability from loss or damage by fire. The cotton was destroyed by fire in defendant's warehouse at Jersey City. Defendant was not a member of the dispatch company and only occupied the relation of intermediate carrier. *Held*, that defendant was entitled to the benefit of the restrictive clause in the bills of lading, and is exonerated from liability unless the fire resulted from its negligence. *Whitworth v. Erie R. Co.*, 6 Am. & Eng. R. Cas. 349, 87 N. Y. 413; *affirming* 13 J. & S. 602.—FOLLOWED IN *Draper v. Delaware & H. Canal Co.*, 118 N. Y. 118.

A railroad company undertook to carry wool from Canada into the United States. At the national line the cars were detained by the customs officers, and subsequently a fire occurred which burned a part of the wool and damaged more. In the effort to save the wool it became mixed with other wool, and a delivery was made to plaintiff of part of his wool and some of another quality, but altogether less than the shipment, and somewhat damaged, and delayed. The contract of shipment provided that the

company should not be liable for damages caused by delays from storms, accidents, or unavoidable causes, or from weather, fire, etc. *Held*, that if the company had delivered all plaintiff's wool that was saved from the fire, it was all they were bound to do, but that the delivery of a stranger's wool did not acquit them unless by consent of plaintiff. The company was not liable for the delay. *Milligan v. Grand Trunk R. Co.*, 17 U. C. C. P. 115.

In an action for four car-loads of flour destroyed by fire in a freight-house, it appearing that they were shipped under a special contract limiting the liability as to delay beyond the line of the receiving company, and limiting as to damage caused by fire, and also that the consignee was properly notified of storage and willingness to deliver when the flour was stored in the freight-house—*held*, that defendants were not liable as carriers, as they had expressly limited their liability, nor as warehousemen, because no negligence was shown. *Brodie v. Northern R. Co.*, 6 Ont. 180.

685. Limitations as to delays.—A clause in a special contract with a railway company specified that the company would not be responsible for any claims arising from delay or detention of any train, whether in starting, or at any station, or in the course of the journey. *Held*, not to release the company from delay arising at warehouse of terminal station while goods were awaiting transshipment to a connecting line. *Devlin v. Grand Trunk R. Co.*, 30 U. C. Q. B. 537.

Goods were detained in defendant's freight-house because of the neglect of the succeeding carrier to receive them, although notified of their arrival. *Held*, that the detention was not defendant's fault, and did not deprive it of the benefit of the exemption clause. *Whitworth v. Erie R. Co.*, 6 Am. & Eng. R. Cas. 349, 87 N. Y. 413; *affirming* 13 J. & S. 602.

A railroad company agreed to forward to a consignee in New York, "in accordance with the provisions, stipulations, and exceptions of the general rules and regulations and freight tariffs of the company," a car-load of watermelons, charges to be collected on delivery. The contract also contained these stipulations: "This company assumes no liability beyond its own rails. This company will not be responsible for delays or damages from unavoidable causes nor

guarantee any special dispatch in the transportation of any article." The watermelons were properly shipped, but the next connecting road refused to forward unless its charges were prepaid. Defendant at once notified plaintiff, who refused to prepay, and afterwards the fruit was forwarded, reaching New York in a decayed condition by reason of the delay. *Held*, that defendant did not contract to carry beyond its terminus, and was not liable for the loss. *Dunbar v. Port Royal & A. R. Co.*, 36 So. Car. 110, 15 S. E. Rep. 357.

686. Limiting liability to time of unloading.—On receiving goods a company gave a receipt stating, among other conditions, that the company should not be liable as common carriers for articles of freight after their arrival at the place of destination and unloading at the company's warehouse or depots. The goods in question were marked for a point beyond the receiving company's line and were carried to the end of its line, and three days afterward were destroyed in its warehouse by an accidental fire. No notice of the arrival of the goods had been given to the next connecting carrier. *Held*, that the place of destination mentioned in the receipt meant the ultimate destination of the goods, therefore the exemption provided for did not apply, and the company was liable. *Ayres v. Western R. Corp.*, 14 Blatchf. (U. S.) 9.—DISTINGUISHED IN *Wertheimer v. Pennsylvania R. Co.*, 17 Blatchf. (U. S.) 421, 1 Fed. Rep. 232. FOLLOWED IN *The Majestic*, 56 Fed. Rep. 244.

687. How limitations made, or determined.—A railroad cannot limit its liability for goods lost beyond its own lines, by a stipulation in the receipt that it shall not be liable for safe transportation of the goods after they are delivered to other parties for completing transportation or delivery. *Southern Exp. Co. v. Barnes*, 36 Ga. 532.

Yet where the receipt given by a connecting carrier is also signed by the forwarding carrier, acting as agent for the shipper, he will be bound. *Southern Exp. Co. v. Palmer*, 48 Ga. 85.

A common carrier cannot, by a general notice, exonerate himself entirely from his legal duty and liability for property which is delivered to him for transportation, or fix the amount beyond which he will not be held responsible in case of injury or loss,

although such property is delivered to him by another carrier, to whom the notice has been made known, and who received the same from the owner under an agreement to carry it over his own line, and then, as agent of the consignor, to send it forward by a carrier. *Judson v. Western R. Corp.*, 6 Allen (Mass.) 486.—FOLLOWED IN *Pemberton Co. v. New York C. R. Co.*, 104 Mass. 144.

Where the initial carrier is sued for a delay in carrying goods beyond its line, the defendant cannot establish a limitation of its liability by proof of a custom of which the shipper had no notice; but where the delay seems to have been occasioned by a mob, while the goods were in the hands of a connecting carrier, the question of such carrier's negligence is for the jury. *Little v. Fargo*, 43 Hun (N. Y.) 233, 5 N. Y. S. R. 462.

Defendant company maintained a freight office in New York city, but did not own a road reaching the city, nor reaching at the other end a point to which plaintiff wished to ship goods. Upon inquiry as to the freight rate to the point, defendant's agent gave a rate and instructed plaintiff where to deliver and how to mark freights, but no agreement was made to ship goods. Some nineteen days after the information had been furnished plaintiff bought goods and directed the parties from whom he bought to ship them according to the directions given by defendant's agent. *Held*, that the conversation between plaintiff and the agent did not constitute an agreement to ship, therefore the shipping could not be said to be an acceptance; but the contract must be determined by what was done at the time the goods were shipped, and was therefore contained in the receipt given. *Ricketts v. Baltimore & O. R. Co.*, 61 Barb. (N. Y.) 18.

And in such case, where the written receipt given limited the defendant's liability to damages occurring while the goods were in its actual custody, it was not liable for an injury occurring beyond its line. *Ricketts v. Baltimore & O. R. Co.*, 61 Barb. (N. Y.) 18.

688. Evidence to prove a limitation.—Where goods are received by persons as carriers, and a receipt and bill of lading are delivered, it is not error to refuse to receive parol evidence that the defendants were not common carriers for the whole distance stated in the bill of lad-

ing. The question of the liability of defendants depends on the contract. *Chouteaux v. Leech*, 18 Pa. St. 224.—QUOTED IN *Nashua Lock Co. v. Worcester & N. R. Co.*, 48 N. H. 339.

Where a carrier is sued to recover the damages to freight, and the complaint sets forth the contract between the parties as contained in a bill of lading, it is necessary to introduce the bill of lading in evidence; and where it is a through bill the rule is not affected by a provision therein that the liability of each carrier is limited to its own route, as such provision is not binding. *Texas & P. R. Co. v. Logan*, 3 Tex. App. (Civ. Cas.) 227.

A railroad company sued for damage to freight received from another company, and shipped in another state, in order to obtain the benefit of an exemption from liability for loss occasioned in the manner set out, and which is provided for in the bill of lading issued by the other company, and in the other state, must allege and prove that such stipulation exempting from liability is lawful in the state where it was made. *International & G. N. R. Co. v. Moody*, 35 Am. & Eng. R. Cas. 607, 71 Tex. 614, 9 S. W. Rep. 465.

Where goods were delivered to a railroad in Indiana, marked to a consignee in Kansas, its line of road terminating at Chicago, and it appeared that on the next day the company made out and delivered to the shipper a bill of lading containing an agreement to carry the goods to the company's freight station in Chicago, and limiting its liability to its own line, and that the goods reached Chicago in safety and were transferred to another company, in whose custody they were burned—held, in a suit against the company giving such a bill of lading, to recover for the loss, that it was error to refuse to admit in evidence on the part of the company the shipping order, containing directions as to the shipment and the bill of lading. *Pennsylvania Co. v. Fairchild*, 69 Ill. 260.

680. Power of shipper's agent to contract for.—Defendant contracted to transport several car-loads of potatoes from certain points on its line to the place of destination, which was beyond that line, at a price fixed, of which defendant's station agents were advised. The persons who delivered the potatoes on the part of S. & Co., the shippers, signed shipping-bills made out

on blanks kept by defendant for that purpose, and filled out by its agents, in conformity with its general requirement and custom on receipt of goods for transportation. The shipping-bills purported to be requests on the part of the persons signing them that the defendant receive the property addressed to the consignees subject to the terms and conditions stated in or upon the shipping-bills. These limited defendant's common-law liability in various particulars. S. & Co. had no knowledge of the shipping-bills and did not expressly authorize their agents, who delivered the property, to execute them; they, however, knew it to be the general custom of railroad companies, upon delivery of goods for transportation, to require shipping-bills containing the terms and conditions of shipment. In an action to recover damages for the non-delivery of one car load of potatoes, and for damages alleged to have been caused by delay in the delivery of the others—held that, conceding it to have been within the presumed authority of those who delivered the potatoes to make or accept stipulations or conditions for the reception and carriage of property, beyond that, so far as it was dependent upon such presumption of authority, the owners were not necessarily bound by anything contained in the shipping-bills; that the provisions therein, so far as they may be otherwise construed, were not applicable to the shipments in question; and, therefore, only the terms and conditions, so far as reasonable and applicable to through transportation, were to be deemed within the terms of the contract. *Jennings v. Grand Trunk R. Co.*, 49 Am. & Eng. R. Cas. 98, 127 N. Y. 438, 28 N. E. Rep. 394, 40 N. Y. S. R. 318; affirming 52 Hun 227, 23 N. Y. S. R. 15, 5 N. Y. Supp. 140.

690. Missouri Pacific road, as a whole, one line.—So far as the Missouri Pacific Railway Company is concerned, every line of road operated by it is to be regarded as a part of "the line of the Missouri Pacific Railway Company," to which the liability is restricted. *International & G. N. R. Co. v. Anderson*, 3 Tex. Civ. App. 8, 21 S. W. Rep. 691.

XII. PROCEDURE.

1. Generally.

691. Nature of action against carrier.*—In actions against a common car-

* Proper form of action against carriers, see note, 11 AM. & ENG. R. CAS. 101.

rier for the breach of a contract for the carriage and delivery of goods, the suit may be framed either *ex contractu*, upon the breach of the engagement, or *ex delicto*, upon the violation of the public duty. But whether the action be assumpsit on the contract, or case for the violation of duty, the same law is applicable to both classes of action, and the measure of damages is equally a question of law, and as much under the control of the court as if the right rested in agreement only. *Baltimore & O. R. Co. v. Pumphrey*, 9 Am. & Eng. R. Cas. 331, 59 Md. 390. *Catlin v. Adirondack Co.*, 11 Abb. N. Cas. (N. Y.) 377; reversing 20 Hun 19.

A common carrier may be sued in an action *ex delicto* for an injury caused by its negligence to goods intrusted to it for transportation. *Willing v. St. Louis & S. F. R. Co.*, 28 Mo. App. 103.

An action against a common carrier for damages to goods while in transit, in which no contract of affreightment is set up in the petition, is an action *ex delicto*. *Heil v. St. Louis, I. M. & S. R. Co.*, 16 Mo. App. 363. —REVIEWING *Clark v. Kansas City & N. R. Co.*, 64 Mo. 440.

A breach of the duty of a common carrier is a breach of the law for which an action lies, founded on the common law, and which wants not the aid of a contract to support it. *Burkle v. Ellis*, 4 How. Pr. (N. Y.) 288. —QUOTING *Bretherton v. Wood*, 3 B. & B. 54.

Where a carrier is sued for a breach of a special contract to safely carry and deliver certain freights, the action is for the recovery of money, and comes within the meaning of N. Y. Code, § 129, sub-sec. 1. *Trapp v. New York & E. R. Co.*, 6 How. Pr. (N. Y.) 237.

Where the summons is in the form prescribed in an action for money upon contract, and the complaint alleges that the defendant was engaged in carrying goods for hire; that certain goods were delivered to defendant to be carried, which defendant undertook to carry; that the charges were duly paid, and charges a loss, claiming damages in a specified amount, the action is upon contract. *Catlin v. Adirondack Co.*, 11 Abb. N. Cas. (N. Y.) 377; reversing 20 Hun 19.

Where a carrier is sued for a breach of contract to safely carry goods, the action is not for the injury of property, within the meaning of N. Y. Code Civ. Pro. § 549, pro-

viding for execution against the person. *Catlin v. Adirondack Co.*, 11 Abb. N. Cas. (N. Y.) 377; reversing 20 Hun 19.

602. When but one cause of action exists.—Tenders by different persons, acting as agents of plaintiffs, at different times and places, of separate lots of grain for transportation, all making the quantity refused to be transported, constitute but one cause of action for the refusal to transport the whole quantity. *Cobb v. Illinois C. R. Co.*, 38 Iowa 601.

A complaint in an action against a common carrier to whom property had been delivered for transportation alleged negligence in the care of the property while in transit and also after it had arrived at its destination and remained in the custody of the carrier as warehouseman. Held, that this constituted only one cause of action. *Armstrong v. Chicago, M. & St. P. R. Co.*, 45 Minn. 85, 47 N. W. Rep. 459.

603. Jurisdiction of court.—The "privilege or immunity" secured by the constitution and laws of the United States, which gives the U. S. supreme court jurisdiction on appeal or error, regardless of the amount in controversy, does not include the right of a railroad company, as common carrier, to carry goods for hire. *Bowman v. Chicago & N. W. R. Co.*, 115 U. S. 611, 6 Sup. Ct. Rep. 192. —DISTINGUISHED IN *Davis v. Kansas City, S. & M. R. Co.*, 32 Fed. Rep. 863.

An action against a railroad company for breach of contract for the carriage and delivery of goods may be in form *ex contractu* or *ex delicto*. But the law applicable and the measure of damages are the same in both classes of action; and in either form a justice of the peace has jurisdiction to hear and determine the cause. *St. Louis, I. M. & S. R. Co. v. Heath*, 18 Am. & Eng. R. Cas. 557, 41 Ark. 476.

The superior court of the county in which delivery was made to the common carrier, and in which the violation of the carrier's duty commenced, has jurisdiction of the action, although the tort may have been only partially completed in that county and its full completion took place in another county. *Central R. Co. v. Pickett*, 87 Ga. 734, 13 S. E. Rep. 750.

Where goods are shipped from another state to a point in Texas, but lost before reaching the latter state, the courts of Texas have jurisdiction of an action against the

carrier to recover for the loss, though the contract of shipment limited the transportation to such other state. *Mayer v. Brown*, (Tex.) 16 S. W. Rep. 788.

694. When issues are for jury.—Whether goods are delivered by a common carrier within a reasonable time is a question for the jury. *Schwab v. Union Line*, 13 Mo. App. 159.

A railway carrier is not, as a matter of law, bound to furnish refrigerator cars to carry perishable goods. Whether it is negligence not to do so is a question for the jury. *Udell v. Illinois C. R. Co.*, 13 Mo. App. 254.

Where a railroad company leaves a car containing goods so near a freight-house (which the company has reason to apprehend might take fire at any time from a passing engine) as to be exposed to the hazard of fire communicated from such freight-house, it is proper to submit to the jury the question of the company's negligence. *Tanner v. New York C. & H. R. R. Co.*, 32 Am. & Eng. R. Cas. 380, 108 N. Y. 623, 1 Silv. App. 569, 15 N. E. Rep. 379, 13 N. Y. S. R. 501.

Where the complaint in an action against a railroad company for delay in delivering freight consigned to plaintiff states that defendant is a common carrier, and that delay was caused by its negligence as such, and the answer denies such negligence, and the proof goes largely to the question of negligence, defendant cannot object to the action of the court in excluding from the jury the question of an express contract between the parties and submitting the case wholly upon the question of negligence, on the ground of surprise. *Waite v. New York C. & H. R. R. Co.*, 35 Am. & Eng. R. Cas. 576, 110 N. Y. 635, mem., 17 N. E. Rep. 730, 17 N. Y. S. R. 162, 2 Silv. App. 85; affirming 39 Hun 655, mem.

When an action is brought against a carrier to recover for the loss of goods, and it is not pretended that the case involves the examination of a long account, the damages should be assessed by a jury; and it is error, under the New York Code, to refer the case to a referee to ascertain the damages. *Hewitt v. Howell*, 8 How. Pr. (N. Y.) 346.

695. Presumption as to condition or kind of goods.—Where it does not appear either that the carrier received the

goods as in bad order or that they were in fact in bad order when received, the presumption is they were in good order. *Henry v. Central R. & B. Co.*, 89 Ga. 815, 15 S. E. Rep. 757.

Where a machine is injured when delivered to the consignee, and there is no evidence to show that it was delivered to defendant carrier or some connecting carrier in good condition, the presumption is that it was delivered to the consignee in the same condition in which it was received. *Missouri Pac. R. Co. v. Breeding*, 4 Tex. App. (Civ. Cas.) 217, 16 S. W. Rep. 184.

In a suit against a common carrier to recover for the loss of the greater part of a shipment of carboys, part containing nitric acid and the others containing sulphuric acid, the former being of much the greater value, the proof was unsatisfactory as to the proportion of each shipped; but there was proof tending to show that the car contained the acids in the usual proportions to be mixed in the manufacture of nitro-glycerine. The court, at the request of the defendant, instructed the jury that "the legal presumption is, the burden of proof being on the plaintiff, that all the acids lost, and not proven to have been nitric, and most valuable, must have been sulphuric, and of the least value." *Held*, that the instruction did not state a correct legal principle, under the evidence, and was calculated to mislead the jury; that there was no legal presumption in such a case, but it was purely a question of fact, from the evidence, whether the carboys, or most of them destroyed, contained nitric or sulphuric acid. *Lake Shore Nitro-Glycerine Co. v. Illinois C. R. Co.*, 75 Ill. 394.

696. Suit against several carriers — Verdict against some and not others.—Where goods are shipped to pass over several connecting lines, and a loss occurs, and the several carriers are sued, a misjoinder cannot be alleged, as a verdict of guilty may be found against one and of acquittal as to the others. *Baker v. Michigan S. & N. I. R. Co.*, 42 Ill. 73.

697. When date is immaterial.—Where a shipper sues a railroad company for failing to furnish cars at the time contracted, the date of the making of the contract is immaterial, and though the complaint alleges that the contract was made on a certain day, yet it is error to ex-

* See also ante, 638, 653.

clude evidence of a contract made on another day. *Morehouse v. Texas Trunk R. Co.*, 4 Tex. App. (Civ. Cas.) 462, 17 S. W. Rep. 1086.

698. Instructing the jury.—(1) *What instructions are proper.*—Where grain carried is most commonly and conveniently removed directly from the car, the liability of the company as a carrier does not cease until the car is placed in a safe and convenient location for unloading; and where it appears that the car was so placed that it could be unloaded only with difficulty, it is not error for the court, in instructing the jury, to eliminate every question except that of the company's liability as carrier, where the charge is modified by the statement that if the car was put in the proper place for unloading, the company was not liable. *Independence Mills Co. v. Burlington, C. R. & N. R. Co.*, 32 Am. & Eng. R. Cas. 456, 72 Iowa 535, 34 N. W. Rep. 320.

In an action against a railroad for failing to carry and deliver freight within a reasonable time, at the request of plaintiff the court instructed the jury in general terms that it was the duty of the company to carry and deliver within a reasonable time. Further instructions were given, at the request of the defendant, to the effect that in determining what is a reasonable time all the surrounding circumstances must be kept in view and that the company was not liable for delay caused by an unusual press of business. *Held*, that the objection to the first instruction, that it was too general, was cured. *Illinois C. R. Co. v. Haynes*, 64 Miss. 604, 1 So. Rep. 765.

In an action against a railroad company for the loss of certain corn and oats intrusted to it for transportation, upon examination of the evidence—*held*, that the instruction of the court did not assume facts as proven that should have been passed upon by the jury, and was not erroneous. *Bush v. Northern Pac. R. Co.*, 18 Am. & Eng. R. Cas. 559, 3 Dak. 444, 22 N. W. Rep. 508.

(2) *What instructions are improper.*—Where a company is sued for failing to deliver certain melons according to contract, and the evidence shows that they were carried to the place of destination within a reasonable time but that the consignee refused to receive them because of damages received by not being properly loaded, it is

error to charge that if the company did not put the melons in good, safe cars, and they had to be transferred to other cars, whereby they were damaged, the jury should find for the plaintiff, as such charge changes the issue made by the pleadings. *Central R. & B. Co. v. Avant*, 32 Am. & Eng. R. Cas. 475, 80 Ga. 195, 5 S. E. Rep. 78.—REVIEWED IN *Central R. Co. v. Hubbard*, 86 Ga. 623.

In a suit against a common carrier for damages to cotton bales, and where the issue is whether the cotton bales were received, or in effect delivered to the defendant, and where the testimony on such point is conflicting, it is error in the court in the charge to the jury to call attention to evidence about which there could be no doubt, and instruct that such facts prove a delivery and the consequent liability of defendant. *Houston & T. C. R. Co. v. Hodde*, 42 Tex. 467.

(3) *What prayers should be refused.*—Where a railway company had contracted with a compress company to transport all cotton brought by its owners to the warehouse of that company, but neglected to do so until a large quantity of cotton accumulated at the warehouse and in the adjoining street and caught fire, whereby plaintiff's cotton, situated a short distance away, was destroyed, an instruction that if the jury find that defendant had contracted to remove the compress company's cotton, and that plaintiff's loss was caused by its failure to do so, they should find for plaintiff, was properly refused, since defendant's failure to comply with its contract to remove the cotton was not the juridical cause of the fire. *Martin v. St. Louis, I. M. & S. R. Co.*, 55 Ark. 510, 19 S. W. Rep. 314.

Where the goods arrived on Saturday evening, an instruction that if they were in such condition that they could have been saved by unloading them on Sunday, and that if they were damaged by a failure to do so the plaintiff cannot recover, is properly refused. *St. Clair v. Chicago, B. & Q. R. Co.*, 42 Am. & Eng. R. Cas. 414, 80 Iowa 304, 45 N. W. Rep. 570.

It is the duty of a common carrier, when property in its possession for transportation has been injured, to preserve it and limit the damages as far as it can by the exercise of reasonable diligence, but an instruction should not be given on such question, in the absence of evidence of the carrier's neglect in that regard affording a foundation for it.

Davis v. Wabash, St. L. & P. R. Co., 26 *Am. & Eng. R. Cas.* 315, 89 *Mo.* 340, 1 *S. W. Rep.* 327; reversing 13 *Mo. App.* 449.

699. Contributory negligence.—Where cotton was burned in the yards of a compress company to which it had been delivered by a carrier to be compressed, and there was no evidence that the fire was caused by sparks from the engines of the railroad company, the engines not having been within one hundred feet of the cotton for an hour before the fire, no engines being within a mile of the shed at the time the fire broke out, and all the engines being properly supplied with spark-arresters, the circumstances could not justify the conclusion that the railroad company directly caused the fire; but, on the other hand, where it appeared that the superintendent and checking-clerk of the compress company carried lighted cigars in the cotton-shed, and an employé of the company was seen carrying matches behind his ear, the conclusion that the fire resulted from negligence of the compress company was natural, just, and reasonable. *Otis Co. v. Missouri Pac. R. Co.*, 55 *Am. & Eng. R. Cas.* 636, 112 *Mo.* 622, 20 *S. W. Rep.* 676.

Where the shipper of corn allowed it to get wet before it was put in the cars and sues the company for a damage thereto when it arrives at its place of destination, and the issue is whether the damage resulted from its condition when shipped or from a short delay by the company, an instruction which limits the finding for the defendant to the fact of the corn being worthless when shipped, and entirely omits to call attention to the question whether the plaintiffs had knowingly loaded the corn in a wet condition, is erroneous. *Galveston, H. & S. A. R. Co. v. Smith*, 2 *Tex. App. (Civ. Cas.)* 129.

700. Paying money into court.—Where a carrier is sued not only for damages for unreasonable delay but also for non-delivery, the cause of action is not satisfied by the acceptance of money paid into court under a plea as to so much of the count as alleges non-delivery within a reasonable time. *Levene v. Great Western R. Co.*, 18 *L. T.* 295.

701. Previous demand not necessary.*—A demand and refusal being only a method of proving a default, and the law

not requiring a useless thing, an action may be maintained against a carrier for the loss of goods, without proof of a demand at the place of destination, when the evidence shows that the goods never reached that place. *Louisville & N. R. Co. v. Meyer*, 27 *Am. & Eng. R. Cas.* 44, 78 *Ala.* 597. *Ludwig v. Meyre*, 5 *Watts & S. (Pa.)* 435.

In an action by the bailee of goods against the owners of a steamboat for negligence, the fact in issue being whether the owners of the goods had demanded of plaintiff compensation for the damage sustained, the record of a judgment recovered by them against him for the injury to their goods and their receipt for the money paid by him in satisfaction of their demand, are competent evidence to prove the demand. *McGill v. Monette*, 37 *Ala.* 49.

702. When burden of proof on carrier.*—When goods in the custody of a common carrier are lost or damaged, the presumption is that the loss was occasioned by his default; and the burden is upon him to prove that it arose from a cause for which he is not responsible. *Cumming v. Barraclouta*, 40 *Fed. Rep.* 498; reversing 39 *Fed. Rep.* 288. *Purcell v. Southern Exp. Co.*, 34 *Ga.* 315.

It is incumbent upon a carrier making such defense to prove by clear and satisfactory evidence that goods received by him for transportation were destroyed by the public enemy. *Van Winkle v. South Carolina R. Co.*, 38 *Ga.* 32.

When goods, though perishable, or liable to rapidly deteriorate from internal causes, are damaged while in the hands of the carrier, the burden of proof is upon him to show either that he was free from negligence, or that, notwithstanding his negligence, the damage occurred without his fault; that is, that his negligence did not contribute to the damage. *Central R. & B. Co. v. Hasselkus*, 55 *Am. & Eng. R. Cas.* 586, 91 *Ga.* 382, 17 *S. E. Rep.* 838.

Where goods are delivered to a carrier for a point beyond its line, and it defends a suit for loss or injury on the ground that it was only liable to the end of its line, the

* Burden of proof in case of loss of goods by carrier, see note, 6 *L. R. A.* 852.

Burden of proof in actions against carriers, Loss by fire, see 45 *AM. & ENG. R. CAS.* 375, *abstr.*

Burden of proof to show contract by notice between carrier and shipper, see note, 5 *AM. ST. REP.* 729.

* See also *ante*, 92, 243, 307.

burden of proof is on the company to show that the goods were carried to the end of its line and there delivered or tendered for delivery. *Schroeder v. Hudson River R. Co.*, 5 *Duer* (N. Y.) 55.

Although the defendant was sued upon its original contract as carrier, and alleged that the loss was occasioned by fire while the goods were being stored by the carrier in its capacity as warehouseman, without any fault on its part, it devolved upon the carrier to prove, not only that it did its whole duty, but that it was not guilty of negligence which caused or contributed to the loss. *Wilson v. California C. R. Co.*, 55 *Am. & Eng. R. Cas.* 625, 94 *Cal.* 166, 29 *Pac. Rep.* 861.

703. When shifted to carrier.*—

Where a carrier is sued for failing to promptly carry and deliver goods, slight evidence on the part of plaintiff is sufficient to cast the burden of proof on the carrier. So where the carrier contracted to deliver goods within a specified time, proof by the consignee that he did not receive the goods within the time specified, together with evidence that a part of the goods did not arrive, is sufficient to cast the burden on the carrier to show when the goods did arrive. *Place v. Union Exp. Co.*, 2 *Hill* (N. Y.) 19.

Where the proof shows a total default in delivering the goods, or a failure to account for their non-delivery, a *prima-facie* case of negligence is made out, and the burden of proof is then shifted to the defendant to rebut this *prima-facie* negligence by evidence that the loss did not happen in consequence of his neglect to use all that care and diligence that a prudent or careful man would exercise in relation to his own property. *Texas & P. R. Co. v. Morse*, 1 *Tex. App. (Civ. Cas.)* 179.

704. When on plaintiff.†—In an action against a carrier for non-delivery of goods, although the allegation is a negative one, if put in issue, the burden of proof is upon the plaintiff, and he must give some evidence of non-delivery, according to the obligation assumed by the carrier, before the latter can be called upon to prove delivery. *Roberts v. Chittenden*, 88 *N. Y.* 33.

* See also *ante*, 107, 108.

Proof of delivery of goods to carrier and of failure to deliver to the consignee makes *prima-facie* case against carrier, see note, 13 *L. R. A.* 33.

† See also *ante*, 106-108.

Slight proof of non-delivery is sufficient to put the burden of showing delivery on the defendant, but there must be some proof by the plaintiff. It is therefore not sufficient for plaintiff to show that four bales of goods, marked with his initials, were delivered to another consignee as the property of another consignor, for *non constat*, but this was a proper delivery, and that plaintiff's cotton was also properly delivered. *Chicago, St. L. & N. O. R. Co. v. Previne*, 18 *Am. & Eng. R. Cas.* 644, 61 *Miss.* 288.

The burden is upon the plaintiff to show negligence. In the absence of such proof the fact of an accident and resulting injury will be attributed presumptively to causes other than negligence. *Harvey v. Terre Haute & I. R. Co.*, 6 *Mo. App.* 585; affirmed on other grounds, 74 *Mo.* 538.

Where goods are shipped with a provision in the bill of lading exempting the initial carrier and its connecting lines from liability for loss by fire, and the owner sets up an unusual delay in shipping, whereby the goods were lost, the burden of proof is on the plaintiff. *Whitworth v. Erie R. Co.*, 13 *J. & S. (N. Y.)* 602.

When the carrier has adduced evidence rebutting the *prima-facie* presumption of negligence which arises from the proof of injury while the goods are still in his possession, but the rebutting evidence consists of the oral testimony of witnesses the sufficiency and credibility of which are matters for the determination of the jury, a charge which asserts that the burden of proof is thereby shifted to the plaintiff is properly refused, because calculated to confuse and mislead the jury. *Western R. Co. v. Harwell*, 45 *Am. & Eng. R. Cas.* 358, 91 *Ala.* 340, 8 *So. Rep.* 649.

2. Who May Sue.*

705. The owner.—To sustain a suit against a carrier for an injury to the goods carried, the goods must belong to the plaintiff at the time of the injury. *Lau v. Hatcher*, 4 *Blackf. (Ind.)* 364.

The plaintiff must be the owner or have some special interest in the goods. *Thompson v. Fargo*, 44 *How. Pr. (N. Y.)* 176.

The owner of goods, whether consignor or consignee, should bring the suit for an

* Who must bring suit for loss of goods, see notes, 18 *AM. & ENG. R. CAS.* 642, 38 *AM. DEC.* 423. See also *ante*, 122.

injury caused by the negligence of the carrier. *Congar v. Galena & C. U. R. Co.*, 17 Wis. 477.

Where negligence is shown, the owner may recover damages against the carrier for injury to goods though he is not the shipper. The action does not sound in contract. *Harvey v. Terre Haute & I. R. Co.*, 6 Mo. App. 585; affirmed on other grounds, 74 Mo. 538.

The owner of goods shipped, part of which are lost or destroyed by neglect of the carrier, may maintain an action against him for the value of the goods lost, without previous payment or tender of freight, if he has received the remainder of the goods with the carrier's consent. *Alden v. Pearson*, 3 Gray (Mass.) 342.

An acceptance by the owner of goods short of their destination, and after they have been damaged in consequence of the carrier's negligence, is not a bar to an action for such damage. *Lesinsky v. Great Western Dispatch*, 10 Mo. App. 134.

Goods do not change their ownership by being in the charge of a common carrier, whose only rights are a lien for charges, and whose duty is to deliver them uninjured to the consignee; and, therefore, when the carrier has injured these goods *in transitu*, a right of action arises in favor of the owner. *Miami Powder Co. v. Port Royal & W. C. R. Co.*, 55 Am. & Eng. R. Cas. 688, 38 So. Car. 78, 16 S. E. Rep. 339.—QUOTING *Wallingford v. Columbia & G. R. Co.*, 26 So. Car. 267.—*Steele v. Grand Trunk R. Co.*, 31 U. C. C. P. 260.

If a carrier pays the consignor of goods compensation for their loss without notice that he was merely an agent, and believing that he delivered the goods on his own account, this is no defense to an action by the actual owner for the loss of the goods. *Coombs v. Bristol & E. R. Co.*, 3 H. & N. 1, 27 L. J. Ex. 269.

706. Owner may sue on contract made by undisclosed agent.—Though an agent, without disclosing that he was acting as agent, contracts with a carrier for the transportation of goods, the owner of the goods may bring an action for breach of the contract. *Ames v. First Div. St. P. & P. R. Co.*, 12 Minn. 412 (Gil. 295). *Elkins v. Boston & M. R. Co.*, 19 N. H. 337.

707. The owner of oil-tanks.—Plaintiff, a shipper of oil, by arrangement with one of a connecting line of railroads

furnished tanks for the transportation of his oil which were fastened to flat cars of the company, but were to remain the property of the shipper and to be returned when emptied. A bill of lading was furnished with each shipment of oil specifying the quantity, but no mention was made of the tanks. No bill of lading was furnished for the return of the empty tanks, nor was any consideration paid therefor independent of that paid for the transportation of the oil; nor was any special arrangement made for the return transportation. Two of said tanks, filled with oil, were destroyed by fire while on defendant's portion of the line. Held, that under the arrangement made by the plaintiff with the railroad companies, the latter assumed, as to the tanks, the unrestricted liabilities of common carriers, and that although no compensation was paid to the companies directly for the transportation of the empty tanks, yet that they receive a compensation, in a legal sense, in the payment of freight on the oil; and that the plaintiff was entitled to recover the value of the tanks destroyed. *Spears v. Lake Shore & M. S. R. Co.*, 67 Barb. (N. Y.) 513.—FOLLOWING *Mallory v. Tioga R. Co.*, 39 Barb. (N. Y.) 488.

708. The consignor.*—The contract for transportation being with the consignor he may sue for a breach in failing to safely carry and deliver, whether he retains any property in the goods or not, the recovery being for the benefit of the consignee if he is the real owner. *Ohio & M. R. Co. v. Emrich*, 24 Ill. App. 245. *Missouri Pac. R. Co. v. Smith*, 84 Tex. 348, 19 S. W. Rep. 509.

Unless it be shown that the consignee objects, it will be presumed that the suit was commenced and prosecuted with the knowledge and consent of the consignee, and for his benefit. *Southern Exp. Co. v. Craft*, 49 Miss. 480.

Where the entire property is in the consignor, he is the proper party to sue. Where the entire property is in the consignee, he should sue. When both are interested, one as general, the other as special owner, either may sue; and a recovery in such action will be a bar to any subsequent action by another party having either a

* Party contracting with carrier may bring suit for loss of goods, see note, 30 AM. & ENG. R. CAS. 115.

general or a special property in the goods; and the carrier cannot object that some of the goods belong to another party. *Denver, S. P. & P. R. Co. v. Frame*, 18 Am. & Eng. R. Cas. 637, 6 Colo. 382.

A shipper named in a bill of lading may sue the carrier for an injury to the goods, although he has no property, general or special, therein. This may be done by force of the original contract for safe carriage, made by the carrier with him. *Hooper v. Chicago & N. W. R. Co.*, 27 Wis. 81, 5 Am. Ry. Rep. 302.—QUOTED IN *Waterman v. Chicago, M. & St. P. R. Co.*, 18 Am. & Eng. R. Cas. 486, 61 Wis. 464.

Such right of action upon the contract is not affected by the provision of Wisconsin Code, requiring every action to be brought in the name of the real party in interest. *Hooper v. Chicago & N. W. R. Co.*, 27 Wis. 81, 5 Am. Ry. Rep. 302.

A judgment in favor of a consignee against a consignor, who are respectively purchaser and seller, on account of insufficient delivery by the carrier, and based upon the ground that the property never passed to the consignee, does not estop the seller or consignor from maintaining an action against the carrier for failing to safely carry and deliver the goods. *Finn v. Western R. Corp.*, 102 Mass. 283.

The consignor of goods by rail cannot sue the carrier for them if the latter delivers them to the wrong person on written authority to do so from the consignee, even though the consignee states that he has no claim on the goods; *a fortiori*, he cannot if he himself has assented to such delivery. *Dobbin v. Michigan C. R. Co.*, 21 Am. & Eng. R. Cas. 85, 56 Mich. 522, 23 N. W. Rep. 204.

Plaintiff delivered to a servant of a railroad company, who had frequently shipped goods for her before, a basket of clothes for transportation. He stated that he had shipped the basket, but neither the plaintiff nor any one for her ever received it. *Held*, that the plaintiff was entitled to recover from the company whatever she proved the basket to be worth. *Quarrier v. Baltimore & O. R. Co.*, 18 Am. & Eng. R. Cas. 535, 20 W. Va. 424.

709. Where the consignor has sold the goods.—The implied contract between a shipper and carrier on the part of the carrier is to safely carry and deliver the goods, and on the part of the shipper to pay a rea-

sonable compensation. The carrier has a right to look to the shipper for his compensation or charges; and unless he acts as a mere agent of the consignee the shipper may enforce the contract and sue the carrier for a breach. *Finn v. Western R. Corp.*, 112 Mass. 524.

One who forwards goods in execution of an order or agreement for sale is not a mere agent of the purchaser in doing so. He is acting in his own interest and behalf in his dealing with the carrier, or in his own right or upon his own responsibility, unless he acts under special authority or directions from the purchaser, and is entitled to recover from the carrier the full value of property shipped and lost. *Finn v. Western R. Corp.*, 112 Mass. 524.—DISAPPROVING *Dawson v. Peck*, 3 T. R. 330; *Green v. Clark*, 12 N. Y. 343; *Kruidler v. Ellison*, 47 N. Y. 36, and approving dissenting opinion in *Griffith v. Ingledeu*, 6 S. & R. (Pa.) 429.

A contract of sale being rescinded by the consignee's refusal to receive the goods because not delivered in time, the consignor, as the owner, may sue the carrier for failure to deliver. *Bergner v. Chicago & A. R. Co.*, 13 Mo. App. 499.

Where a purchaser orders goods from the seller and gives no directions as to the mode of conveyance to him, the seller, who pays the freight and delivers them to a carrier, may maintain an action against the carrier for a loss. *Goodwyn v. Douglas*, 1 Cheves (So. Car.) 174.

When a consignor delivers goods to a carrier to be delivered to a consignee, *prima facie*, the consignee is the owner; but when the consignor merely contracts with the carrier for the conveyance of the goods to a certain point, and the consignor is shown to be the owner before shipment, there is nothing to show a change of ownership. *East Line & R. R. Co. v. Hall*, 64 Tex. 615.

710. Either consignor, consignee, or real owner may sue.*—Where the shipper of goods guarantees the payment of the freight, and makes a special agreement for their carriage, an action may be brought for non-delivery to the consignee either by the consignor or by the consignee. *Stafford v. Walter*, 67 Ill. 83.

Where the carrier contracts with the con-

* When consignor and when consignee may sue, see note, 16 AM. & ENG. R. CAS. 265.

signor for the shipment the latter may sue for a breach though he be but a bailee. He has such a special property in the goods as to give him the right of action. So may the real owner sue, and so may the consignee. *Great Western R. Co. v. McComas*, 33 Ill. 185.

711. Consignor deemed owner—Carrier cannot dispute his title.*—

The general rule is that the carrier cannot dispute the title of the consignor where the latter has made the contract with the carrier and has become liable for the charges; but this rule seems not to apply where the seller only delivers grain on board cars in pursuance of a contract of sale, and all the shipping arrangements are made by the purchaser, and the bill of lading specifies that the grain was shipped to the consignee on account of the purchaser. *Illinois C. R. Co. v. Schwartz*, 11 Ill. App. 482.

Where the shipper of goods has sold them to the consignee, of which the railway has knowledge, and with such knowledge contracts with the shipper to safely carry them, he can sue for a failure to safely carry, and the company cannot set up in defense the title of the consignee. And having repaid the whole price to the consignee, the shipper may recover the whole value of the property, unaffected by a subsequent offer to return it. *Brill v. Grand Trunk R. Co.*, 20 U. C. C. P. 440.

712. The consignee.—The consignee (purchaser) is the person *prima facie* entitled to sue a common carrier for loss of property, but this presumption may be rebutted by proof. *Southern Exp. Co. v. Caperton*, 44 Ala. 101. *South & N. Ala. R. Co. v. Wood*, 18 Am. & Eng. R. Cas. 634 72 Ala. 451.

The consignee of goods may maintain an action against a common carrier for their loss, although another person was the owner of them or was jointly interested in them with him. *Southern Exp. Co. v. Armstead*, 50 Ala. 350.

An action against a common carrier for failure to deliver goods intrusted to it is properly brought in the name of the consignees alone, notwithstanding they are prosecuting the suit for the benefit of another whom they hold liable for the value of the goods. *Mobile & G. R. Co. v. Williams*, 54 Ala. 168.

The consignees of a car-load of wheat screenings, shipped over a company's railroad, but which was destroyed before reaching its destination, may maintain an action against a railroad company for the recovery of damages for such destruction. *Kirkpatrick v. Kansas City, St. J. & C. B. R. Co.*, 27 Am. & Eng. R. Cas. 51, 86 Mo. 341.

Where the consignee of goods shipped upon a railroad pays the draft drawn on him by the shipper and receives the bill of lading to which the draft is attached, and subsequently purchases the goods from the owner, he thereby becomes the real party in interest under the Code. Rev. St. § 3462. And it makes no difference that the goods were destroyed before the absolute sale, as the property of the owner in them still continued and was the subject of transfer; and the transferee could maintain action for damages for their destruction on the ground of such transfer. *Kirkpatrick v. Kansas City, St. J. & C. B. R. Co.*, 27 Am. & Eng. R. Cas. 51, 86 Mo. 341.

One who is not the consignee, and who is not the indorsee of a bill of lading, cannot maintain an action against the carrier for failing to properly carry and deliver, though he has paid a draft for the price of the goods, as under Georgia Code no one but the consignee or holder of a bill of lading can sue. *Haas v. Kansas City, Ft. S. & G. R. Co.*, 35 Am. & Eng. R. Cas. 572, 81 Ga. 792, 7 S. E. Rep. 629.

Plaintiff ordered certain coils of rope, but when they were tendered to him by the carrier were found unsatisfactory, and he directed them to be returned to the shipper; but before they reached the shipper he paid the price thereof. *Held*, that he could maintain an action against the carrier for a loss. *Ralph v. Chicago & N. W. R. Co.*, 32 Wis. 177.—DISTINGUISHED IN *Lee v. Chicago, R. I. & P. R. Co.*, 45 Am. & Eng. R. Cas. 157, 80 Iowa 172.

713. Consignee deemed the owner.

—As a general rule, an action against a carrier for the loss of goods sent by a vendor to a vendee must be brought in the name of the consignee; for the law infers that, by the delivery to the carrier, the goods become the property of the consignee, and this though the consignor pay the freight; but where, by agreement between the vendor and vendee, the goods did not become the property of the latter, and he was at no risk in regard to them until they

* See also *ante*, 220.

actually reached him, the consignor should sue. *Madison, I. & P. R. Co. v. Whitesel*, 11 Ind. 55. *Smith v. Lewis*, 3 B. Mon. (Ky.) 229. *McCauley v. Davidson*, 13 Minn. 162 (Gil. 150). *Gwyn v. Richmond & D. R. Co.*, 6 Am. & Eng. R. Cas. 452, 85 N. Car. 429, 39 Am. Rep. 708. *Bucharach v. Chester Freight Line*, 42 Am. & Eng. R. Cas. 362, 133 Pa. St. 414, 19 Atl. Rep. 409. *Congar v. Galena & C. U. R. Co.*, 17 Wis. 477. *Young v. Canadian Pac. R. Co.*, 1 Man. 205.

The legal presumption is that upon the delivery of goods to a common carrier the title thereto vests in the consignee, and in the absence of notice to the contrary, the carrier has the right to rely on this presumption, if the property be lost, stolen, or destroyed. *Dyer v. Great Northern R. Co.*, 51 Minn. 345, 53 N. W. Rep. 714.

This rule is not affected by Minn. Gen. St. 1878, ch. 39, §§ 15, etc., which relate to the filing of notes or other contracts evidencing conditional sales. *Dyer v. Great Northern R. Co.*, 51 Minn. 345, 53 N. W. Rep. 714.

714. Consignor may release to consignee.*—As a rule the title to goods shipped does not vest in the consignee until delivery to him of a bill of lading or of the goods; but where they are lost while in transit, the consignor may release to the consignee, and the latter may maintain an action against the carrier for the loss. *Ela v. American Merchants' Union Exp. Co.*, 29 Wis. 611.

715. Consignee or owner must first pay charges.†—Under the older decisions of this state a consignee could sue the common carrier in trover for goods injured in carriage, where the injury amounted to more than the freight charges, and in such case the carrier lost his lien for freight; but the more recent decisions, hereby reaffirmed, require the owner to pay all freight charges and then sue the carrier for the injury done. *Miami Powder Co. v. Port Royal & W. C. R. Co.*, 55 Am. & Eng. R. Cas. 688, 38 So. Car. 78, 16 S. E. Rep. 339.—FOLLOWING *Shaw v. South Carolina R. Co.*, 5 Rich. (So. Car.) 462; *Nettles v. South Carolina R. Co.*, 7 Rich. (So. Car.) 190.

716. Where the consignee is a

factor.—Though in an action against a carrier for non-delivery or loss of goods, or default in conveyance, the owner of the goods is ordinarily the person to demand compensation, yet one who has a special property as a factor or a special agreement for carrying them may sue. So also the shipper in whose name the bill of lading is taken may sue, the privity of contract being established between the parties by means of the bill of lading. *Houston & T. C. R. Co. v. Stewart*, 1 Tex. App. (Civ. Cas.) 718.

The consignor of cotton who is the owner thereof may maintain his action against a common carrier for the loss of the cotton; and the consignee, who is a mere factor, may be a witness for him. *Western & A. R. Co. v. Kelly*, 1 Head (Tenn.) 158.

A railroad company receipted for goods to be shipped to factors at the place of destination, but the shipper signed a declaration in which the goods were mentioned as being consigned to other parties, the factor's principals, and the goods were so shipped. Held, that the factors, never having come into possession of the goods, had no lien thereon, and could not sue for their value. *Clark v. Great Western R. Co.*, 8 U. C. C. P. 191.—DISTINGUISHING *Midland G. W. R. Co. v. Benson*, 30 L. T. 26.

717. Partners or joint owners.—The joint owners of personal property intrusted to a common carrier may maintain an action against him for its loss, notwithstanding the receipt given for the property by the carrier, at the time he received it, was an acknowledgment that he had received it from two of the plaintiffs, the joint ownership of the other plaintiff being unknown to him; and such receipt, accompanied by proof that the plaintiffs were the real owners, is admissible in evidence for the plaintiffs. *Day v. Ridley*, 16 Vt. 48.

Where goods are shipped to two persons having a joint interest therein one of them cannot maintain an action against the railroad company for damages to the goods while being shipped. *Missouri Pac. R. Co. v. Rushin*, 3 Tex. App. (Civ. Cas.) 385.

The fact that the owner and shipper of property is doing business in the name of a firm, in violation of N. Y. act of 1833, ch. 281, "to prevent persons transacting business under fictitious names," and that the property is marked with the firm name, is no defense to an action by such owner

* Assignment of right of action against carrier for injury to goods, see 45 AM. & ENG. R. CAS. 378, *ante*.

† See also *ante*, 42, 200.

against a railroad company for loss or damage to the property while being carried. *Wood v. Erie R. Co.*, 72 N. Y. 196, 28 Am. Rep. 125; affirming 9 Hun 648.

718. Where goods are insured.—Shippers of insured goods may recover from the carrier their value, though the insurance company may have paid the insurance, notwithstanding Ala. Code, § 2891, providing that "in all cases where suits are brought in the name of the person having the legal right, for the use of another, the beneficiary must be considered the sole party in the record." *Mobile & M. R. Co. v. Jurey*, 16 Am. & Eng. R. Cas. 132, 111 U. S. 584, 4 Sup. Ct. Rep. 566.

In such case no legal privity exists between the company and the insurer which would give the former a right to avail itself of a payment made by the latter. *Texas & P. R. Co. v. Levi*, 13 Am. & Eng. R. Cas. 464, 59 Tex. 674.

In taking the benefit of the insurance the carrier does not limit his common-law liability to the shipper for any loss that may occur. There is no contract of exemption against liability for loss or negligence under an agreement that the carrier shall be indemnified. *British & F. M. Ins. Co. v. Gulf, C. & S. F. R. Co.*, 21 Am. & Eng. R. Cas. 112, 63 Tex. 475.

719. Persons who have accepted drafts.—A consignee who has contracted to purchase goods, and who has made advances thereon, has a lien on the goods for his advances paramount to all others, and may maintain an action in his own name against the carrier for loss or injury thereto. *Burritt v. Rench*, 4 McLean (U. S.) 325.

Under Georgia Code, providing that only the consignee may sue for loss or injury to property shipped, one who is not the consignee, but who has paid a draft for the price of the goods, cannot maintain an action against the carrier for failing to properly carry and deliver. *Haas v. Kansas City, Ft. S. & G. R. Co.*, 35 Am. & Eng. R. Cas. 572, 81 Ga. 792, 7 S. E. Rep. 629.

Where the consignee of grain paid drafts for the price, drawn by the consignor, and held bills of lading for the same, the consignee had such property in the grain as to enable him to maintain a suit against the railroad for delay in delivering the grain, though there was an agreement that the grain should not be the property of the consignee until it was inspected at the place of

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delivery. *Illinois C. R. Co. v. Cobb*, 64 Ill. 128.—DISTINGUISHED IN *Dickson v. Chicago, B. & Q. R. Co.*, 81 Ill. 215.

720. Sufficiency of title to support action.—Suit may be maintained against a common carrier in the name of any one having either a general or special property in the goods, and an action, properly brought by any one having such right of action, will be a bar to any subsequent suit against the carrier by another party having either a general or special property in the goods, for the same damage. *Illinois C. R. Co. v. Miller*, 32 Ill. App. 259.—QUOTING *Illinois C. R. Co. v. Schwartz*, 13 Ill. App. 490.—*Southern Exp. Co. v. Caperton*, 44 Ala. 101.

Where a transportation company gave a shipping receipt for the transportation of goods, and they are lost, the person to whom the receipt is given may bring the action, although the property may belong to another. *Northern L. Packet Co. v. Shearer*, 61 Ill. 263.

Where a party buys grain in his own name, for which he is responsible, and ships the same to another, who pays no money on the same, but who pays drafts drawn on general account, the latter will not have such a property in the grain as to give him a right to maintain an action against the carrier for delay in transportation, especially when it is provided by contract that the grain must first pass inspection. *Cobb v. Illinois C. R. Co.*, 88 Ill. 394, 21 Am. Ry. Rep. 317.

To sustain an action against a common carrier for failing to deliver goods, plaintiff must be the owner or have some special interest in them. *Prima facie* the consignee is the owner. There may be cases where the consignor has sufficient interest to sue, but where he merely acts as the agent of the consignees in collecting and forwarding certain property, which he never owned, he has not such right or interest as to enable him to sue. *Thompson v. Fargo*, 49 N. Y. 188, 44 How. Pr. 176; reversing 58 Barb. 575.

Forwarding merchants, who have prepaid freight on goods, may maintain assumption against the carriers for loss of the goods, when the suit is for the use of the real owners. *Baltimore & P. Steamboat Co. v. Atkins*, 22 Pa. St. 522.

One count of a declaration alleged that P. delivered to the defendant, a common carrier, certain bales of cotton, to be safely

carried from the place of shipment to a place named, in consideration of a certain reward paid by P.; that defendant agreed to carry the same, and that defendant delivered to P. a bill of lading for such cotton, thereby acknowledging the receipt thereof, and undertaking to carry the same, as aforesaid; that said P., for a valuable consideration to him paid, assigned and delivered said bill of lading to D., who, on the same day, assigned and delivered the same to plaintiff, whereby the right and title to said cotton, and the right to the possession thereof, passed to and became vested in the plaintiff; and alleged breach of the contract. *Held*, that the contract thus set up was not an implied but a special contract, and a mere chose in action, which was not assignable, so as to enable the assignee to sue in his name. *Knight v. St. Louis, I. M. & S. R. Co.*, 141 Ill. 110, 30 N. E. Rep. 543; *affirming* 40 Ill. App. 471.

Goods were shipped by rail consigned to a bank or its assigns. The bank assigned the goods to plaintiff, who sued for not delivering promptly. There was no evidence showing what interest the bank had in the goods. *Held*, in the absence of a plea denying ownership in plaintiff, it was admitted that he was the real owner at the time of shipment, and could sue. It was not necessary that the bank indorse the bill of lading to plaintiff. *Kyle v. Buffalo & L. H. R. Co.*, 16 U. C. C. P. 76.

721. The carrier may sue a wrongdoer.—A common carrier, as he is not absolved from liability to the owner of the goods by the torts of third persons, has a right to maintain an action for the wrong, and a recovery by him for the injury done to the goods will be a bar to a subsequent action by the owner for the damages or loss resulting from the same injury. *Steamboat Farmer v. McCraw*, 26 Ala. 189.

722. Estoppel.—A judgment recovered by the administrator of an employé killed by a defective car, against the plaintiff, a quarry company, did not preclude the latter from maintaining an action against the railway company furnishing the car for a breach of its duty as a carrier. The former action was for an injury resulting from a breach of duty owing by the quarry company to an employé, while the present action is brought

for the breach of duty owing by a carrier to one for whom it had undertaken to carry goods or property. *Hoosier Stone Co. v. Louisville, N. A. & C. R. Co.*, 131 Ind. 575, 31 N. E. Rep. 365.

3. Pleadings.

723. Sufficiency of the complaint, generally.—In an action against a common carrier for the failure to deliver goods, it is sufficient to pursue the form of complaint given in Ala. Code, p. 703, No. 13. *Howland v. Wallace*, 81 Ala. 238, 2 So. Rep. 96.

In a declaration against a common carrier for negligence, it must be alleged that he accepted or undertook to carry the goods, or no judgment can be rendered thereon. *Sommerville v. Merrill*, 1 Port. (Ala.) 107.

Where an action against a carrier is based upon the latter's negligence, there should be some general statement of the cause of the damage beyond a mere statement of neglect and carelessness. Whether the carrier is guilty of negligence or carelessness is a conclusion of law dependent upon facts which must be proved. So the mere statement that "defendant so negligently and carelessly misbehaved itself in transporting the same (the goods) that the plaintiff, by reason thereof, sustained damage," is too indefinite and uncertain. *Ruben v. Ludgate Hill Steamship Co.*, 17 N. Y. S. R. 17, 49 Hun 608, *mem.*

A complaint alleging that the defendant, a common carrier, failed to safely carry certain articles of freight according to contract, and "so negligently and carelessly conducted in regard to the same that it was greatly damaged," states facts sufficient to constitute a tort. *Bowers v. Richmond & D. R. Co.*, 107 N. Car. 721, 12 S. E. Rep. 452.—*QUOTED IN Purcell v. Richmond & D. R. Co.*, 108 N. Car. 414.—*Williams v. Baltimore & O. R. Co.*, 9 W. Va. 33.

In an action for not properly carrying goods the complaint should indicate the form of action, as, e. g., whether damages are claimed for partial loss or for delay in delivery, or for conversion. *Miami Powder Co. v. Port Royal & W. C. R. Co.*, 55 Am. & Eng. R. Cas. 688, 38 So. Car. 78, 16 S. E. Rep. 339.

A petition against a carrier, alleging delay in the delivery of a cotton-gin in shipment,

* See also *ante*, 604.

* See also *ante*, 121.

and asking compensation for use of such machinery during the alleged delay, is good on general demurrer as a claim for rents. *Gulf, C. & S. F. R. Co. v. Pettit*, 3 Tex. Civ. App. 588, 22 S. W. Rep. 761.

A car-load of wheat was shipped by contract with one of the defendants, to be transferred to a given point in care of another railroad company, but, in violation of that contract, was transferred to the B., C. R. & N. R. Co., the other defendant in this action. The complaint showed these facts, and also showed that the wheat was destroyed while in possession of the latter defendant. Held, that the averments were sufficient to sustain the action, and, as the evidence showed that defendants had a joint interest in the contract of transportation, a verdict against them should be sustained. *Independence Mills Co. v. Burlington, C. R. & N. R. Co.*, 32 Am. & Eng. R. Cas. 456, 72 Iowa 535, 34 N. W. Rep. 320.

724. Necessary averment that defendant is a common carrier.—Where a railroad company is sued for the non-delivery of goods, it is necessary to allege in the complaint that the company is a common carrier; otherwise it cannot be held liable in that capacity. *Bristol v. Rensselaer & S. R. Co.*, 9 Barb. (N. Y.) 158.

In a suit *in rem* it is not necessary to charge the ship as a common carrier; but the rule is otherwise where the suit is *in personam*. But, in the former case, it must appear from the evidence that the ship was employed in the business of a common carrier. *Seller v. Steamship Pacific*, 1 Oreg. 409.

An averment that defendant is a corporation, created by the laws of the state, and engaged in operating a railroad, and carrying corn and grain in cars furnished by itself upon its own and other roads, is equivalent to an averment that it is a common carrier. *Toledo, W. & W. R. Co. v. Roberts*, 71 Ill. 540.

An allegation of a contract to carry, coupled with an averment that defendant is a railroad corporation, is sufficient to fix the liability of the defendant. The complaint is clearly good after verdict where the proof shows that defendant was exercising the office of a carrier and did in fact so contract as to the shipment sued on. *Kain v. Kansas City, St. J. & C. B. R. Co.*, 29 Mo. App. 53.

The allegation that "the defendant, be-

fore and at the time of the committing of the grievances hereinafter mentioned, were the owners and proprietors of a certain railroad, to wit, the Baltimore & Ohio Railroad, and of certain carriages used by it for the carriage and conveyance of goods and chattels in, upon, and along said railroad from a certain place, to wit, Parkersburg, Wood County, West Virginia, for hire and reward to it the defendant in that behalf," is a sufficient allegation that the defendant was a common carrier. *Baltimore & O. R. Co. v. Morehead*, 5 W. Va. 293.

Though a declaration does not allege that the defendants are common carriers, yet, if the facts set out constitute them such in law, it is sufficient to sustain the action against them as common carriers. *Southern Exp. Co. v. McVeigh*, 20 Gratt. (Va.) 264.

Though a declaration in case does not allege the duty of the defendants as common carriers to carry the goods, and the breach of that duty, if it avers facts from which the law infers the duty, and that the defendants, not regarding their said duty, etc., and assigns the breach, that is sufficient. *Southern Exp. Co. v. McVeigh*, 20 Gratt. (Va.) 264.

A complaint which alleged defendant's failure to "ship, transport, and carry" perishable goods to their destination, as per agreement, to plaintiff's damage, states a cause of action. There being a special contract, it was not necessary to allege that defendant was a common carrier. *Dunbar v. Port Royal & A. R. Co.*, 36 So. Car. 110, 15 S. E. Rep. 357.

725. Averments of negligence.—In a declaration in contract against a common carrier it is common, though not necessary, to allege that the goods were injured by the negligence of the carrier or its servants. So a declaration charging the injury to have been "through the fault of the defendant," is sufficient. *School District v. Boston, H. & E. R. Co.*, 102 Mass. 552.

Where a cotton-compress company received certain cotton to be compressed and shipped for plaintiffs, and placed the same on a platform in close proximity to railway tracks and passing engines, and the cotton was there destroyed by fire, a petition stating the facts showed actionable negligence, and a general demurrer thereto was improperly sustained. *Martin v. Missouri Pac. R. Co.*, 3 Tex. Civ. App. 133, 22 S. W. Rep. 195.

A complaint in an action against a railway company alleging that the defendants were common carriers; that C. and B. were in the habit of sending empty casks by defendants' railway to plaintiff, which plaintiff filled with ketchup and returned; that defendants, by their agents and servants, knew the purpose for which the casks were delivered to plaintiff; that the defendants negligently and improperly delivered to plaintiff, as C. and B.'s casks, certain other casks not belonging to C. and B., and which had contained turpentine; that plaintiff, not knowing, or having reasonable means of knowing, that the empty casks delivered were not C. and B.'s, filled them with ketchup, which was spoiled, shows no duty on the part of the company which could give rise to a cause of action, and is demurrable. *Cunnington v. Great Northern R. Co.*, 49 L. T. 392, 48 J. P. 134.

726. Averments of ownership by plaintiff—In an action by the consignor against a common carrier for damages for the non-delivery of goods to the consignee at the place stipulated in the contract, the complaint will be held bad on demurrer if it does not allege that plaintiff was the owner of the goods, or that such goods were not elsewhere delivered to and accepted by the consignee at the place named in the contract. *Pennsylvania Co. v. Holderman*, 69 Ind. 18.

In an action to recover against a carrier for failure to deliver goods, brought in the name of the consignor, the complaint is bad unless it avers facts showing that the consignor is the real party in interest. In the absence of such averments it is presumed that the consignee is the real party in interest. *Pennsylvania Co. v. Poor*, 23 Am. & Eng. R. Cas. 711, 103 Ind. 553, 3 N. E. Rep. 253.

In an action against a common carrier for a failure to deliver freight, a count in the declaration employing no other averment of ownership in the plaintiff than the word "claims" is not sufficient on demurrer. *Montgomery & W. P. R. Co. v. Edmonds*, 41 Ala. 667.

If a complaint against a common carrier, for failure to carry and deliver property, shows that the property was bought of the consignor by the plaintiff, that the consignor delivered it to the carrier, and that the carrier executed a bill of lading to the plaintiff, but failed to deliver the goods, it is

sufficient. *Ohio & M. R. Co. v. Yohe*, 51 Ind. 181.

Where a bank sues as assignee of a shipping-note for the non-delivery of goods by a railroad, it is not necessary to aver that they acquired the shipping-note as security for an advance made thereon, under the statute 34 Vict. c. 5, § 46, providing that banks may hold bills of lading, etc., as security for advances made thereon. *Royal Canadian Bank v. Grand Trunk R. Co.*, 23 U. C. C. P. 225.

727. Averments as to payment of charges.—In case against a common carrier, it is not necessary to allege that a compensation was paid, or agreed to be paid, for carrying the goods. *Hall v. Cheney*, 36 N. H. 26.

Where a railroad company is sued for the non-delivery of goods, if the complaint does not allege that the defendant received, or was to receive, a compensation for carrying and delivering the goods, the agreement will be regarded as made without consideration. *Bristol v. Rensselaer & S. R. Co.*, 9 Barb. (N. Y.) 158.

Where an action is brought to recover damages for the refusal of a railroad company to transport the plaintiff's lumber, it is not necessary to aver in the petition the points to which the lumber was to be carried and the tender of the freight upon it, as the complaint is not for a refusal to carry any specific lot of lumber, but for the continual withholding of facilities. *Central & M. R. Co. v. Morris*, 28 Am. & Eng. R. Cas. 50, 68 Tex. 49, 3 S. W. Rep. 457.

In an action against a carrier for refusing to carry goods, it is not necessary to aver the actual tender of money for the carriage; an averment that the plaintiff was ready and willing to pay is sufficient. *Pickford v. Grand Junction R. Co.*, 8 M. & W. 372, 9 D. P. C. 766, 2 Railw. Cas. 592, 5 Jur. 731.

728. Averments as to duty to carry in a reasonable time.—A complaint against a common carrier for failure to deliver goods must show either that after the carrier received the goods to be transported a reasonable time has elapsed for transportation, or that the goods have been transported before the demand was made; and also, either that the defendant's reasonable rates and charges have been paid or tendered, or that a reason exists for not having done so. *Jeffersonville, M. & I. R. Co. v. Gent*, 35 Ind. 39.

Admitting it to be one of the duties of a common carrier to transport without unreasonable delay, the neglect of that duty could not be a ground of recovery against him without an averment in the declaration charging the duty and assigning a breach of it. *Buckley v. Great Western R. Co.*, 18 *Mich.* 121. — EXPLAINED IN *Derosia v. Winona & St. P. R. Co.*, 18 *Minn.* 133 (Gil. 119).

729. Setting out special contract sued on.—Whether the form of action against a carrier for injury or loss to goods be assumpsit or case, the contract of shipment should be correctly described in the declaration. *Chicago, B. & Q. R. Co. v. Hale*, 2 *Ill. App.* 150.

In cases where there is a special contract with the carrier, by which the common-law liability is restricted, and the action is in form *ex contractu*, it seems that the special contract must be set out in the declaration; but where the action is in tort for the breach of a duty or obligation imposed by law, it is unnecessary to notice the special contract, although it may be under seal. *Clark v. St. Louis, K. C. & N. R. Co.*, 64 *Mo.* 440, 17 *Am. Ry. Rep.* 284.

Under the Indiana Code, where a contract of shipment sued on is evidenced by a bill of lading, the complaint should be based on the contract, refer to it, and a copy be filed with the complaint. *Indianapolis & C. R. Co. v. Remmy*, 13 *Ind.* 518.

Where it appears that goods were received for shipment under a written contract set up in one paragraph of complaint, there can be no recovery under another paragraph counting on a breach of the carrier's common-law duty, and evidence of a parol agreement is not admissible under the latter paragraph. *Snow v. Indiana, B. & W. R. Co.*, 28 *Am. & Eng. R. Cas.* 77, 109 *Ind.* 422, 9 *N. E. Rep.* 702.

If a complaint against a common carrier states a cause of action it is wholly immaterial whether it is based on a common-law liability or on a special contract; and it is error of the court to require plaintiff's counsel to elect whether they will stand on the defendant's common-law liability or upon an alleged special contract. *Tuggle v. St. Louis, K. C. & N. R. Co.*, 62 *Mo.* 425.

730. Misnomer.—That the name of a partnership was inverted in making a written contract will not defeat an action

brought in tort against the carrier by the partnership in its proper name. *Central R. Co. v. Pickett*, 87 *Ga.* 734, 13 *S. E. Rep.* 750.

731. Itemizing goods lost—Making complaint more certain.—Where it is sought to recover damages from a railroad company for various articles of goods shipped as freight, it is sufficient to itemize in the complaint the various articles, with the value of each article, and the aggregate value of the whole, and then to allege the aggregate damage to the whole without specifying the damage to each article separately. *Brown v. Adams*, 3 *Tex. App. (Civ. Cas.)* 462.

In an action for the recovery of eighty-six barrels of commercial fertilizers, shipped over defendants' road but not delivered, the complaint set out the shipment of two invoices, aggregating 240 barrels chemicals, on Feb. 4th and 13th, 1879, from Port Royal to Allendale, and seven invoices at stated dates from February to May, 1879, of 256 barrels of dissolved bone from Augusta to Allendale, out of which shipments twenty barrels of chemicals and sixty-six barrels of dissolved bone had not been delivered to the consignee, but that plaintiffs "do not know on what day or days the eighty-six barrels of fertilizers alleged to have been lost were received by the defendants for shipment." *Held*, that a motion to require the plaintiff to make his complaint more definite and certain by stating "on what day or days the fertilizers alleged to have been lost" were received, was properly refused. *Duabur v. Port Royal & A. R. Co.*, 19 *So. Car.* 601.

732. Allegation as to delivery and loss.—In a declaration against a carrier for the loss of goods it is necessary to aver a delivery of the goods to him, and the omission to make such an averment would be fatal on general demurrer. *Jordan v. Hazard*, 10 *Ala.* 221.

A petition, in an action against a common carrier for loss of property received for carriage, which alleges the delivery and loss of the property is sufficient. *McFadden v. Missouri Pac. R. Co.*, 30 *Am. & Eng. R. Cas.* 17, 92 *Mo.* 343, 10 *West. Rep.* 372, 4 *S. W. Rep.* 689.

In an action against a carrier an allegation of a delivery of things to be carried is equivalent to an allegation of a delivery to be safely and securely carried, subject to such exceptions as the law creates. *Austin*

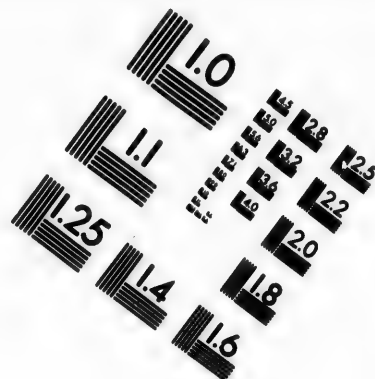
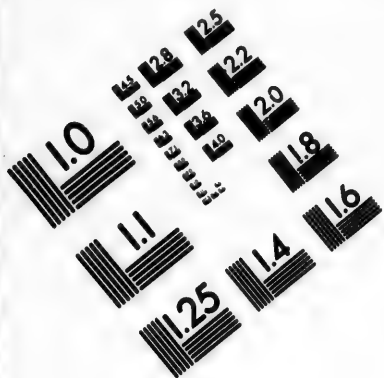
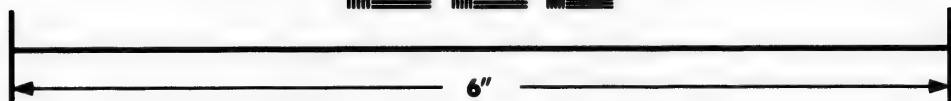
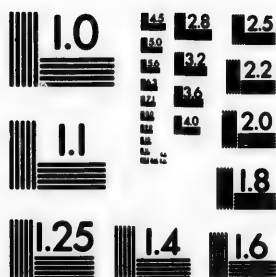


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v. Manchester, S. & L. R. Co., 16 Q. B. 600, 15 Jur. 670, 20 L. J. Q. B. 440.

A petition alleged that cotton was delivered to defendant on its platform, it being the custom of defendant at that place to receive freight for shipment on its platform, and that, relying upon this custom, the plaintiff so delivered the cotton without demanding or receiving a receipt or bill of lading therefor. *Held*, that the petition was bad. *Missouri Pac. R. Co. v. Douglas*, 16 Am. & Eng. L. Cas. 98, 2 Tex. App. (Civ. Cas.) 32.

733. As to time of receipt of goods by carrier.—In an action against carriers to recover for damages to goods shipped, the petition must state the time when the goods were received for shipment by the carrier. *Missouri Pac. R. Co. v. Creath*, 3 Tex. App. (Civ. Cas.) 109.

734. Sufficiency of answers and pleas.—In Illinois under an unverified plea of the general issue in assumpsit against a common carrier for goods lost, defendant may at the trial deny his liability under the bill of lading, § 34 of the Practice Act having no application to such a denial. *St. Louis, I. M. & S. R. Co. v. Knight*, 30 Am. & Eng. R. Cas. 88, 122 U. S. 79, 7 Sup. Ct. Rep. 1132.

Where the owner of the lost or damaged goods brings his action against the owners of the boat which caused the loss or damage by running into the flat-boat on which the goods were, a plea of former recovery by the common carrier for the injuries caused by the collision "which it avers are the same injuries in the plaintiff's declaration alleged to have been done to the goods of the said plaintiff," is not equivalent to an averment that the recovery was for the damage done to the goods described in the declaration *non constat*, that it may not have been for damages done to the goods of some other person which were on board the flat-boat at the same time; such a plea, therefore, is defective on demurrer. *Steam-boat Farmer v. McCraw*, 26 Ala. 189.

When in an action against a common carrier for non-delivery of goods to a consignee it pleads only that it never received the goods, this is an admission of the non-delivery to the consignee; and proof of the non-delivery to the consignee is not necessary to entitle the plaintiff to a judgment. *Hot Springs R. Co. v. Hudgins*, 18 Am. & Eng. R. Cas. 643, 42 Ark. 485.

Special pleas are bad that only set up what might be proved under the general issue. So where a railroad is sued for not properly carrying goods, and pleads specially that its liability is limited by contract to its own line and that it safely carried said goods and delivered them to the next carrier in the route, the pleas were bad, as amounting to the general issue. *Illinois C. R. Co. v. Johnson*, 34 Ill. 389.

Where a contract of shipment of insured goods contains a provision to the effect that if the carrier shall be rendered liable for damages covered by the insurance that he may recover the amount from the underwriter, an answer to an action on such contract, averring that the underwriter agreed to pay the loss and that the suit is for his benefit, is insufficient. *Cincinnati, H. & D. R. Co. v. Spratt*, 2 Duw. (Ky.) 1.

The complaint alleging a special contract by the defendant to carry to Chicago and a breach of the contract, and the answer containing a general denial, the fact was available in defense that the injury complained of occurred after the property had passed beyond the defendant's terminus. *Ortt v. Minneapolis & St. L. R. Co.*, 36 Minn. 396, 31 N. W. Rep. 519.

The English rule of court of Hilary Term, 1834, that in an action on the case against a common carrier the plea of not guilty will not operate as a denial "of the receipt of the goods by the defendant, as a carrier for hire, or of the purposes for which they were received," was not made of force in South Carolina by Court Rules of 1837, No. 87. *Brown v. Dunlap*, 3 So. Car. 101.

735. Variance.—Where a carrier is sued for the non-delivery of goods, and the form of the complaint is according to the Alabama Code for non-delivery, a recovery cannot be had on proof showing that the goods were delivered, but in a damaged condition. *South & N. Ala. R. Co. v. Wilson*, 27 Am. & Eng. R. Cas. 41, 78 Ala. 587.

In an action against a common carrier for failing to deliver goods within the stipulated time at D., it is error to admit, and for the court to instruct the jury to consider, evidence tending to show loss to the shipper because of the non-arrival of the goods at M. within a reasonable time, there being no averment in the pleadings that the goods were consigned to M. or that their failure to reach M. in due time was caused by any delay in shipment by the carrier. *East*

Tenn., V. & G. R. Co. v. Hale, 27 *Am. & Eng. R. Cas.* 36, 85 *Tenn.* 69, 1 *S. W. Rep.* 620.

In an action against a common carrier for failure to deliver articles shipped, to which the defendant pleaded a general denial, and the loss of the articles by the act of God—*held*, that the defendant could not prove under the pleadings that the plaintiff had released the contract for shipment of the articles, or that there was but a partial loss. Such defenses should have been pleaded. *Houston & T. C. R. Co. v. Harn*, 44 *Tex.* 628.

It is not unusual to insert in a declaration averments which affect only the rule of care and negligence which should govern the case. Thus declarations alleging the defendants to be common carriers, and at the same time averring gross negligence on their part in the transportation of goods, are usual and well approved. In such cases the failure to prove the allegation of negligence is no variance, and the plaintiff may recover without such proof, provided the evidence shows a case under the general rule respecting the liability of carriers. On the other hand, if the plaintiff does prove the allegation of negligence he may recover even though there are circumstances limiting the responsibility of the carrier below the common-law rule. *Sargent v. Birchard*, 43 *Vt.* 570.

A declaration in an action against a carrier charged that the goods were to be carried and delivered to one E. T. Learned. At the trial the evidence was that the carrier clearly understood such person to be the real consignee, although the name marked on the goods was E. D. Leonard. *Held*, that the evidence was sufficient to support the averment. *Mahon v. Blake*, 125 *Mass.* 477.

Where the declaration stated a delivery of the wool to the carrier at its depot to be transported immediately to a place named, and averred that in consideration thereof and of a certain reward the carrier promised, etc.—*held*, that on receiving the wool under an arrangement previously made, a duty arose to transport it accordingly, from which the law will imply a promise to do so, and consequently there was no variance in the proof of the consideration. *Deming v. Grand Trunk R. Co.*, 48 *N. H.* 455.—APPROVED IN *Pruitt v. Hannibal & St. J. R. Co.*, 62 *Mo.* 527; *Watson v. Memphis & C. R. Co.*, 9 *Heisk. (Tenn.)* 255.

A complaint in an action against a carrier alleged the shipment of goods, and that before they reached their place of destination the consignee had removed to another place, and that carrier was directed to forward the goods, which he failed to do, and that they were negligently lost. At the trial plaintiff gave evidence that the consignee's agent demanded the goods at the place of destination, but that a delivery was negligently refused. *Held*, inasmuch as there was no objection taken at the trial to the variance between the declaration and the evidence, that it was sufficient to sustain a recovery. *Rosebrooks v. Dinsmore*, 4 *Abb. App. Dec. (N. Y.)* 118, 5 *Abb. Pr. N. S.* 59, 36 *How. Pr.* 138; *reversing* 4 *Robt.* 672.

736. Amendments.—The declaration alleging an undertaking to deliver in a specific time, but none to deliver in a reasonable time, evidence of what would be a reasonable time was inadmissible, and no recovery could be had under the declaration as it stands for failure to deliver in a reasonable time. If the necessary allegation is supplied by amendment, all the relevant facts and circumstances touching the particular shipment, as well as touching that class of shipments generally, may be shown, to ascertain what length of time would be reasonable. *Central R. & B. Co. v. Hasselkus*, 55 *Am. & Eng. R. Cas.* 586, 91 *Ga.* 382, 17 *S. E. Rep.* 838.

Amendments must be confined to restating the cause of action in the pending suit, and can never be allowed for the purpose of introducing a wholly new and different cause of action. So where the original complaint charges that the carrier refused to receive goods for shipment, an amended count charging a failure or refusal to carry the goods safely states a different cause of action, and is not allowable. *Illinois C. R. Co. v. Phelps*, 4 *Ill. App.* 238.

The complaint having alleged a contract by defendant "to ship, transport, and carry" plaintiff's goods to New York, it was error to admit in proof thereof a bill of lading, whereby defendant only agreed to forward to New York, with the stipulations that it "assumes no liability beyond its own rail," and "will not be responsible for delays or damages from unavoidable causes," the two contracts being different and involving different responsibilities. But possibly this objection might be obviated by permitting an amendment of the complaint. *Dunbar*

v. Port Royal & A. R. Co., 36 So. Car. 110, 15 S. E. Rep. 357.

A complaint against a railroad company for the statutory penalty, for charging and receiving for the carriage of freight a greater sum than was allowed by the statute, may be amended after the repeal of the statute so as to go merely for the amount wrongfully taken in excess of the statutory rates. *Graham v. Chicago, M. & St. P. R. Co.*, 49 Wis. 532, 5 N. W. Rep. 944.—FOLLOWING *Smith v. Chicago & N. W. R. Co.*, 49 Wis. 443.

737. Recovery limited to issues made.—A plaintiff cannot recover against a carrier damages to goods delivered to be carried, under a complaint charging a non-delivery only. *Nudd v. Wells*, 11 Wis. 407. *South & N. Ala. R. Co. v. Wilson*, 27 Am. & Eng. R. Cas. 41, 78 Ala. 587.—FOLLOWED IN *Alabama G. S. R. Co. v. Grabfelder*, 83 Ala. 200, 3 So. Rep. 432.—*Alabama G. S. R. Co. v. Grabfelder*, 83 Ala. 200, 3 So. Rep. 432.—FOLLOWING *South & N. Ala. R. Co. v. Wilson*, 78 Ala. 587.

A declaration by a corporation against a common carrier, alleging an alternative contract to deliver to the plaintiff, or H. M. Beaty & Co. for the plaintiff, is not supported by proof of a contract to deliver to and for H. M. Beaty & Co. Nor does such proof support the more loose allegation of a contract to deliver generally for the plaintiff, without specifying to whom. *Atlanta & W. P. R. Co. v. Texas Grate Co.*, 40 Am. & Eng. R. Cas. 130, 81 Ga. 602, 9 S. E. Rep. 600.

In an action for damages alleged to have been caused by the failure of a railroad company to ship freight at a time stipulated, it was error to submit to the jury the question of damages caused by the detention *en route* of the freight shipped under a subsequent contract, especially as the complaint did not contain any allegation of a breach in that respect. *Waters v. Richmond & D. R. Co.*, 110 N. Car. 338, 14 S. E. Rep. 802.

738. Instructing jury outside the issues made.—Where a declaration in an action against a carrier to recover for goods lost does not charge that they were received in the character of a common carrier, it is error to charge the jury that they may find the company liable as such for loss. *Smith v. King's Mountain R. Co.*, 3 So. Car. 53.

In an action to recover the value of oil claimed by plaintiff (the declaration contain-

ing no good counts except the common counts), which was in possession of defendant at the time action was brought, and which had not been sold or tortiously disposed of by the defendant, and which came into possession of defendant as a common carrier and not wrongfully, it was error in the court below to instruct the jury that if they believed from the evidence that the said oil was the property of the plaintiff it was their duty to find a verdict for the plaintiff for the value of the oil, there not being evidence before the jury tending to prove a sale of the oil by the plaintiff to the defendant, but evidence clearly proving that there had been no such sale, and that the defendant had only refused to deliver the oil on demand. In such case and under such a state of facts the plaintiff was not entitled to recover the value of the oil upon the common counts for oil sold and delivered to the defendant by the plaintiff, or for money had and received by the defendant for the use of plaintiff, there not being any sufficient and proper special count in the declaration covering the case. *Dresser v. West Virginia Transp. Co.*, 8 W. Va. 553.

739. Interpleader.—Goods belonging to plaintiff, and stored in defendants' warehouse, were alleged to have been sold by plaintiff to M., who, with plaintiff, came there and marked them in a certain way, after which, under plaintiff's instructions, they were dispatched by defendants to T., as plaintiff's property, and delivered to his order. On the goods being claimed by M.—held, that in such a case interpleader would not be awarded. *Brill v. Grand Trunk R. Co.*, 20 U. C. C. P. 9.

4. Evidence.

740. Admissibility of evidence.—Where one carrier sues another for the negligent loss of goods, a judgment in favor of the consignee against the plaintiff company is not admissible in evidence, the action being based upon the defendant's breach of duty in failing to safely carry and deliver goods. *Pennsylvania Co. v. Chicago, M. & St. P. R. Co.*, 44 Ill. App. 132.

In an action against a common carrier for damages in refusing to receive and transport grain properly stored for transportation, it is competent for the plaintiff to give evidence showing that, because of such refusal, his grain became heated and spoiled, notwithstanding the fact that such damage

resulted from something inherent in the nature of the grain itself. *Pittsburgh, C. & St. L. R. Co. v. Morton*, 61 *Ind.* 539.

In an action between a consignor and a common carrier to recover for goods which were delivered by the carrier to a third party, facts and circumstances tending to show that such third party was the agent of the consignor are admissible in evidence, even though such facts and circumstances were unknown to the defendant at the time of the delivery. *Angle v. Mississippi & M. R. Co.*, 9 *Iowa* 487.

In an action to recover damages of a railroad company for injury to a lot of flour during its transportation, the evidence of a witness who only saw a part of the flour examined at the place of destination is admissible on behalf of plaintiff. The objection that the witness only saw a part of the flour examined does not go to his competency. *Winne v. Illinois C. R. Co.*, 31 *Iowa* 583, 1 *Am. Ry. Rep.* 460.

In an action for breach of contract to carry goods, evidence that it was impracticable to carry such goods is not admissible to show such a contract was not made. *Ames v. First Div. St. P. & P. R. Co.*, 12 *Minn.* 412 (*Gil.* 295).

Plaintiffs contracted for the purchase of plank and employed defendants to deliver it at a certain point. In an action for failure to deliver, evidence was admissible for the defense that portable mills could have been erected by plaintiffs and plank manufactured and delivered at the point, within the time and at the price plaintiffs were to pay under their contract. *Pennsylvania R. Co. v. Titusville & P. P. R. Co.*, 71 *Pa. St.* 350.

In action by consignee to recover damages for non-delivery of freight, plaintiff's witnesses may prove facts within their own knowledge, showing the condition of management at the depot of delivery and what passed between the conductor and consignee at the time of arrival. *Edwards v. Cheraw & D. R. Co.*, 32 *So. Car.* 117, 10 *S. E. Rep.* 822.

Where the value of goods was fixed by a stipulation, and their identity was established by competent evidence, the improper admission of other evidence as to value and identity was an immaterial error. *Browning v. Goodrich Transp. Co.*, 78 *Wis.* 391, 47 *N. W. Rep.* 428.

In an action against a railroad company for the loss of goods, plaintiff alleged de-

fendant's undertaking to carry the goods safely, and negligence on its part and the loss of the goods. The company made a specific denial of each allegation of the complaint. *Held*, that evidence that the road was not in the control of the company, but was controlled by a receiver, was admissible. *Kansas Pac. R. Co. v. Searle*, 35 *Am. & Eng. R. Cas.* 6, 11 *Colo.* 1, 16 *Pac. Rep.* 328.

The petition averred that plaintiffs delivered to defendant in New York one case of plate glass, which defendant received and agreed, for a reward to be paid it, to transport to Cincinnati, and there safely deliver to plaintiffs; that when so delivered two lights were badly broken by reason of defendant's negligence, to the damage, etc. The answer denied "each and every" of said averments. At trial plaintiff gave in evidence part of the deposition of H. This stated that a case containing plate glass in good order was shipped. In another part of the deposition H. testified that he never notified defendant that it was plate glass, and that defendant at the time gave a receipt for "one case of rough glass." A copy of this receipt (the original having been identified by the witness) was duly attached to the deposition by the officer. Next above the words "rough glass" was plainly printed: "The actual contents of packages must be stated on this receipt." At a proper time the defense offered to put in evidence said part of the deposition and said copy, but the court excluded it. *Held*, that the evidence excluded tended to prove part of the *res gesta* of the alleged delivery, and to show that defendant did not receive and agree to transport any plate glass. *Despatch Line v. Glenny*, 41 *Ohio St.* 166.

741. Sufficiency of evidence.—In an action to recover for goods lost by a carrier, evidence that the goods were shipped in the name of one as the agent of the plaintiff—and were the property of the plaintiff—is not testimony alone of an undertaking to carry. *Peck v. Dinsmore*, 4 *Port. (Ala.)* 212.

In an action against a common carrier for lost goods, where the issue was as to whether the goods actually came to the hands of defendant company from a former carrier, a verdict against the company will not be set aside on appeal where the proof, though slight, supports the verdict and is uncontradicted. *Chicago & N. W. R. Co.*

v. *Williams*, 44 Ill. 176.—FOLLOWED IN *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454.

In an action against a railroad company to recover damages for loss of profits on a contract to furnish railroad ties, because of defendant's refusal or failure to furnish plaintiff reasonable, proper, and fair shipping facilities, where the evidence shows that plaintiff gave up his contract on account of being crowded out of the tie-yards by another who was an independent contractor and patron of the defendant, and not its agent and employé, plaintiff cannot recover, and a demurrer to the evidence should be sustained. *Spurlock v. Missouri Pac. R. Co.*, 93 Mo. 530, 12 West. Rep. 347, 6 S. W. Rep. 349.

In an action against a common carrier to recover for property lost, to authorize a recovery the proofs must show, (1) that the defendant was a common carrier; (2) that the property was received as freight by defendant; (3) that the defendant failed to deliver the same at the place of destination; (4) the market value of the property at its place of destination at the time when it should have been delivered. *Missouri Pac. R. Co. v. Douglas*, 16 Am. & Eng. R. Cas. 98, 2 Tex. App. (Civ. Cas.) 32.

A plaintiff who sues a railroad company for damages for delay in the shipment and delivery of goods cannot recover by introducing his sworn account without other evidence to support the claim. *Galveston, H. & S. A. R. Co. v. Güldea*, 2 Tex. App. (Civ. Cas.) 204.

Where suit was brought against a railroad company for damages resulting from a failure to transport certain wood which had been placed along the line of defendant's road for transportation, and where the testimony for the plaintiffs tended to show that, after they had notified and applied to the company to transport their wood, the defendant furnished transportation to other parties engaged in the same business, and who had applied therefor after the plaintiffs had done so, and that by reason of such failure the wood depreciated in value and they sustained loss; and where the testimony for the defendant was a denial of these facts, and tended to show that it did not have the means to transport the wood owing to the pressure of general business on the road, after a verdict for the plaintiffs the presiding judge did not abuse

his discretion in refusing to grant a new trial, on the ground that the verdict was contrary to law and without evidence to support it. *Atlanta & C. A. L. R. Co. v. Holcombe*, 76 Ga. 590.

In a suit brought to recover damages for the loss of household goods contained in a box shipped over a line of railroad, where judgment was rendered in favor of plaintiff for \$180.55—held, that there being no evidence of the character and value of the goods contained in the box which was lost, and the account setting out the items and their value not being proven, the judgment will be reversed for want of evidence to support it. *Houston & T. C. R. Co. v. McGlosson*, 1 Tex. App. (Civ. Cas.) 89.

742. Best and secondary evidence.

—In an action against a common carrier for the loss of goods, his receipt of the goods may be proved without producing a bill of lading or accounting for the failure to produce it. *Louisville & N. R. Co. v. McGuire*, 79 Ala. 395.

Where grain was shipped under a written contract, it was shown that the station agent delivered the same to a messenger to deliver to the general freight agent, who was the proper custodian of it, and that his office where he kept such papers was burned. Held, that this was not a sufficient foundation for the admission of secondary evidence of the contents of the written agreement. The general agent should have been called to show that he received it and placed it in his office, and that it was there when the office was burned. *Chicago & N. W. R. Co. v. Ingersoll*, 65 Ill. 399.

743. Account-books as evidence.

—The course of business adopted by connecting railways is competent evidence on the question of the receipt or delivery of property by one to the other. So books kept by agents in which are entered the receipt and delivery of goods, when properly proven, are *prima-facie* evidence of the entries therein. *Root v. Great Western R. Co.*, 65 Barb. (N. Y.) 619, 1 T. & C. 10; affirmed in 55 N. Y. 636, mem.

Where a railroad was sued for the non-delivery of grain, and the company defended upon the ground that they delivered to a third party to whom the consignee had grain shipped to him, delivered, and that the same was burned in the great Chicago fire, defendant offered in evidence an entry

made in a book of such third party, on October 7, 1871, shown to have been made in the usual course of business by the foreman of the receiving and weighing department of such third party, as tending to show the receipt of plaintiff's grain on that day. It was not pretended that the foreman was dead, but the offer was based upon showing the entry to have been in his handwriting, and made it in the course of his ordinary duties and as a part of the *res gestæ*. *Held*, that the entry was proper evidence and should have been admitted. *Chicago & N. W. R. Co. v. Ingersoll*, 65 Ill. 399.

744. Evidence not responsive to issues.—Where a carrier is sued to recover damages for delay in carrying the corpse of plaintiff's son, any question as to the custom of undertakers in delivering corpses to trains is foreign to the issue, when the only ground of recovery is that the servant of company misled appellee. *Chicago, B. & Q. R. Co. v. Hoeffner*, 44 Ill. App. 137.

Where a railroad company is sued for the loss of perishable goods and sets up as a defense a delay in shipping, caused by unusual storms, where the petition charges a conversion of the goods, plaintiff is not restricted to proof alone of a conversion, where he alleges also that the company wholly neglected its duty, and failed and refused to comply with its obligation to safely carry, and may under such averment show negligence of the company which caused the loss before the storm was encountered. *Missouri Pac. R. Co. v. Barnes*, 2 Tex. App. (Civ. Cas.) 507.

Where a consignee of corn sues a railroad for not delivering promptly, claiming damages by reason of a fall in the market, it is error to admit evidence showing a loss by reason of the corn sprouting. *Kyle v. Buffalo & L. H. R. Co.*, 16 U. C. C. P. 76.

In the trial of a suit against a carrier for the value of a chest and its contents, which were enumerated in the petition, a witness after stating the value in detail of a number of articles was asked if she knew the value of the chest and contents, and answered that she did, and named the value at \$400. She also stated that besides the articles she had specifically mentioned there were some others which she had not named. This statement was not made in answer to any question asked her, but in connection with her testimony relating to

the contents of the chest. *Held*, that an objection to her testimony on the ground that there was evidence tending to show that there were more goods in the chest than were sued for, was not well taken. *Seyfarth v. St. Louis & I. M. R. Co.*, 52 Mo. 449.

745. Admissions against interest.—By agents or employees.—In an action against a railroad for non-delivery of goods, the declarations of the company's agent, a short time after the transaction, were evidence against them. *Union R. & T. Co. v. Riegel*, 73 Pa. St. 72.

Where plaintiff sues a carrier for delay in delivering grain, whereby he claimed to have lost the benefit of a contract of sale to the government, it is competent for the company to introduce in evidence a signed and sworn statement of the plaintiff, filed before the United States court of claims, stating certain facts affecting his right of recovery in the action against the company, and such statement will be received as true. *Illinois C. R. Co. v. Cobb*, 64 Ill. 143.

Where a carrier is sued for the loss of goods, letters written or oral statements made by the carrier's local freight agent showing that the goods had been delivered to the carrier, and touching an investigation as to the cause of the loss, are admissible in evidence against the carrier; but a question on cross-examination as to his authority to receive the kind of goods shipped and lost, is not admissible. *Green v. Boston & L. R. Co.*, 128 Mass. 221, 35 Am. Rep. 370.—DISTINGUISHED IN *Boston & M. R. Co. v. Ordway*, 140 Mass. 510.

Where a carrier is sued for the loss of goods, a notice signed by the superintendent of the carrier and publicly posted, offering a reward for the recovery of the goods, is admissible in evidence against the carrier, tending to show an admission of liability by the company. *Bennett v. Northern Pac. Exp. Co.*, 12 Oreg. 49, 6 Pac. Rep. 160.

An admission by freight agent of a railroad company who were common carriers, that a claim made against them by plaintiff for injury to goods carried by them was all right, such admission being made two days after delivery, and after the agent had examined the goods, was held to render it unnecessary for plaintiff to prove by other evidence that the goods were actually injured at the time of delivery. *Queen v. Peters*, 16 New Brun. 77.

After the commencement of a suit against a carrier for the loss of goods, the carrier agreed that if the plaintiff would swear to a bill of the articles lost he would pay for them. *Held*, that such agreement was an admission of liability, and that an affidavit made in pursuance of the agreement was admissible to show the amount of the demand. *Hurd v. Pendrigh*, 2 Hill (N. Y.) 502.—FOLLOWING *Brooks v. Ball*, 18 Johns. (N. Y.) 337.

In an action against a carrier to recover damages for loss of market, evidence of the statements of plaintiff's broker is hearsay, and inadmissible. *Voorhees v. Chicago, R. I. & P. R. Co.*, 29 Am. & Eng. R. Cas. 322. 71 Iowa 735, 30 N. W. Rep. 29.

If the owner of goods employed one to carry and deliver them to a purchaser, the declaration of the carrier made at the time of delivery, that he brought and delivered the goods on account of another person, is not binding on the owner. *Folsom v. Batchelder*, 22 N. H. 47.

The declaration of a steamboat clerk, after the delivery of goods, is not competent to charge the steamboat company with negligence in their transportation. *Bordentown & P. Steamboat Co. v. Flanagan*, 41 N. J. L. 115.—FOLLOWING *Ashmore v. Pennsylvania S. T. & T. Co.*, 38 N. J. L. 13.

746. Hearsay and opinion evidence.—In an action for the destruction of cotton which was loaded upon a flat-car, without covering of any kind, the opinion of a witness whether the cotton would have been burned if it had been loaded in box, cars or covered by tarpaulin, is admissible, such point being for the determination of the jury upon the facts proved. *Louisville, N. O. & T. R. Co. v. Natchez, J. & C. R. Co.*, 43 Am. & Eng. R. Cas. 54, 67 Miss. 399, 7 So. Rep. 350.

Plaintiff sued to recover damages by reason of the company failing to deliver fruit trees within a reasonable time, which he had contracted to sell to other parties, and at the trial introduced a witness who testified that the parties would have taken the trees if they had reached them within a reasonable time. *Held*, that this was objectionable as hearsay evidence; but its admission was not reversible error where there was other evidence independent of it to establish the same fact. *Texas & P. R. Co. v. Talley*, 2 Tex. App. (Civ. Cas.) 671.

A bill of lading bound the carriers to forward the goods to their destination with the usual dispatch. To show the usual time of transit, the shippers called a witness who testified thereto, but said he derived his information from a clerk in the freight office at the place of destination. *Held*, that fact being peculiarly within the knowledge of the carriers, that slight evidence thereof on the part of the shippers was sufficient, and that the testimony was competent. *Newell v. Smith*, 49 Vt. 255, 17 Am. Ry. Rep. 100.

747. Oral evidence to explain or contradict writings.—A recital in the written contract that the shipping rate charged was a special and reduced one, is merely *prima-facie* evidence of that fact and is open to explanation or contradiction. *McFadden v. Missouri Pac. R. Co.*, 30 Am. & Eng. R. Cas. 17, 92 Mo. 343, 10 West. Rep. 372, 4 S. W. Rep. 689.

In an action against a carrier for delay in the transportation of goods, the receipt given by the company, together with all the facts in the case, going to show what was the meaning of terms in the receipt, is competent evidence of a special contract for transportation. *Rome R. Co. v. Sullivan*, 32 Ga. 400.

The possession by a shipper of a receipt containing limitations of the carrier's liability is only *prima-facie* evidence that the shipper consented to the conditions. So where he claims that the shipment was under a special oral agreement, and that the bill of lading containing the limitations was not delivered until some days after the shipment, evidence to show that the shipment was in fact made under the oral agreement is admissible for the purpose of rebutting the presumption against him arising from the possession of the receipt. *Strohn v. Detroit & M. R. Co.*, 21 Wis. 554.

In a suit against a carrier for non-delivery of goods, if the action be brought on bills of lading, none will be admissible in evidence except those set out in the declaration. But where the action was case, brought by the owner of the property, who was neither consignor nor consignee, and described the property as a certain number of bushels of grain—*held*, that the fact that a bill of lading was made for each car did not confine plaintiff to proof of only one car under each count. He could prove the entire shipment as one transaction, though made partly on

one day and partly on another. *Illinois C. R. Co. v. Cobb*, 64 Ill. 148.

748. Evidence that defendant is a common carrier.—Where a suit is against a carrier for the violation of its common-law duty to safely carry, proof of a delivery to the defendant is not enough; there must be proof also that he is a common carrier. *Ringgold v. Haven*, 1 Cal. 108.

Where it is sought to make defendants liable as common carriers, it is incumbent on the plaintiff to prove that they were in fact common carriers; but advertisements in the public newspapers notifying the public that they had undertaken the business of common carriers is legal and proper evidence, when the defendants are identified with the notice. *Doty v. Strong*, 1 Pinn. (Wis.) 313.

749. Evidence of ownership in plaintiff or consignee.—The plaintiff, in an action to recover the value of personal property, may testify that he was the owner of it, although one of his witnesses has testified to facts tending to show ownership in another person; and if the plaintiff has so testified, the case should not be withdrawn from the jury and a verdict directed for the defendant for want of evidence by the plaintiff of a transfer of the property to him by the person referred to in the testimony of his witness. *Whitney v. Eastern R. Co.*, 9 Allen (Mass.) 364.

A. delivered to defendant property to be transported in his wagon; the property was damaged. B. instituted a suit for the damages, and to prove property to himself took the deposition of A., who stated the property was B.'s and that he acted as his agent. To support the testimony of A. the plaintiff proved by his attorney that he had written to him to bring the suit; and the attorney had sent a commission to him to take testimony, etc., which was done. The evidence of the attorney was objected to. *Held*, that it was inadmissible. *Jenkins v. Pickett*, 9 Yerg. (Tenn.) 480.

A shipper of oil indorsed bills of lading to plaintiff as security for money advanced to the shipper on his drafts on the consignee. The drafts were dishonored, and the carrier refused to deliver the oil to plaintiff because the consignee owed them freight charges. *Held*, that evidence that the oil belonged to the consignee was admissible, as, by the indorsement of the bill

of lading, plaintiff only took such title as the consignor had. *Empire Transp. Co. v. Steele*, 70 Pa. St. 188.

750. Evidence of usage or custom.—In an action against the owners of a steamboat, as common carriers, for failing to deliver goods at the place specified in their bill of lading, evidence of a custom among the steamboat men to ascend the river as high as the stage of water in it permitted and then to land their cargo and deposit the goods in warehouses, is not admissible for the defendants. *Cox v. Peterson*, 30 Ala. 608.

Proof of a usage long established, uniform and well known, to the effect that, under a bill of lading in the usual form, with the words "privilege of reshipping" inserted, a boat from below bound to any place above the falls may wait there for a rise of water for a month or more, without incurring liability for not delivering the cargo in a reasonable time, is admissible. *Broadwell v. Butler*, 6 McLean (U. S.) 296.

751. Evidence of delivery or tender to carrier, and contract to carry.—A railroad company cannot be rendered liable for failing to receive and carry freights, until plaintiff proves that the freights were actually tendered to the company and that it refused to carry. *Northwestern Fuel Co. v. Burlington & C. R. Co.*, 20 Fed. Rep. 712.

What is termed a dray-ticket, given by a carrier upon the receipt of goods, merely noting the marks and destination on the goods, is not in itself evidence of a contract to forward, but only makes it the duty of the company to safely keep and redeliver the goods, or account for their value. *Fleming v. Mills*, 5 Mich. 420.

In a suit against a common carrier for a failure to deliver their goods put into his hands for transportation, an important question was whether the goods were actually delivered to the defendant for transportation, and the testimony of the plaintiffs' agent, that he purchased the goods of a firm in New York and directed the firm to ship the goods by the defendant, was received by the court, among other things, as going to prove the delivery of the goods to the defendant. *Held*: (1) that the evidence was admissible for the purpose of showing the plaintiffs' interest in the goods, to identify them, and to show that they had authorized the New York firm to ship them

by the defendant's line; (2) but that it was not admissible as evidence that they were in fact delivered to the defendant. *New England Mfg. Co. v. Starin*, 60 Conn. 369, 22 Atl. Rep. 953.

752. Evidence for carrier tending to excuse loss or injury.—In an action against a carrier to recover for the value of cotton lost, the company cannot introduce evidence of skill on the part of the conductor who had charge of the train at the time of the loss, unless the plaintiff has first introduced proof of unskillfulness on his part. *Montgomery & W. P. R. Co. v. Edmonds*, 41 Ala. 667.

Where goods are carried to the place of destination and there lost from the carrier's depot, evidence offered on the part of the carrier, to the effect that the goods in question were treated in the same way and were cared for with the same degree of care which the same kind of goods had always received at the station, and that none had ever been lost before, is properly excluded as immaterial. *Lane v. Boston & A. R. Co.*, 112 Mass. 455.

Where goods were lost while in the open air, after their arrival at the place of destination, and it is sought to make the company liable for negligence in not safely storing, evidence on the part of the carrier that there was not room in the freight-house at the time, and as to its sufficiency for the business usually done at that station, is admissible as tending to disprove negligence. *Stowe v. New York, B. & P. R. Co.*, 113 Mass. 521.

Where a carrier is sought to be made liable as warehouseman after the goods had been stored at the place of destination, evidence that the consignee was notified that there was not room for storage and that the goods must be removed at once, is admissible, both as tending to disprove negligence and as to the reasonableness of the consignee's delay in removing the goods. *Stowe v. New York, B. & P. R. Co.*, 113 Mass. 521.

753. Prima-facie evidence of capacity of foreign corporation to contract.—If a corporation created by the laws of another state, whose existence and legal organization are not disputed, is found making contracts within this commonwealth through its agents, and it is sued on such contract, it is not necessary for the plaintiff

to furnish in the outset any other evidence of the capacity of the corporation to make the contract. *McCluer v. Manchester & L. R. Co.*, 13 Gray (Mass.) 124.

754. Evidence of change of destination.—Where the owner of goods ships them by rail under a contract to transport them to the consignee in St. Louis, Mo., and they are so carried, it is error, in an action by the shipper against the carrier for damages arising from delay in the delivery of the goods, to permit the consignee to testify that he had notified the general freight agent of the defendant that he wanted the goods sent to him at East St. Louis, and to hold car-lots there, and notify him, when there is no proof showing authority in the consignee to interfere and change the shipper's contract. *Wabash, St. L. & P. R. Co. v. Jaggerman*, 23 Am. & Eng. R. Cas. 680, 115 Ill. 407, 4 N. E. Rep. 641.

Where goods are lost by reason of the place of destination being changed, proof that the way-bill given to the consignee did not show the change, and that the way-bill delivered by the next preceding line named the original destination, is sufficient to warrant a finding that the change was made by defendant company. *Harris v. Cheshire R. Co.*, (R. I.) 16 Atl. Rep. 512.

755. Proving quantity or kind and value of goods lost.—In an action against a railroad company as a common carrier for the failure to deliver a quantity of corn received for transportation, the quantity received being a material question, the person who delivered it for the plaintiff having testified to the quantity, as ascertained from the number of barrels and the quantity of shelled corn measured out of one barrel, he may state as a fact corroborating his measurement and calculation that he afterwards filled the same barrel with corn out of the same crib and again measured it out, with the same result as before. *South & N. Ala. R. Co. v. Wood*, 9 Am. & Eng. R. Cas. 419, 66 Ala. 167, 41 Am. Rep. 749.

Where a bundle is shipped as bedding and lost, in the absence of anything to show fraud on the part of the shipper it is proper to permit him to prove that there were wrapped up and shipped inside of the bedding certain articles of clothing of a certain value. *Gulf, C. & S. F. R. Co. v. Clark*, 2 Tex. App. (Civ. Cas.) 459.

756. Sufficiency of evidence to show negligence.*—When goods are shown to be under the management of the carrier or of its servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation, that the accident arose from want of care. *Rintoul v. New York C. & H. R. R. Co.*, 21 Blatchf. (U. S.) 439, 17 Fed. Rep. 905.

Evidence showing that an article shipped was properly packed in a crate, and that the crate was broken when taken from the car, is sufficient to authorize the submission to the jury of the question of the carrier's negligence. *Witting v. St. Louis & S. F. R. Co.*, 45 Am. & Eng. R. Cas. 369, 101 Mo. 631, 14 S. W. Rep. 743.

5. Measure of Damages.

a. For Loss or Injury.†

757. Generally.‡—As a general rule the measure of damages for a failure to deliver is the value of the goods at their place of destination, with compensation for the actual loss, which is the natural and proximate consequence of the act, and excluding remote or indirect losses. The loss sustained by the plaintiff in his general business does not come under this rule. *Baltimore & O. R. Co. v. Pumphrey*, 9 Am. & Eng. R. Cas. 331, 59 Md. 390.—DISTINGUISHING *Brown v. Werner*, 40 Md. 15; *Shafer v. Wilson*, 44 Md. 268. QUOTING *United States Tel. Co. v. Gildersleve*, 29 Md. 232; *Hadley v. Baxendale*, 9 Ex. 341.

Carriers are answerable for the ordinary and proximate consequences of their negligence, and not for those which are remote and extraordinary. *Morrison v. Davis*, 20 Pa. St. 171.—QUOTED AND APPLIED IN *Little Rock, M. R. & T. R. Co. v. Talbot*, 47 Ark. 97.

Where the carrier is liable for the loss the owner is entitled to full compensation for the breach of the contract to carry and forward, and it is not error in the court to

refuse to lay down a rule of damages which may not give him such compensation, unless it appears from the record that the failure to so charge was prejudicial to him. *Erie R. Co. v. Lockwood*, 28 Ohio St. 358, 14 Am. Ry. Rep. 143.

758. In case of loss the measure of damages is the value of goods at destination.—Where goods are lost while in the hands of a carrier, the measure of damage is the value of the goods at the place of destination at the time they should have been delivered, in good condition, less the freight agreed upon. *Sturges v. Bissell*, 46 N. Y. 462. *South & N. Ala. R. Co. v. Wood*, 18 Am. & Eng. R. Cas. 634, 72 Ala. 451. *Louisville & N. R. Co. v. Gilmer*, 42 Am. & Eng. R. Cas. 450, 89 Ala. 534, 7 So. Rep. 654. *Ringgold v. Haven*, 1 Cal. 108. *Little v. Boston & M. R. Co.*, 66 Me. 239. *Union R. & T. Co. v. Traube*, 59 Mo. 355, 8 Am. Ry. Rep. 441. *Davis v. Wabash, St. L. & P. R. Co.*, 13 Mo. App. 449; reversed on other grounds in 89 Mo. 340. *Dean v. Vaccaro*, 2 Head (Tenn.) 488. *Fowler v. Davenport*, 21 Tex. 626.—REVIEWED IN *Houston & T. C. R. Co. v. Jackson*, 21 Am. & Eng. R. Cas. 126, 62 Tex. 209.

In such an action the lowest measure of damages is the value of the goods. *Ludwig v. Meyre*, 5 Watts & S. (Pa.) 435.

And such value is purely a question of fact for the jury. *Chicago & N. W. R. Co. v. Dickinson*, 74 Ill. 249.

The damages recoverable against carriers for the negligent loss or injury of goods must be ascertained by reference to the price which goods of the same kind and quality bear in market at the time the injury occurred; and this is so though subsequent experiments in the use of such goods show that the market price was almost wholly imaginary, their real value being little or nothing. *Smith v. Griffith*, 3 Hill (N. Y.) 333.—FOLLOWED IN *Richmond v. Bronson*, 5 Den. (N. Y.) 55.

The measure of damages for total loss of goods, caused by the carrier's negligence while they remained in the depot of destination, is the market value of the goods at that place at date of their destruction. *East Tenn., V. & G. R. Co. v. Kelly*, 91 Tenn. 699, 20 S. W. Rep. 312.

Where a common carrier was sued for an injury to a quantity of mulberry trees, after plaintiff had proved the market value of the trees at the time of the injury the defend-

* See also *ante*, 114.

† See also *ante*, 123.

‡ Damages for failure to deliver goods, see notes, 16 AM. & ENG. R. CAS. 246; 18 Id. 632, 642.

Measure of damages in case of loss or destruction of goods, see note, 21 AM. & ENG. R. CAS. 125.

ant offered to prove that the same kind of trees had since been ascertained, from actual experiments, to be of no real value; that their market value at the time of the injury was fictitious; that they were not worth cultivating with a view to raising silkworms; that plaintiff purchased with a view of growing seedlings for sale, and that they were of no value for such purpose within one year thereafter. *Held*, that the measure of damages was the market value of the trees at the time of the injury, and that the evidence was inadmissible. *Smith v. Griffith*, 3 Hill (N. Y.) 333.

759. Loss of gold coin—Allowing premium on gold as damages.—Gold coin was delivered to defendant carrier in Mexico to be carried into the United States, after the passage of the legal-tender act, and when gold was at a premium. *Held*, that the measure of damages for a loss in the carrier's hands was the face value of the coin in treasury notes, together with the premium on gold, with interest from the time of the demand. *Cushing v. Wells*, 98 Mass. 550. — **DISTINGUISHING** *Wood v. Bullens*, 6 Allen (Mass.) 516; *Bush v. Baldrey*, 11 Allen (Mass.) 367.

760. Restricting damages to value at place of shipment.—In an action against a common carrier for the failure to deliver goods received for transportation, the measure of damages is the value of the goods at the point of destination, with interest, less freight charges; but when it appears that the goods were in fact lost at the point of shipment, or place at which they were received, whether the true measure of damages is not the value at that place, *quære*. *Echols v. Louisville & N. R. Co.*, 42 Am. & Eng. R. Cas. 454, 90 Ala. 366, 7 So. Rep. 655.

The ordinary measure of damage for loss of goods while in the carrier's hands is their value at place of destination; but a carrier, sued for a loss of cotton, cannot complain because the proof was limited to the value of the cotton at the place of shipment, or the place where it was lost, as goods are presumed to be worth as much or more at the place of destination than at the point of shipment, in the absence of evidence to the contrary. *Rome R. Co. v. Sloan*, 39 Ga. 636.—**QUOTED IN** *St. Louis, I. M. & S. R. Co. v. Phelps*, 46 Ark. 485.

It is not error to exclude evidence of the value of goods shipped at the point of their

destination, where the freight contract provides that in case of loss the amount thereof shall be computed at the value of the goods at the time and place of their shipment. *Caples v. Louisville, E. & St. L. R. Co.*, 17 Mo. App. 14.

Under Texas Rev. St. art. 278, making railroad companies liable as at common law, a company is liable for the full value at the place of destination, less charges, of goods shipped but lost, although the bill of lading provides that in case of loss the measure of damages shall be the value of the goods at the place of shipment. *Gulf, C. & S. F. R. Co. v. Borton*, 4 Tex. App. (Civ. Cas.) 389, 15 S. W. Rep. 909.

761. How market value ascertained.—In an action against a railroad company as a common carrier to recover damages for its failure to deliver a quantity of corn received by it for transportation from one intermediate station to another, about eighty miles apart, the value of the corn at the place of delivery to the railroad, at the time of its delivery, is relevant and competent evidence on the question of its value at the point of destination. *South & N. Ala. R. Co. v. Wood*, 18 Am. & Eng. R. Cas. 634, 72 Ala. 451. *Echols v. Louisville & N. R. Co.*, 42 Am. & Eng. R. Cas. 454, 90 Ala. 366, 7 So. Rep. 655.

The value of an article for which there is no home market may be ascertained by deducting the cost of transportation from the price to be obtained in the nearest market. *Union Pac., D. & G. R. Co. v. Williams*, 3 Colo. App. 526.

Where there is no market value of goods at the place of delivery, the measure of damages may be ascertained by considering the original cost at the place of shipment and the freight charges, and the difference between this sum and what the goods sell for in the damaged condition will be the damages, after deducting the owner's expenses and the value of his time in disposing of the goods. *Wabash, St. L. & P. R. Co. v. Lynch*, 12 Ill. App. 365.

Market prices may be proven from the market reports as found in the newspapers, as based upon a general survey of the whole market. *Sisson v. Cleveland & T. R. Co.*, 14 Mich. 489.

In ascertaining the market value of goods, the law contemplates a range of the entire market and the average price as thus found, running through a reasonable time, and not

any sudden and transient inflation or depression in prices, resulting from causes independent of the operations of local commerce. *Smith v. Griffith*, 3 Hill (N. Y.) 333.

In an action against a carrier by water for the non-delivery of property to plaintiffs' agent at a distant port, where the plaintiffs had failed to give precise evidence of the market value of the goods at the place of delivery—*held*, that the defendants might give evidence of their value at the place where they were shipped and of the expenses of transportation to the place of delivery as a proximate method of ascertaining the damages. *Richmond v. Bronson*, 5 Den. (N. Y.) 55.—FOLLOWING *Smith v. Griffith*, 3 Hill (N. Y.) 333. QUOTING *Rensselaer Glass Factory v. Reed*, 5 Cow. (N. Y.) 610.

If there be, at place of destination, no market for the goods, their market there may be ascertained, in such case, by proof of their market value at other convenient points. *East Tenn. v. G. R. Co. v. Hale*, 27 Am. & Eng. R. Cas. 36, 85 Tenn. 69, 1 S. W. Rep. 620.

Where goods are lost, the measure of damages is the market value of the goods at the place of destination at the time when they should have been delivered. If this test is inapplicable, by reason of there being no market for goods of the description at the place of delivery, the jury must ascertain the cost price and the expenses of transit (if paid), and add to these items a reasonable sum for importer's profits. *O'Hanlan v. Great Western R. Co.*, 11 Jur. N. S. 797, 6 B. & S. 484, 34 L. J. Q. B. 154, 13 W. R. 741, 12 L. T. 490.

762. When charges must be deducted.—The measure of damages where goods are lost in transit is the net value of the property at its point of destination, deducting freight. Interest may also be added. *Woodward v. Illinois C. R. Co.*, 1 Biss. (U. S.) 403. *Rice v. Ontario Steamboat Co.*, 56 Barb. (N. Y.) 384.

Where the recovery is based on the value of the goods at the point of delivery, the freight charges should be deducted if not paid, and if paid, then the value of the property without reference to the charges is the criterion. *Galveston, H. & S. A. R. Co. v. Ball*, 80 Tex. 602, 16 S. W. Rep. 441.

But the jury cannot, where no counterclaim for the freight has been made, deduct
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the amount of the freight from the damages to which the plaintiff may be entitled. *Bamberg v. South Carolina R. Co.*, 9 So. Car. 61.

And no deduction can be made unless there is proof of the amount of the freightage. *Gray v. Missouri River Packet Co.*, 64 Mo. 47.—QUOTING *Atkisson v. Steamboat Castle Garden*, 28 Mo. 124.

Where goods are delivered to a carrier and they are not transported according to his undertaking, but are injured or destroyed, the rule of damages is the value of the goods at the place to which they were to be carried, less the freight. *Michigan S. & N. I. R. Co. v. Casier*, 13 Ind. 164.

Where a railroad company is sued for the conversion of goods by delivering them without requiring payment of the price, as it is required to do, it has a right to deduct from plaintiff's damages its freight charges. *Massachusetts L. & T. Co. v. Fitchburg R. Co.*, 143 Mass. 318, 9 N. E. Rep. 669.—QUOTING *Forbes v. Boston & L. R. Co.*, 133 Mass. 154.

Where goods are damaged while in the hands of a carrier by water, the difference between the actual market value of the goods at the time and place of delivery and their value if sound is the measure of damages, after deducting any rebate allowed by the custom-house officers on a "damaged appraisement." *The Mangalore*, 9 Sawy. (U. S.) 71, 23 Fed. Rep. 463.

763. Loss of contract of sale.*—Where a shipper's interest is simply a contract of purchase, the damages for a breach of contract to receive and transport grain are not lessened by plaintiffs' settlement with their vendors for sums less than the purchase price of the property. The legal liability of plaintiffs under contract of purchase fixes defendant's liability, which cannot be varied by the manner of plaintiffs' discharge of their obligations. *Cobb v. Illinois C. R. Co.*, 38 Iowa 601.

Where an owner of goods ships them consigned to another, giving the consignee an option to take and pay for them at a price fixed or return them, in an action against the carrier for their loss the measure of damages is not the market value at the place of destination, but, at most, the price fixed, with interest from a day when the goods would, in the usual course of

* See also *post*, 784.

carriage, have reached the consignee and have been accepted. *Magnin v. Dinsmore*, 62 N. Y. 35, 50 How. Pr. 457; reversing 6 J. & S. 248.

Plaintiff shipped grain by rail, which was damaged *en route* by delay, and he sold for the same price he had paid. *Held*, that his measure of damages was the difference between what he sold for and the contract price at which he had sold the grain before shipment. *Illinois C. R. Co. v. Cobb*, 64 Ill. 143.

764. Nominal or actual damages.*

—In a suit for a failure to carry grain according to contract, compensatory damages alone can be given. *Toledo, W. & W. R. Co. v. Roberts*, 71 Ill. 540.

If by an actual sale and receipt of the price, the consignee protects himself against any loss resulting from the goods being damaged in transit, he cannot recover of the carrier anything beyond nominal damages and costs. That he may be liable, on account of warranty or fraud in making the sale, to refund to the purchaser a part of the price, will not entitle him to proceed against the carrier before refunding, on the contingency that this liability may some time be enforced. *Henry v. Central R. & B. Co.*, 89 Ga. 815, 15 S. E. Rep. 757.

If he has thus protected himself as to a part of the consignment, but not as to the whole, he may recover actual damages as to the part on which he has sustained such damages. *Henry v. Central R. & B. Co.*, 89 Ga. 815, 15 S. E. Rep. 757.

Where a jury assesses only actual damages, allowing nothing for punitive damages or smart-money, an error in fixing the damages is no evidence of passion or prejudice, where they are computed on the value of the goods. *Erie & P. Dispatch v. Stanley*, 22 Ill. App. 459.

In a suit against a railroad for failing to safely carry goods issues in fact were left to a jury, reserving the question of nominal or substantial damages for the opinion of the court. *Held*, that the only question for the court was whether plaintiff should be limited to nominal damages or recover the actual value of his goods. The question of mitigating the damages upon the facts proved could not be considered. *Robson v. Buffalo & L. H. R. Co.*, 10 U. C. C. P. 279.

765. Measure of damages for an injury.

—The measure of damages for goods damaged in the carrier's hands is the difference between what they would have been worth if they had been delivered at the proper time in good condition and what they were worth in the condition at the time they were delivered. *The Mangalore*, 9 Sawy. (U. S.) 71, 23 Fed. Rep. 463. *Heil v. St. Louis, I. M. & S. R. Co.*, 16 Mo. App. 363.

The application of the rule that the measure of damages is the difference between the market value of the goods as delivered and what their value would have been if they had not been damaged in the course of transportation, is not always just and proper. *Winne v. Illinois C. R. Co.*, 31 Iowa 583, 1 Am. Ry. Rep. 460.

In an action for damage to hay carried, the recovery could be only such damages as the defendant's misconduct caused; and the value at the place of destination could not properly be the test, except subject to a deduction of the freight for carrying it there from the place of delivery; and the price of sound hay could not be recovered without proof that sound hay had been delivered to defendant and injured while in custody. *Marquette H. & O. R. Co. v. Langton*, 32 Mich. 251.

A carrier guilty of negligence is liable to the owner of the goods for the actual damage occasioned by such negligence, and his liability is not limited by the valuation placed upon the goods by the owner at the time of shipment. *Harvey v. Terre Haute & I. R. Co.*, 6 Mo. App. 585; affirmed on other grounds in 74 Mo. 538. — DISTINGUISHED IN *Yerkes v. Keokuk N. L. Packet Co.*, 7 Mo. App. 265.

766. When cost of caring for injured goods may be added.

—In the absence of stipulations limiting his liability a carrier who delivers goods injured during transit is responsible for their market value at the point of destination in the condition in which they were received, less their market value in the condition in which they were delivered and the freight rates earned for their carriage; or, in cases of reparable injuries, for all the reasonable costs and expenses incurred in repairing the injured articles, so as to put them in as good condition as when they were received for shipment, and their rental value during the delay in their use caused by such repairs.

* See also *post*, 789.

Gray v. St. Louis, I. M. & S. R. Co., 54 Mo. App. 666.

In an action against a railroad company for damages to a lot of flour, the plaintiff may show and recover what it cost to put the flour in a salable condition after its arrival at the place of consignment, it appearing that such expenditure was beneficial to the defendant by reducing the damages which it would otherwise have sustained under the operation of the general rule. *Winne v. Illinois C. R. Co.*, 31 Iowa 583, 1 Am. Ry. Rep. 460.

Where plaintiff ships cotton to his factor, in estimating the damages against the carrier for a loss the latter is not entitled to have the factor's commissions deducted from the damages. *Kyle v. Laurens R. Co.*, 10 Rich. (So. Car.) 382.

While the ordinary measure of damages for injury to property is the difference between its value before and after the injury, yet in a case of injury to cotton by fire from a railway engine, when it was shown that the cotton in its damaged condition could have found no purchaser at the place where the injury was received, and that it could not be shipped to another place without repacking, such expenses as were incurred in repacking and preparing it for market may be looked to in estimating damages. *Texas & P. R. Co. v. Levi*, 13 Am. & Eng. R. Cas. 464, 59 Tex. 674.—FOLLOWED IN *Texas & P. R. Co. v. Tankersley*, 63 Tex. 57.

Where goods are carried by vessel and delivered in a damaged condition, the cost of having them appraised, according to a custom of the port, is an item of damages for which the carrier is liable, but not the cost of the auctioneer who sells them. *Pendall v. Rench*, 4 McLean (U. S.) 259.

It would not be a correct rule for the measure of damages, to say that "the plaintiffs are entitled to recover only what they paid for the peaches and such other loss as the proof shows that they sustained in consequence of such failure incurred in and about the loading, the superintending, or unloading, less what they have realized from the sale; not the profits that may have been realized from the sale in New York, in case the instructions had been followed and the fruit delivered earlier in New York." *Central R. & B. Co. v. Skellie*, 86 Ga. 686, 12 S. E. Rep. 1017.

767. Where plaintiff has advanced money on the goods.—Where a con-

signee who has advanced money on goods sues the carrier for damages thereto, his measure of damages is the amount of his advances, with interest, less what the goods sold for; but in no case can he recover more than the value of the goods in a sound state. If his advances and interest exceed that amount he must look to the consignor. *Burritt v. Rench*, 4 McLean (U. S.) 325.

The measure of damages in an action by a factor who has accepted a draft for goods consigned to him and who sues for the delay in the delivery of such goods by the carrier is the advances made, expenses, and commissions, less the value of the goods when delivered. *Ober v. Indianapolis & St. L. R. Co.*, 13 Mo. App. 81.

768. For injuries to mares with foal.—Where it is shown that the large part of a cargo of horses consists of mares with foal, there is an inherent defect in such freight, and the correct measure of damages for total loss is the price, less the freight charges, which they would have brought at the place of destination in the condition which they would have been in had the company exercised due and necessary care while they were in its possession. *Missouri Pac. R. Co. v. Fagan*, 35 Am. & Eng. R. Cas. 666, 72 Tex. 127, 9 S. W. Rep. 749.

769. Recovery both for injury and loss of market.—The plaintiff sent to London some hops consigned to a purchaser. The company kept the hops for some days in an open van, whereby a small portion was stained by wet, and the purchaser rejected the whole. The plaintiff dried the stained hops and they were rendered as good as ever for actual use, but the staining had depreciated the market value of the bulk. The plaintiff sent the hops to a factor for sale, but at that time the market price of hops had fallen. The company had no notice that the hops were sent to London for sale. *Held*, (1) that plaintiff was entitled to recover, as damages, the amount of the depreciation in the market value of the hops, and was not confined to the value of the portion actually damaged; (2) that he was entitled to recover the difference between the market price on the day when the hops were sold and the day when they ought to have been delivered. *Collard v. South Eastern R. Co.*, 7 H. & N. 79, 7 Jur. N. S. 950, 30 L. J. Ex. 393, 9 W. R. 697, 4 L. T. 410.

770. When consignee may refuse to accept damaged goods.*—By the negligence of a carrier a machine was so damaged in transportation that the cost of repairing it would have amounted to the cost of a new machine. *Held*, that the consignee was justified in refusing to receive it, and might recover from the carrier the value of the machine and the amount paid for its carriage with interest from the time when it should have been delivered. *Thomas, B. & W. Mfg. Co. v. Wabash, St. L. & P. R. Co.*, 62 *Wis.* 642, 51 *Am. Rep.* 725, 22 *N. W. Rep.* 827.

Where freight has been so injured while in the hands of a carrier as to be worthless, and the consignee refuses to receive it and sues for its value, it is error for the court to enter a judgment both for the value of the property and for the property itself after being repaired by the company, upon a verdict merely for the value of the property. *Texas & P. R. Co. v. Logan*, 3 *Tex. App. (Civ. Cas.)* 227.

771. When consignee must accept goods and protect himself from further loss.—A common carrier is not liable for the whole value of property damaged by his want of care, so long as its character is not so changed but that it may be applied to the ordinary uses of such property, though he will be answerable for the depreciation in its value by reason of its being rendered unfit for some particular uses. *Hackett v. Boston, C. & M. R. Co.*, 35 *N. H.* 390.

A person who receives freights in a damaged condition, but yet of some value, must do what he can to preserve the property from further damage; so where a person received fruit trees somewhat damaged he could only recover for the damage existing at the time, and not for such as died afterward by his own neglect. *Missouri Pac. R. Co. v. Rushin*, 3 *Tex. App. (Civ. Cas.)* 385. *Tardos v. Chicago, S. L. & N. O. R. Co.*, 35 *La. Ann.* 15.

772. Sufficiency of proof of damages.—In an action against a common carrier for failing to deliver goods of an alleged value, though the value be not controverted by the answer, it must be proved to authorize the jury to assess the damages. *Huston v. Peters*, 1 *Metc. (Ky.)* 558.

In an action against a railroad company

to recover the value of twenty-three bales of cotton received by the company as a common carrier and destroyed while in its possession, it is competent for the plaintiff to prove the weight of the twenty-five bales which were delivered to the company, and of two of the bales which were not lost, in order to enable the jury to ascertain the weight of the twenty-three bales which were destroyed; and the admission, first, of the weight of the two bales, followed by evidence of the weight of all the bales, is at most error without injury. *Montgomery & W. P. R. Co. v. Edmonds*, 41 *Ala.* 667.

In an action for damage to goods it is enough to prove the condition and value of the goods when delivered to the carrier and when received by the consignee, and if damaged in the hands of the carrier he is entitled to recover; and the fact that the damage was partly caused by bad packing goes only to the amount of damage. *Higginbotham v. Great Northern R. Co.*, 2 *F. & F.* 796, 10 *W. R.* 358.

773. When interest is allowable.*—Interest may be considered as an element of damages recoverable from a common carrier for breach of a contract to receive and transport freight. *Cobb v. Illinois C. R. Co.*, 38 *Iowa* 601.—**DISTINGUISHING** *Mote v. Chicago & N. W. R. Co.*, 27 *Iowa* 22; *Richmond v. Dubuque & S. C. R. Co.*, 33 *Iowa* 422.

Where goods are lost while in carrier's hands, legal interest may be allowed upon their value from the time that they should have been delivered. *Robinson v. Merchants' Despatch Transp. Co.*, 45 *Iowa* 470. *Northern Transp. Co. v. McClary*, 66 *Ill.* 233. *Harris v. Delaware, L. & W. R. Co.*, 61 *N. Y.* 656. *Erie R. Co. v. Lockwood*, 28 *Ohio St.* 358, 14 *Am. Ry. Rep.* 143. *Lucesco Oil Co. v. Pennsylvania R. Co.*, 2 *Pittsb. (Pa.)* 477. *Kyle v. Laurens R. Co.*, 10 *Rich. (So. Car.)* 382. *Galveston, H. & S. A. R. Co. v. Ball*, 80 *Tex.* 602, 16 *S. W. Rep.* 441. *Whitney v. Chicago & N. W. R. Co.*, 27 *Wis.* 327, 5 *Am. Ry. Rep.* 291.

Where the freight on goods has been prepaid and the parties have entered into a contract that in case of loss the price at the place of shipment is to govern, it is proper to give judgment both for the value

* See also *ante*, 236.

* Allowance of interest in actions against carriers, see notes, 30 *AM. & ENG. R. CAB.* 40, 18 *L. R. A.* 449. See also *ante*, 158.

of the goods lost and the amount of the freight; and in addition to the value of the goods and the amount of the freight it is proper to allow interest on the amount of the damages from the date of the loss. *Missouri Pac. R. Co. v. Barnes*, 2 *Tex. App. (Civ. Cas.)* 507.

The fact that the owner was paying interest on a debt which the produce shipped was intended to satisfy, neither adds to his right to recover interest for the delay nor enlarges the liability of the carrier. *Houston & T. C. R. Co. v. Jackson*, 21 *Am. & Eng. R. Cas.* 126, 62 *Tex.* 209.—REVIEWING *Fowler v. Davenport*, 21 *Tex.* 635.

But where the only evidence of the value was the price stated in the bill where the goods were purchased—*held*, that the jury should have been limited to that price in assessing the damages, with interest from the time of loss to time of trial. *Blumenthal v. Brainerd*, 38 *Vt.* 402.

774. When interest not allowable except as a punishment.—Where property is lost or destroyed while in charge of a common carrier, the measure of damage is the market value of the property at the place of destination, and interest is not ordinarily recoverable as part of the damages. *Texas & P. R. Co. v. Davis*, 2 *Tex. App. (Civ. Cas.)* 156.

Where goods are lost by accident while in the carrier's hands, without any bad conduct or negligence being imputed to him, interest is not allowable on the value of the goods, even after the institution of the action. *Lakeman v. Grinnell*, 5 *Bosw. (N. Y.)* 625.

In the absence of fraud, delinquency, or injustice on the part of a carrier, interest should not be allowed on the value of goods lost in his hands. *Fowler v. Davenport*, 21 *Tex.* 626. *Texas & P. R. Co. v. Wright*, 2 *Tex. App. (Civ. Cas.)* 292. *Texas & P. R. Co. v. Martin*, 2 *Tex. App. (Civ. Cas.)* 295.

775. Allowance of attorney's fees.—In action against common carriers for breach of contract, attorney's fees for bringing the suit are not recoverable; otherwise in actions in tort. *New Orleans, J. & G. N. R. Co. v. Moore*, 40 *Miss.* 39.

There being no evidence that the carrier acted in bad faith or was stubbornly litigious or put the plaintiffs to unnecessary expense, an instruction that the jury could add reasonable attorneys' fees to the actual damages was erroneous. *Richmond & D.*

R. Co. v. Benson, 86 *Ga.* 203, 12 *S. E. Rep.* 357.

776. Allowance of costs.—An action against a railway company for failing to safely carry and deliver goods delivered to it as a common carrier is "founded on contract," within the meaning of the County Courts Act 1867, § 5; and where the defendant tenders an amount which the plaintiff accepts in satisfaction, the plaintiff is not entitled to costs. *Fleming v. Manchester & S. R. Co.*, L. R. 4 Q. B. D. 81, 39 L. T. 555, 27 *W. R.* 481; *reversing* 26 *W. R.* 741.

An action against a railway company for failing to stop goods *in transitu*, when requested by the vendor, and delivering them to an insolvent vendee, is founded on tort and not on contract, within the County Courts Act 1867, § 5, and if the plaintiff recovers a sum exceeding £10, he is not deprived of costs by that section. *Pontifex v. Midland R. Co.*, L. R. 3 Q. B. D. 23, 47 L. J. Q. B. 28, 26 *W. R.* 209, 25 *W. R.* 215, 35 L. T. 706, 37 L. T. 403.—DISTINGUISHED IN *Fleming v. Manchester S. & L. R. Co.*, L. R. 4 Q. B. D. 81, 39 L. T. 555, 27 *W. R.* . . .

A plaintiff in an action against a common carrier for the breach of his duty to carry goods safely, brought in a superior court to recover a sum not exceeding £20, is not deprived of his costs by 19 & 20 Vict. c. 108, § 30, if the defendant suffers judgment by default. *Tattan v. Great Western R. Co.*, 2 *El. & El.* 844, 6 *Jur. N. S.* 800, 29 L. J. Q. B. 184, 8 *W. R.* 606.—DISCUSSED IN *Baylis v. Lintott*, L. R. 7 C. P. 345, 42 L. J. C. P. 119, 28 L. T. 666.

*b. For Delay or Failure to Carry.**

777. Generally.—A common carrier is liable in damages for a negligent delay in the transportation of property; but the owner cannot on account of unreasonable delay refuse to receive the goods and sue for a conversion. He can claim only the damages sustained by the delay. *St. Louis, I. M. & S. R. Co. v. Mudford*, 21 *Am. & Eng. R. Cas.* 139, 44 *Ark.* 439.

Where a carrier fails to convey with reasonable expedition, it is no answer to an action for damages arising from delay that the carriage was at the ordinary rate. *Blake-*

* Measure of damages for loss of goods or for unreasonable delay, see notes, 9 *AM. & ENG. R. CAS.* 334; 21 *Id.* 142; 30 *Id.* 135; 11 *AM. ST. REP.* 366. See also *ante*, 125-148.

more v. Lancashire & Y. R. Co., 1 F. & F. 76.

Where a carrier refuses to deliver goods which have been sent carriage paid, without the payment by the consignee of an additional sum, and an action of trover is commenced for the conversion of the goods, pending which the goods are given up in a damaged state, the additional sum demanded for the goods is not the measure of damages. *Davis v. North Western R. Co.*, 4 *Jur. N. S.* 1303.

The owner of a vessel agreed to carry pork to a certain market and sell it for the best price, or leave it with a commission merchant in case a certain price could not be obtained. The sale was not made, and the pork was left as directed. The owner of the pork sued the owner of the vessel, charging a failure to use due diligence in making the voyage, and in trying to effect the sale. *Held*, that the measure of damages was not the value of the pork at the price at which defendant was at liberty to sell it, nor its actual value, but such damages as the plaintiff actually sustained by the defendant's negligence. *Colvin v. Jones*, 3 *Dana (Ky.)* 576.

778. Damages for delay, generally—**Loss of market.***—The general rule of damages for unreasonable delay in transporting freight is the difference between the value of the property at the time and place it should have been delivered and its value when it was delivered, with interest, after deducting the charges for freight, whether the depreciation in value accrued from a fall of prices or from a physical injury sustained through the negligence of the carrier. *St. Louis, I. M. & S. R. Co. v. Phelps*, 46 *Ark.* 485.—**QUOTING** *Rome R. Co. v. Sloan*, 39 *Ga.* 636.—*Bussey v. Memphis & L. R. R. Co.*, 4 *McCrary (U. S.)* 405, 13 *Fed. Rep.* 330. *Weston v. Grand Trunk R. Co.*, 54 *Me.* 376.—**QUOTING** *Inglelew v. Northern R. Co.*, 7 *Gray (Mass.)* 88; *Wilson v. Lancashire & Y. R. Co.*, 9 *C. B. N. S.* (99 *E. C. L.*) 632. **REVIEWING** *Smith v. New Haven & N. R. Co.*, 12 *Allen (Mass.)* 531.—*Inglelew v. Northern R. Co.*, 7 *Gray (Mass.)* 86.—**DISTINGUISHED** IN *Fox v. Boston & M. R. Co.*, 37 *Am. & Eng. R. Cas.* 632, 148 *Mass.* 220, 19 *N.*

E. Rep. 222, 1 *L. R. A.* 702. **QUOTED** IN *Weston v. Grand Trunk R. Co.*, 54 *Me.* 376. **REVIEWED** IN *Cutting v. Grand Trunk R. Co.*, 13 *Allen (Mass.)* 381.—*Sisson v. Cleveland & T. R. Co.*, 14 *Mich.* 489.—**DISAPPROVING** *Wibert v. New York & E. R. Co.*, 19 *Barb. (N. Y.)* 36. **DISTINGUISHING** *Conger v. Hudson River R. Co.*, 6 *Duer (N. Y.)* 375.—**APPROVED** IN *Cutting v. Grand Trunk R. Co.*, 13 *Allen (Mass.)* 381.—*Faulkner v. Southern Pac. R. Co.*, 51 *Mo.* 311, 3 *Am. Ry. Rep.* 293. *Ward v. New York C. R. Co.*, 47 *N. Y.* 29, 1 *Am. Ry. Rep.* 452.—**FOLLOWING** *O'Hanlan v. Great Western R. Co.*, 6 *B. & S.* 484; *Bracket v. M'Nair*, 14 *Johns. (N. Y.)* 170. **NOT FOLLOWING** *Wibert v. New York & E. R. Co.*, 19 *Barb. (N. Y.)* 36.—**FOLLOWED** IN *Sherman v. Hudson River R. Co.*, 64 *N. Y.* 254.—*Medbury v. New York & E. R. Co.*, 26 *Barb. (N. Y.)* 564. *East Tenn., V. & G. R. Co. v. Hale*, 27 *Am. & Eng. R. Cas.* 36, 85 *Tenn.* 69, 1 *S. W. Rep.* 620.—**APPROVED** IN *Louisville & N. R. Co. v. Wynn*, 45 *Am. & Eng. R. Cas.* 312, 88 *Tenn.* 320, 14 *S. W. Rep.* 311.—*International & G. N. R. Co. v. Philips*, 63 *Tex.* 590. *Galveston, H. & S. A. R. Co. v. Douglass*, 1 *Tex. App. (Civ. Cas.)* 29. *International & G. N. R. Co. v. Anderson*, 3 *Tex. Civ. App.* 8, 21 *S. W. Rep.* 691.—**ADHERING** TO *Ft. Worth & D. C. R. Co. v. Greathouse*, 82 *Tex.* 108.—*Missouri Pac. R. Co. v. White*, 3 *Tex. App. (Civ. Cas.)* 200. *Newell v. Smith*, 49 *Vi.* 255, 17 *Am. Ry. Rep.* 100. *Peet v. Chicago & N. W. R. Co.*, 20 *Wis.* 594.

And in such case the inquiry as to the values should be limited to the place of delivery. *Kansas Pac. R. Co. v. Reynolds*, 8 *Kan.* 623, 5 *Am. Ry. Rep.* 260. *Lesinsky v. Great Western Dispatch*, 13 *Mo. App.* 575.

And this rule applies in the absence of a special contract to deliver within a specified time, and even where the goods are not intended for any special purpose at a certain time, and where no damage is done to the goods themselves. *Cutting v. Grand Trunk R. Co.*, 13 *Allen (Mass.)* 381.—**APPROVING** *Collard v. Southeastern R. Co.*, 7 *H. & N.* 79; *Great Western R. Co. v. Redmayne*, *L. R.* 1 *C. P.* 330; *Sisson v. Cleveland & T. R. Co.*, 14 *Mich.* 489. **QUOTING** *Wilson v. Lancashire & Y. R. Co.*, 9 *C. B. N. S.* 632. **REVIEWING** *Woodger v. Great Western R. Co.*, *L. R.* 2 *C. P.* 318; *Inglelew v. Northern R. Co.*, 7 *Gray (Mass.)* 91; *Smeed v. Ford*, 1 *El. & Bl.* 602; *Black v.*

*Carrier's liability for loss of market, see note, 30 *AM. & ENG. R. CAS.* 8. See also *ante*, 146.

Baxendale, 1 Ex. 410; *Denny v. New York C. R. Co.*, 13 Gray (Mass.) 481.—REVIEWED IN *Dyer v. Grand Trunk R. Co.*, 42 Vt. 441.

Where it is the custom of a railroad company to give consignees notice of the arrival of goods, a failure to do so will make it liable, and the measure of damages will be the difference in the value of the goods at the time that notice should have been given and at the time in which it was given. *New Orleans, J. & G. N. R. Co. v. Tyson*, 46 Miss. 729.

The true measure of damages is the difference between the market value at the point of destination at the time stock *should* have arrived if the contract had been kept, and their value at the same time at point of shipment. *Gelvin v. Kansas City, St. J. & C. B. R. Co.*, 21 Mo. App. 273.

In an action for delay in failing to deliver goods, the measure of damages is any necessary expense incurred by plaintiff in obtaining the goods, together with the difference between the cost of the goods and what could have been realized for them at the time and place of destination, if the amount was less than the cost. If greater, there would be nothing to add or deduct; and this is so although the goods at the time of delivery may have been valueless to plaintiff for the purpose for which they were bought. *Rankin v. Pacific R. Co.*, 55 Mo. 167.

779. Illustrations.—If a railroad company agreed to deliver certain melons for plaintiff into the city of Savannah in due time to transport the same to Boston by a certain steamer, and failed to comply with such agreement, and the melons were, after their arrival too late in Savannah, by his consent shipped to New York and there sold at a loss, such shipment and sale in New York was for the benefit of the railroad company, and it was their duty to make good the loss. *Skellie v. Central R. & B. Co.*, 81 Ga. 56, 6 S. E. Rep. 811.

Defendant company received fruit, knowing that it was intended for the market at a place beyond its line, and agreed to carry it to the end of its line and there deliver to a connecting carrier. When the fruit arrived at its place of destination it was found injured by delay which had occurred on defendant's road. *Held*, that even if defendant's liability ceased upon delivering the fruit to the connecting carrier, still in assessing damages the proof need not be

confined to the market value at the end of its road, but it was proper to introduce proof of the market value at the place of destination, as furnishing a satisfactory basis for the jury upon which to estimate the damages. *Marshall v. New York C. R. Co.*, 45 Barb. (N. Y.) 502; *affirmed* (P) 48 N. Y. 660, *mem.*

In such case, in the absence of evidence showing that there was any difference in the market value of fruit at the end of defendant's line and at the place of destination, or that it was injured after delivery to the connecting line, it is proper to instruct the jury that the damages might be assessed according to the market value at the place of destination, less the freight charges over the line of the connecting carrier. *Marshall v. New York C. R. Co.*, 45 Barb. (N. Y.) 502; *affirmed* (P) 48 N. Y. 660, *mem.*

Where fish are delivered for transportation by special train and boat from London to Boulogne, and in consequence of a delay miss the Paris train at Boulogne and are delayed for twenty-four hours, losing the market, in estimating the damages the loss of the market in Paris is not to be taken into account. *Hawes v. South Eastern R. Co.*, 54 L. J. Q. B. D. 174, 52 L. T. 514.

780. What is place of destination.

—The general rule is, where a carrier is liable for injury to goods, that the damages are assessed according to the market value at the place of destination; but where the goods are for a point beyond its line, and it only contracts to carry them to the end of its line and there deliver to the next carrier, and they are injured before delivery to the next carrier, the place of destination will be deemed the end of the initial carrier's line. *Marshall v. New York C. R. Co.*, 45 Barb. (N. Y.) 502; *affirmed* (P) 48 N. Y. 660, *mem.*

781. Delay must be proximate cause of loss.—The owner of goods cannot recover, for delay in the shipment, the difference between the market value at the time they should have been delivered and that when they were delivered, where the delay is not the proximate cause of the fall in prices. *Jones v. New York & E. R. Co.*, 29 Barb. (N. Y.) 633.—FOLLOWING

Wibert v. New York & E. R. Co., 19 Barb. (N. Y.) 36. NOT FOLLOWING *Kent v. Hudson River R. Co.*, 22 Barb. (N. Y.) 278.—DISAPPROVED IN *Ward v. New York C. R. Co.*, 47 N. Y. 29, 7 Am. Rep. 405. FOL-

LOWED IN *Kirkland v. Leary*, 2 Sweeney (N. Y.) 677.

782. Notice to carrier that goods were for the market.—If a common carrier is chargeable with knowledge that the article carried is intended for market, and unreasonably delays its delivery, and there is a depreciation in the market value of the article at the place of consignment, between the time it ought to have been delivered and the time it was in fact delivered, such depreciation will, ordinarily, constitute the measure of damages. *Devereux v. Buckley*, 34 Ohio St. 16, 21 Am. Ry. Rep. 72.

Where a carrier is sued for delay in transporting marketable goods, the proper measure of damages is the difference between the market value on the day the goods should have arrived and the day on which they actually did arrive. The jury may give such damages although no notice is given to the carrier that the goods were intended for market. *Collard v. South Eastern R. Co.*, 7 Jur. N. S. 950, 30 L. J. Ex. 393, 7 H. & N. 79, 9 W. R. 697, 4 L. T. 410.

783. Loss of profits.—The loss of profits on the sale of the goods, or other damages of like character, are too remote to furnish a proper basis for recovery; but any damages which are the immediate consequences of the unreasonable delay may be recovered. *Galveston, H. & S. A. R. Co. v. Douglass*, 1 Tex. App. (Civ. Cas.) 29.

Where a carrier delays the delivery of goods until the season for them is past, the measure of damages is the difference between the market values of the goods at the time they should have arrived and when they actually arrived. The loss of profits to the plaintiff from making up these goods into articles of sale and disposing of them cannot be considered. *Wilson v. Lancashire & Y. R. Co.*, 9 C. B. N. S. 632, 7 Jur. N. S. 862, 30 L. J. C. P. 232, 9 W. R. 635, 3 L. T. 859.

The measure of damages for a delay in transporting goods is the decline in the market value, and not the expected profits that the shipper would have made on the goods by a sale of them, though the carrier knew that the goods were sold and were being shipped for the purpose of delivery to purchasers. *Harvey v. Connecticut & P. R. R. Co.*, 124 Mass. 421, 18 Am. Ry. Rep. 9.—APPLYING *Horne v. Midland R. Co.*, L. R. 7 C. P. 583. FOLLOWING *Hadley v. Baxendale*, 9 Ex. 341.

784. Loss of contract of sale.*—

Where goods are contracted to be sold at a price fixed, to be delivered at a particular place, and a carrier promises to transport and deliver them in due time, with full notice that the goods are sold if forwarded seasonably, the measure of damages for a breach of his contract, by which the consignor loses the sale, is the difference between the contract price and the value of the goods when actually delivered. *Deming v. Grand Trunk R. Co.*, 48 N. H. 455.

The measure of damages against a carrier, when he fails to deliver goods in a reasonable time, in the absence of a special contract, is the difference between the market value of these goods when actually delivered, and their value if delivered in a reasonable time. Where there was no special contract sued on or proved, it is error to admit evidence to show that the consignees had bargained off the cotton shipped at three eighths of a cent per pound over the market price, if they could have received it within a reasonable time, though the carrier knew nothing about that bargain, was not informed of it, and not in privity with it. *Columbus & W. R. Co. v. Flournoy*, 75 Ga. 745.

Where plaintiff had other corn than that delayed in transportation at the place of destination, sufficient to fill his contract, and which he tendered to his vendee, but which the latter refused, the plaintiff could not recover damages based upon the contract price, but only upon the market value of the corn at the place of destination. *Illinois C. R. Co. v. Cobb*, 64 Ill. 10.

The measure of damages occasioned by delay in shipment of goods, when the carrier is not informed of the special circumstances causing the loss of the plaintiff's contracts with others, is the difference between their market value at the time they ought to have been delivered and the time they were in fact delivered, if in equally good condition; and if not, the damages should be increased to the extent of the deterioration resulting from the delay. *Lindley v. Richmond & D. R. Co.*, 9 Am. & Eng. R. Cas. 31, 88 N. Car. 547.—FOLLOWING *Burton v. Wilmington & W. R. Co.*, 84 N. Car. 192.—FOLLOWED IN *Hamilton v. Western N. C. R. Co.*, 96 N. Car. 398.

Where the consignee refuses to receive

* See also *ante*, 763.

goods on account of not being delivered on time, and afterwards sends to the consignor a signed memorandum of the original contract, in assessing the damages for negligence the jury cannot consider the loss of the bargain between the consignor and consignee. *Simmons v. South Eastern R. Co.*, 7 *Jur. N. S.* 849.

In an action for delay in the delivery of goods, whereby the plaintiff was unable to fulfil his contract and had the goods thrown back on his hands, and was obliged to sell them for less than he would have received had they been delivered in time, the plaintiff was not allowed under the circumstances to recover the difference between the contract price and the price actually received. *Horne v. Midland R. Co.*, 42 *L. J. C. P.* 59, *L. R.* 8 *C. P.* 131, 21 *W. R.* 481, 28 *L. T.* 312. And see *s. c. L. R.* 7 *C. P.* 583, 41 *L. J. C. P.* 264, 27 *L. T.* 38.

The plaintiff, the owner of certain goods shipped over the defendant railroad, made an advantageous sale of them, provided they were delivered within a certain time. The defendant was not informed of this sale. Through defendant's negligence the goods were not delivered at their destination in time, and the owner, in consequence, lost the benefit of his bargain, by reason of the market price being less than the contract price. *Held*, that the measure of damages is the difference between the value of the goods at the time and place they should have been delivered and their value when they were in fact delivered, computed at the place of destination, with interest, less freight paid. But if the carrier had been informed of the sale and its conditions the measure of damages would have been the difference between the contract price and the market value of the goods when delivered. *Held*, also, that the shipper is not entitled to damages for his loss of time in looking after or inquiring for the goods during transportation; especially not at a place other than their destination. *St. Louis, I. M. & S. R. Co. v. Mudford*, 32 *Am. & Eng. R. Cas.* 539, 48 *Ark.* 502, 3 *S. W. Rep.* 814.

785. Loss of government contract.—Where plaintiffs had contracted for the sale of corn to the United States, at Cairo, at \$1.50 per bushel, and lost the benefit of such sale on account of the non-delivery of the same within a reasonable time—*held*, that if the managing officers of the railroad

had knowledge that the corn was intended for the government, plaintiffs were entitled to recover on the basis of the price they were to have received from the United States, and were not limited to the market value of corn in Cairo, nor required to buy other grain there. *Illinois C. R. Co. v. Cobb*, 64 *Ill.* 128.

But when the government on April 1 notified the shipper that it would receive no more grain after the tenth of that month, under the contract, good faith required the shipper to communicate the knowledge of this fact to the carrier, if he expected to hold him liable for the contract price on corn shipped after April 1. For corn shipped after the lapse of reasonable time in which to give this notice to the carrier, the owner should be confined to the market value of the grain at the place of destination at the time when it should have been delivered, unless such notice was given. *Illinois C. R. Co. v. Cobb*, 64 *Ill.* 128.

786. When expenses caused by delay may be added.—Where the owner of goods sues the carrier to recover damages for a delay in transportation, he may recover, as an item of damages, the expense of necessary search for the goods while delayed. *Savannah, F. & W. R. Co. v. Pritchard*, 28 *Am. & Eng. R. Cas.* 57, 77 *Ga.* 412, 4 *Am. St. Rep.* 92, 1 *S. E. Rep.* 261.

The measure of damages for the breach of a contract to transport from one market to another an ordinary article of merchandise always to be found in the market is the excess in value at the place of destination at the time when, by the contract, the merchandise should have arrived there, beyond its value at the place of shipment, with the agreed freight added, and such expenses as, under the contract, the shipper would have incurred in loading and unloading, etc., had the contract been performed. *Ward's C. & P. Lake Co. v. Elkins*, 34 *Mich.* 439.

A carrier who at first wrongfully refuses to deliver but afterwards delivers goods consigned to a manufacturer, is not liable for consequential damages arising from delay to the consignee's works caused by such refusal, or for a loss of profits from the same cause; but is liable for the expense of sending to the carrier's office a second time for the goods. *Waite v. Gilbert*, 10 *Cush. (Mass.)* 177.

Where goods are only delayed in trans-

portation, the owner cannot treat the delay as a conversion and recover from the carrier the whole value of the goods; but he may recover for such expense and trouble as necessarily resulted directly from the delay. *Briggs v. New York C. R. Co.*, 28 Barb. (N. Y.) 515.

Where there has been delay merely in the delivery of the goods to the consignee by a common carrier, and not a conversion of them, the measure of damages is ordinarily the difference between the value of the goods when they were delivered and when they should have been delivered, to which may be added reasonable expenses caused by the delay; but if there has been a conversion of them by the carrier and the consignee has not thereafter accepted them, he is entitled to recover the value of the goods at the time they should have been delivered to him. *Baltimore & O. R. Co. v. O'Donnell*, 49 Ohio St. 489, 32 N. E. Rep. 476.

The measure of damages for delay in delivery would seem to be any reasonable loss and expenses which had been occasioned by the delay, together with the value of the goods at the time and place they should have been delivered, deducting therefrom the value according to their condition at the time and place of actual delivery or tender. *Nettles v. South Carolina R. Co.*, 7 Rich. (So. Car.) 190.

As expenses naturally contemplated in the shipment of goods, should be included expense of the consignee in providing means for receiving the freight and taking it to his place of business. Expense of wagons and teams sent for freight and not delivered is properly included in damages, if the freight be unlawfully withheld; but it seems that expenses of but one journey by the wagons and teams to the depot of delivery should be allowed. *Gulf, C. & S. F. R. Co. v. Loonie*, 84 Tex. 259, 19 S. W. Rep. 385.

Where a carrier unreasonably delayed the transportation of goods contracted to be supplied on hire, the owner was allowed to recover the loss of the hire of his goods, but not his personal expenses in inquiring for them. *Hales v. London & N. W. R. Co.*, 4 B. & S. 66.

Where the contract for shipment does not contemplate nor cover damages for loss of time by the consignee in awaiting the arrival of the goods at the point of destination, evidence of damages of this character

was inadmissible. It was likewise error to instruct the jury to consider such evidence in their estimate of damages. *Denver & R. G. R. Co. v. De Wiit*, 1 Colo. App. 419, 29 Pac. Rep. 524.

A consignee cannot recover of a carrier for his loss of time in waiting for goods which the latter has unreasonably delayed to deliver. *Ingledew v. Northern R. Co.*, 7 Gray (Mass.) 86.

Where the owner of goods sues a carrier for a delay in transportation, he cannot recover for the time and expense of a team and driver while waiting at the place of destination for the arrival of the goods, unless the carrier, at the time of shipment, had notice that a team would be waiting to receive the goods. *Briggs v. New York C. R. Co.*, 28 Barb. (N. Y.) 515.

787. Fixing penalty for delay by contract.—A contract of shipment provided for a certain freight rate, with a condition that if the goods were not delivered in ten days the carrier would remit five cents from every hundred pounds for every day exceeding that time. *Held*, that the contract must be taken as providing damages only for a temporary delay, such as would be limited to the amount of the freight charges, and not for a failure to perform the contract, where the damages exceeded the charges. *Nudd v. Wells*, 11 Wis. 407.—**DISAPPROVING** *Collins v. Albany & S. R. Co.*, 12 Barb. (N. Y.) 492; *Clapp v. Hudson River R. Co.*, 19 Barb. (N. Y.) 461. **FOLLOWING** *Thomas v. Womack*, 13 Tex. 580; *Lambert v. Craig*, 12 Pick. (Mass.) 199; *George v. Law*, 1 Cal. 363.

788. Where goods are delayed by sending to wrong place.—The measure of damages against a carrier for delivering freight at a wrong destination is the freight charges from the wrong destination to the proper destination and the difference in the market price between the date at which the goods should have arrived at the last place, had they arrived there on time, and the day they actually did get there. *Monteith v. Merchants' D. & T. Co.*, 1 Ont. 47.

789. Nominal damages.*—Where a railway company is guilty of negligent delay in delivering bales of rags received by it for carriage, the owner is entitled only to nominal damages if, owing to the rags hav-

*See also *ante*, 764.

ing been packed while wet, they are found useless for any purpose when received at their destination, whereas if they had been packed dry no loss would have been sustained. *Baldwin v. London, C. & D. R. Co., L. R. 9 Q. B. D. 583.*

700. Assessing additional damages where appeal is taken for delay.—

Damages will be refused on appeal with hesitation, on the ground that the case was brought up for delay only, where the question of the result of the receipt by the shipper's agent of some of the goods on arriving at their destination contains some merit. *Georgia R. Co. v. Cole, 68 Ga. 623.*

701. Sufficiency of evidence where loss by delay is charged.—To recover

of a common carrier damages for mere delay in performing the contract of carriage, the value of such goods at the place of destination when they ought to have arrived should appear, and also their value when they did arrive; the difference between these values being generally the measure of damages. And to show when they ought to have arrived, the contract being silent, it should appear what length of time was usually required or was reasonably necessary to effect the transit. *Atlanta & W. P. R. Co. v. Texas Grate Co., 40 Am. & Eng. R. Cas. 130. 81 Ga. 602, 9 S. E. Rep. 600. Livingston v. New York C. & H. R. R. Co., 5 Hun (N. Y.) 562.*

In an action against a carrier, when unreasonable delay is complained of and the loss of a market is claimed, it is not sufficient for the plaintiff to prove delay, and also a damage, when it appears from his proofs that there was other delay not chargeable to the defendant; but some damage must be traced to the delay for which the defendant was in fault. *Detroit & B. C. R. Co. v. McKenzie, 9 Am. & Eng. R. Cas. 15, 43 Mich. 609, 5 N. W. Rep. 1031.*

In a suit against a railroad for delay in transportation of grain, where plaintiff has proved the market price of grain at the point to which it was consigned at the time when, if there had been no unreasonable delay, it would have arrived, it is competent for defendant to prove that plaintiff sold grain at that point, during the time the grain was actually arriving there, at a certain price, as a fact tending to establish the market price at that place at that time. *Illinois C. R. Co. v. Cobb, 72 Ill. 148.*

702. When interest allowable.*—

The measure of damages for unreasonable delay in the delivery of goods is the difference between their market value when they should have arrived and their actual value when they arrived, with interest from the former date, less the freight. *East Tenn., V. & G. R. Co. v. Johnson, 85 Ga. 497, 11 S. E. Rep. 809.*

The common carrier owes indemnity to the shipper of goods for delay in the transportation; and legal interest upon the price of the goods during the period of the delay may be recovered, as the measure of such indemnity. *Murrell v. Dixey, 14 La. Ann. 296.*

703. For a failure to carry—Exemplary damages.†—For the breach of

a contract to receive, transport, and deliver grain, the measure of damages to be recovered against the carrier is the difference between the price of the grain fixed by plaintiff's contract of sale and its value at the place where it was offered for transportation, less the freight to destination. If the shipper's interest is simply a contract of purchase, the measure of damages is the difference between the contract price of purchase and the contract price of sale, less the cost of freight between the places where the contracts were made. *Cobb v. Illinois C. R. Co., 38 Iowa 601.*

In a failure by a railroad to carry plank for a road from one station to another, the measure of damages is the difference of the value of the plank at shipping and delivering stations, less cost of transportation, provided such lumber could be obtained at the latter station, with compensation for the delay, but not increased expense of putting the plank down. *Pennsylvania R. Co. v. Titusville & P. P. Road Co., 71 Pa. St. 350.*

Where a railroad company is sued for refusing to carry goods, a charge to the jury that "Wherever an act is done by defendant, and he is sued for it, and the jury think that he has been trying honestly to carry out his rights, without interfering with the rights of others, maliciously, wilfully, or otherwise, then the jury should confine themselves to actual damages; but wherever there has been any ill-will, or wilful disregard of the rights of another, then the jury is at liberty to give exemplary

* See also *ante*, 148.

† See also *ante*, 47.

damage," is correct. *Avinger v. South Carolina R. Co.*, 35 *Am. & Eng. R. Cas.* 519, 29 *So. Car.* 265, 7 *S. E. Rep.* 493.

Where a railway company fails to provide cars of a particular description for the shipment of hay at a specified rate per car, as it has agreed, losses sustained by the owner of the hay, who, after shipping some in ordinary cars, keeps the remainder for some time and after notice to the company sells it under cost price, is not directly attributable to the breach of the company's contract, and is not a loss for which the company is liable. In such case, the only damages which can be recovered is in respect of the hay actually delivered and conveyed in the smaller cars, whereby the cost of carriage was increased. *Irvine v. Midland G. W. R. Co.*, 6 *Ir. L. R.* 55.

c. Where Goods Have No Fixed Market Value.

704. Generally.—The measure of damages for the loss of goods is their fair market value at the point of destination, with legal interest thereon from the date when they should have been delivered. The rule does not apply where the goods are old. In such case the particular value of the goods to the owner forms the measure of damages. *Gulf, C. & S. F. R. Co. v. Clark*, 18 *Am. & Eng. R. Cas.* 628, 2 *Tex. App. (Civ. Cas.)* 459.—QUOTING *International & G. N. R. Co. v. Nicholson*, 61 *Tex.* 550, 3 *Tex. Law Rev.* 334.

Where an article has not been the subject of traffic or sale at or near the place of injury or destruction, and it consequently has no market value there, evidence is admissible to show its market value at the nearest points at which it would have a market. *Harris v. Panama R. Co.*, 3 *Bosw. (N. Y.)* 7.

705. Second-hand clothes and household articles.—In case of the loss of goods in the carrier's hands, the general rule is that the measure of damage is the value of goods at the point of destination, but this rule does not apply to such articles as household goods and wearing apparel in use. *Denver, S. P. & P. R. Co. v. Frame*, 18 *Am. & Eng. R. Cas.* 637, 6 *Colo.* 382.

In a suit for damages against a common carrier for the loss of second-hand clothing belonging to the plaintiff, table furniture, and the like, having no special marketable value, and which were useful chiefly to the owner, it would seem that the measure of

damages would be, not their loss at the place of intended delivery, but the value of such things to their owner; not a price suggested by his partiality for them, nor yet what he could sell them for, but the actual loss in money he would sustain by being deprived of such articles of domestic use. *International & G. N. R. Co. v. Nicholson*, 21 *Am. & Eng. R. Cas.* 122, 61 *Tex.* 550. *Gulf, C. & S. F. R. Co. v. Clark*, 2 *Tex. App. (Civ. Cas.)* 459.—QUOTING *International & G. N. R. Co. v. Nicholson*, 61 *Tex.* 550; *Missouri Pac. R. Co. v. Hewett*, 2 *Tex. App. (Civ. Cas.)* 205.

In such cases it is only when the freight money has not been actually paid that the amount of it is to be deducted in estimating damages. When no sum was alleged or proved by the shipper, and no amount was specified in the bill of lading, it was not error in failing to charge on the subject. *International & G. N. R. Co. v. Nicholson*, 21 *Am. & Eng. R. Cas.* 122, 61 *Tex.* 550.

In an action against a railroad company to recover damages for household goods shipped and lost by the carrier, plaintiff claimed, among other things, \$50 rental value of a sewing-machine which was lost among the goods. *Held*, that he could not recover, where the action was for goods lost, for a rental value, the true measure of damages being the actual value of the machine. *Missouri Pac. R. Co. v. Hewett*, 2 *Tex. App. (Civ. Cas.)* 205.

The measure of damage for delay in the transportation and delivery of goods by a carrier, where the goods are not intended for the market, but, like household goods, are intended to serve some specific purpose of the owner, is ordinarily the rental value of the goods during the delay, with legal interest thereon from the time when the goods should have been delivered; but where the goods consist of wearing apparel and other household articles which cannot be said to have any rental value, the measure of damage is the value of the goods during the time of the delay, excluding therefrom any remote, speculative, and uncertain damages. *Brown v. Adams*, 3 *Tex. App. (Civ. Cas.)* 462.

706. Museum collection.—The measure of damages for the injury to a museum would be the market value of the specimens destroyed and the difference in value of those injured just before and just after the injury; and if there was no market value at

the place where the railway received them, then their market value at the nearest point where they had a market value should be shown. The damage cannot be estimated by the time it took the owner to collect them and the value of his time. *Yoakum v. Dunn*, 1 Tex. Civ. App. 524, 21 S. W. Rep. 411.

A charge that "If you find that by reason of the total or partial loss of some of the articles belonging to the collection or museum the whole collection is depreciated in value and rendered unfit for profitable exhibition, you will consider such incidents and results for the purpose of determining the actual damage you find the plaintiff has sustained," was error. Such depreciation could only result from a general lessening of interest in the museum by reason of the loss of certain specimens, and as an element of damage it is too uncertain and speculative. *Yoakum v. Dunn*, 1 Tex. Civ. App. 524, 21 S. W. Rep. 411.

797. Family portraits.—Where a carrier is sued for the loss of a portrait of plaintiff's father, the actual value of the portrait to plaintiff is the measure of damages; and it is competent for him to prove that he has no other portrait of his father. *Green v. Boston & L. R. Co.*, 128 Mass. 221, 35 Am. Rep. 370. — **DISTINGUISHED IN** *Mather v. American Exp. Co.*, 138 Mass. 55, 52 Am. Rep. 258.

In a suit to recover damages for the loss or destruction of family portraits while being carried, which have no market value, the jury may look to their original cost and to the probable cost of reproducing and replacing the same. *Houston & T. C. R. Co. v. Burke*, 9 Am. & Eng. R. Cas. 59, 55 Tex. 323, 40 Am. Rep. 808.

Plaintiff sued a carrier for the loss of a daguerreotype picture of a distinguished statesman. *Held*, that it was competent for plaintiff to prove, on the question of damages, that copies of the picture were in demand and that orders for such copies had been received, as tending to show that the picture had a value other than that arising from the mere pleasure of possessing it; but anticipated profits on such copies are not recoverable. *Bennett v. Drew*, 3 Bosw. (N. Y.) 355.

798. Mental anguish.—Damages are not recoverable for mental anguish and anxiety caused by the non-arrival of "birds, animals," etc., shipped for exhibition at a

fair. *Yoakum v. Dunn*, 1 Tex. Civ. App. 524, 21 S. W. Rep. 411.

d. Goods Ordered for a Special Purpose.

799. Generally.*—Where goods are not intended for sale at the point of their destination, but are intended for the owner's own personal use, the carrier is not responsible or liable for depreciation in market value by reason of delay, but in the absence of special circumstances is liable only for the value of the use of such property during the delay. *St. Louis, I. M. & S. R. Co. v. Hindsman*, 1 Tex. App. (Civ. Cas.) 82.

Where the goods are not intended for sale in the market of destination, but to serve some specific purpose of the owner, in the absence of special circumstances making the carrier liable for special loss, or the expense to which the owner is put by the company's negligent delay, the measure of damages is the actual inconvenience of the owner in being deprived of the use of his property during the delay. *Gulf, C. & S. F. R. Co. v. Maetze*, 18 Am. & Eng. R. Cas. 613, 2 Tex. App. (Civ. Cas.) 553.

To entitle the consignor to other damages than are the natural consequence of the delay, or which could not have been anticipated by the parties at the time of shipment, he must aver them in his petition. *Gulf, C. & S. F. R. Co. v. Maetze*, 18 Am. & Eng. R. Cas. 613, 2 Tex. App. (Civ. Cas.) 553.

800. Carrier not liable for special damages except upon notice.—Before a common carrier can be held for special damages accruing from loss or injury to goods in transit, it must be shown that such special damages were contemplated by him and the consignor at the time of the shipment, and that he, the carrier, had notice of the special circumstances leading to such damages when the goods were received for transportation. *Gray v. St. Louis, I. M. & S. R. Co.*, 54 Mo. App. 666. *Rogan v. Wabash R. Co.*, 51 Mo. App. 665. *Wabash, St. L. & P. R. Co. v. Lynch*, 12 Ill. App. 365. *Cobb v. Illinois C. R. Co.*, 38 Iowa 601. *Galveston, H. & H. R. Co. v. Bell*, 2 Tex. Unrep. Cas. 517.

If the goods delivered to a carrier for transportation are for resale, and so known to him, if guilty of negligent delay, he is

*Special injuries caused by failure to deliver goods, see note, 18 AM. & ENG. R. CAS. 617.

Special damages occasioned by loss or delay, see note, 16 AM. & ENG. R. CAS. 258.

chargeable with the enhanced price, at the place of delivery, less his charges of freight. When not for sale, but to serve a special purpose in business, this rule often would be not adequate to determine damages. *Vicksburg & M. R. Co. v. Ragsdale*, 46 Miss. 458, 1 Am. Ry. Rep. 407.

Where the special circumstances under which the contract was actually made were not communicated to the carrier who made the breach, then in such case the measure of damage is the amount of injury which would generally arise from such breach. *Pacific Exp. Co. v. Darnell*, 62 Tex. 639.

Where property is shipped, as a rule the measure of damage for a delay is the difference between the market value of the property when it should have arrived and the market value when it did arrive; but if the company has notice at the time of the shipment of special reasons why it is necessary to hasten the shipment, then the measure of damages for a delay is for whatever loss the owner has suffered thereby. *Houston & T. C. R. Co. v. Hogg*, 2 Tex. Unrep. Cas. 544.

In cases of ordinary shipment of goods to a merchant of the kind in which he deals, when there is no fact shown that would put the carrier upon notice of the fact that the goods were designed for a special purpose other than is inferred from such character of shipments, the measure of damages for delay in the delivery is the difference in the value of the goods at the time they should have arrived and at the time they did arrive. It was error to allow rents for delayed machinery, delayed under such circumstances. *Gulf, C. & S. F. R. Co. v. Pettit*, 3 Tex. Civ. App. 588, 22 S. W. Rep. 761. *Galveston, H. & S. A. R. Co. v. Watson*, 1 Tex. App. (Civ. Cas.) 465.

801. Machinery for manufacturing purposes.—Ordinarily the measure of damages for the loss of the use of machinery through the negligence of the carrier is the value of the use of the machinery to the owner during the time he is deprived of such use; but where the carrier is notified of the purpose for which it is designed, other items of damage may be included, such as the pay of idle hands, etc. *Priestly v. Northern I. & C. R. Co.*, 26 Ill. 206.—**DISTINGUISHING** *Sangamon & M. R. Co. v. Henry*, 14 Ill. 156.

Where a carrier delays a steam-boiler which is intended to be used in a mill for the sawing of lumber, future profits derived

from the use of the mill during the delay, which are but speculative, are not recoverable as part of the damages. *Vicksburg & M. R. Co. v. Ragsdale*, 46 Miss. 458, 1 Am. Ry. Rep. 407.—**FOLLOWED IN** *New Orleans, J. & G. N. R. Co. v. Echols*, 54 Miss. 264.

Where a railroad failed to deliver in a reasonable time a boiler constructed for a steam saw-mill, the measure of damages would be the actual expenses incurred, as well as the reasonable time and trouble in traveling to ascertain what had become of the boiler, and the expense incurred in preparations for connecting the boiler with the fixtures and machinery of the saw-mill, and interest on the value of the property during the time of detention; but the profits which might have been realized had the boiler reached its destination at the proper time are not proper and reasonable charges, and should not be allowed. *Major v. Cincinnati, H. & D. R. Co.*, 1 *Disney (Ohio)* 23.

Where the rental value of property is the measure of damage for a delay in carrying it, it should be fixed with reference to the circumstances of the case. So where a railroad company is sued for a delay in shipping a cotton-gin, in estimating the rental value during the delay it was proper to take into consideration the fact that there was an adjacent gin; that it was the season of the year for ginning cotton; the proximity or remoteness of other gins; the amount of cotton which would probably have been taken to plaintiff's gin, and such other facts as would assist in ascertaining the reasonable rental value of the gin. *Gulf, C. & S. F. R. Co. v. Maetze*, 18 Am. & Eng. R. Cas. 613, 2 Tex. App. (Civ. Cas.) 553.

No special damages can be recovered from a railroad for breaking a newspaper folding machine while being carried as freight, where the special damages are not alleged in the complaint. In such case the damages are limited to the difference between the value of the machine at the place of delivery, without delay and in good condition, and its value when delivered in its damaged condition, not including anything for repairs. *Missouri Pac. R. Co. v. Breeding*, 4 Tex. App. (Civ. Cas.) 217, 16 S. W. Rep. 184.

Where a machine is so damaged while in the carrier's hands as to render the cost of repairing it equal to or greater than the cost of a new one, the owner may recover

its full value, with interest, from the time that it should have been delivered, and charges, if they have been paid; but he cannot recover damages resulting from a loss of the use of the machine where it does not appear that the carrier had any notice of the contemplated use. *Thomas, B. & W. Mfg. Co. v. Wabash, St. L. & P. R. Co.*, 62 Wis. 642, 22 N. W. Rep. 827, 51 Am. Rep. 725.—DISTINGUISHING *Brown v. Chicago, M. & St. P. R. Co.*, 54 Wis. 342. EXPLAINING *Brayton v. Chase*, 3 Wis. 456.

Where a part of certain machinery was consigned to the defendant as the plaintiff's agent, to be forwarded to him, and the defendant negligently detained it, whereby the whole machinery was kept idle—held, that the measure of damages was not what might have been made by the machinery during the time it was idle, but the legal interest on the capital invested, the price of the hire of the hands necessarily unemployed during the time, the cost of sending for the missing machinery, and all other damages that resulted necessarily from the defendant's negligence. *Foard v. Atlantic & N. C. R. Co.*, 8 Jones (N. Car.) 235.

Part of a printing-press was lost while in the carrier's hands. The carrier had notice of the use for which the press was intended, and contracted to carry and deliver it within a specified time. Held, that the owner might recover any direct and necessary damages resulting from a loss of the use of the press beyond the specified time, including the wages of men hired and the cost of attempting to recover the part lost, and the cost of replacing it. *Cincinnati Chronicle Co. v. White Line C. Transit Co.*, 1 Cin. Super. Ct. 300.

In an action against a railway for damages occasioned by the non-delivery of certain machinery, it appeared that no notice had been given at the time of the contract to defendants of the necessity for a prompt delivery of the machinery, nor of the use it was to be put to. Held, that plaintiffs could only recover the value of the missing article, and were not entitled to the loss of profits arising from its non-delivery, or the wages of certain workmen employed upon the building in which the machinery was to be used. *Ruthven Woolen Mfg. Co. v. Great Western R. Co.*, 18 U. C. C. P. 316.

802. Fruit trees for delivery to purchasers.—A railway company will be liable for any loss that a party sustains who

has ordered fruit trees which are to be delivered to purchasers, but which they refuse to take by not receiving them in time, where the company's agent at the time of shipment was notified of the purposes of the shipment, and that the purchasers would not receive them unless delivered by a certain date. *Texas & P. R. Co. v. Talley*, 2 Tex. App. (Civ. Cas.) 671.

By reason of a delay in carrying fruit trees which plaintiff had contracted to deliver to customers on a certain day, they refused to receive them. Held, in an action against the carrier, that plaintiff's loss, occasioned by the failure of the parties to receive the trees, could not be recovered where the declaration did not set out the contract of sale, and made no claim for special damages, and where it appeared that the carrier did not know that the trees were to be delivered to customers on a certain day. *Wabash, St. L. & P. R. Co. v. Lynch*, 12 Ill. App. 365.

803. Building material.—A building contractor who employs a number of workmen cannot recover from a railroad company the amount of their wages as damages for the time that they are kept idle by reason of the company failing to promptly carry and deliver building material, unless the company has knowledge of the situation of the party and the purpose for which the material is desired. *Ligon v. Missouri Pac. R. Co.*, 3 Tex. App. (Civ. Cas.) 17.

Notice by a builder to the agent of a railroad company, four days after building material is ordered, of the importance to him of its immediate delivery, will not make the company liable to the builder for the wages of men who were kept idle by a failure of the railroad to promptly carry the material, in the absence of fraud or gross negligence. To be available the company must have had knowledge of the situation of the party and the purpose for which the material was desired at the time of entering into the contract of shipment. *Ligon v. Missouri Pac. R. Co.*, 3 Tex. App. (Civ. Cas.) 17.

804. Fuel or material used in manufacturing.—Evidence of loss of profits by the necessary suspension of iron works, in consequence of the failure of a common carrier to deliver coal according to contract, is inadmissible in an action against said carrier for a failure to transport and deliver under his contract. *Cooper v. Young*, 22 Ga. 269.

In an action for delay in the delivery of cotton, whereby a mill was compelled to shut down for want of cotton to go on with, the plaintiffs were not allowed the amount of wages paid during the time the mill was at a standstill and the profits lost, as damages, since the stoppage of the mill did not arise entirely from the non-delivery of the cotton, but arose partly from that and partly from the plaintiffs having no cotton to go on with. *Gee v. Lancashire & Y. R. Co.*, 6 H. & N. 211, 30 L. J. Ex. 11, 9 W. R. 103, 3 L. T. 328.—NOT FOLLOWED IN *Conybeare v. Farries*, L. R. 5 Ex. 16, 39 L. J. Ex. 26, 21 L. T. 497.

805. Commercial traveler's samples.—Where the company is not notified of the object for which goods are sent to a traveling salesman, in case of delay owing to which the salesman does not receive the goods, the shipper cannot recover for loss of profits which he would have derived from the sale of such goods at the place to which they were sent. *Great Western R. Co. v. Redmayne*, L. R. 1 C. P. 329, 12 Jur. N. S. 692, 35 L. J. C. P. 123, 14 W. R. 206, 1 H. & R. 97.

The fact that commercial traveler's samples sent by freight are placed in a box labeled "traveler's goods" does not give notice to the railway company of the purpose for which the goods are sent, so as to affect it with special notice of the fact that the traveler is under expense while waiting for such samples, so as to make particular damages recoverable against it. *Candy v. Midland R. Co.*, 38 L. T. 226.

A parcel of samples was delivered to a railway company to be forwarded to the plaintiffs. By the negligence of the defendants, who had notice that the parcel contained samples, it was delayed on the way until the season at which the samples could be used for procuring orders had elapsed, and they had in consequence become valueless. The plaintiffs could not have procured similar samples in the market. In an action for the non-delivery in a reasonable time—*held*, that the plaintiffs were entitled to recover as damages the value to them of the samples at the time when they should have been delivered. *Schulze v. Great Eastern R. Co.*, 30 Am. & Eng. R. Cas. 134, 19 Q. B. D. 30, 56 L. J. Q. B. 442, 5 Ry. & C. T. Cas. vii.—*APPLYING* *Wilson v. Lancashire & Y. R. Co.*, 9 C. B. N. S. 632.

806. Show goods.—Where a man whose business it is to attend agricultural shows and make a profit thereby ships goods necessary to his business and they are delayed, the profit which would have been made at a particular show is not too speculative to form the subject of damages. *Simpson v. London & N. W. R. Co.*, 45 L. J. Q. B. D. 182, L. R. 1 Q. B. D. 274, 24 W. R. 294, 33 L. T. 805.—APPROVED AND DISTINGUISHED IN *Candy v. Midland R. Co.*, 38 L. T. 226.

Where a railway company is aware of a shipper's purpose to exhibit samples of his goods at an agricultural show, and it fails to deliver the goods until the show is over, the damages recoverable may include a sum for loss of time and profit. In such case no evidence is necessary of the shipper's prospect of making profit at the particular show in question, where it is shown that he usually made a profit out of his exhibits. *Simpson v. London & N. W. R. Co.*, L. R. 1 Q. B. D. 274, 45 L. J. Q. B. D. 182, 24 W. R. 294, 33 L. T. 805.—APPROVED AND DISTINGUISHED IN *Candy v. Midland R. Co.*, 38 L. T. 226.

A label reading "W. H. Moore & Co., Stand 23, Show ground, Litchfield, Staffordshire, van train," is sufficient notice to a railway company that the goods so marked were being sent to a show, and if the delivery of such goods is delayed the owner may recover damages for the loss of profits and expenses. *Jameson v. Midland R. Co.*, 50 L. T. 426.

807. Money sent to pay life insurance.—The plaintiff's intestate delivered to the defendants' agent at Castine \$24.90 to be forwarded to Belfast and there delivered to one Beale, agent of the Continental Life Insurance Company. The money was sent for the purpose of paying the intestate's semi-annual premium on his life policy, which would, by its terms, lapse if premium was not paid on or before eight days thereafter; of all which the defendants' agent had notice, but failed to deliver the money. *Held*: (1) that primarily the defendants would be liable in damages for the net value of the policy on the day it lapsed, both parties having presumably contemplated such damages from knowledge of the circumstances; (2) that it was incumbent upon the plaintiff's intestate to use ordinary care and take all reasonable measures within his knowledge and power to reinstate himself with

the insurance company or to reinsure, and that he cannot recover damages for such loss as he might have thus prevented. *Grindle v. Eastern Exp. Co.*, 67 Me. 317.

808. Goods intended to compete for prize on exhibition.—If a railway company negligently delays the transportation of a model of a machine which is sent by the shipper to compete for a prize, the proper measure of damages is the value of labor and materials used in making the model, and not the chance of obtaining the prize, which was lost by the delay. *Watson v. Ambergate, N. & B. R. Co.*, 15 Jur. 448.

809. Animals for breeding purposes.—Plaintiff sued to recover for injuries to a jack which he had purchased for stock-breeding purposes, and which he claimed was so injured while in the carrier's hands as to be unfit for such purposes. *Held*, in the absence of evidence that plaintiff was liable in special damages to other parties by reason of a failure to procure a suitable animal, of which the carrier had notice, the measure of damages would be confined to a fair compensation for the decreased market value of the animal, and could not extend to expected profits resulting from the use of the animal; but it appearing that the contract of shipment limited the damages to \$100, that amount could not be exceeded in any event. *Chicago, B. & Q. R. Co. v. Hale*, 2 Ill. App. 150.

CARRIAGE OF PASSENGERS.

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I. GENERAL PRINCIPLES.*

1. Railroad Companies Considered as Pas- senger Carriers.†

1. Generally.—A common carrier of passengers is one who undertakes for hire

* Who are common carriers, made liable as such, see note, 47 AM. DEC. 648.

Who are liable as common carriers, and extent of liability, see note, 42 AM. DEC. 496.

Common-law liabilities of carriers, see note, 3 L. R. A. 342.

† Carriers of passengers, who are, see note, 2 L. R. A. 166.

to carry all persons indifferently who may apply for passage. *Nashville & C. R. Co. v. Messino*, 1 *Sneed* (Tenn.) 220. See also *Gillingham v. Ohio River R. Co.*, 51 *Am. & Eng. R. Cas.* 222, 35 *W. Va.* 588, 14 *L. R. A.* 798, 14 *S. E. Rep.* 243.

One engaged in transporting passengers for hire upon a railroad operated by him is denominated by the law a common carrier. *Davis v. Button*, 78 *Cal.* 247, 18 *Pac. Rep.* 133, 20 *Pac. Rep.* 545.

To constitute one a common carrier of passengers it is necessary that he should hold himself out to the public as such. This may be done not only by advertisement, but by actually engaging in the business and pursuing the occupation as an employment. *Nashville & C. R. Co. v. Messino*, 1 *Sneed* (Tenn.) 220.

Railroad companies in Georgia, having charters which authorize them to take private property for public purposes, are common carriers in conducting their freight and passenger business, and so are their lessees when engaged in such business in the use and exercise of the franchises of the companies respectively. *Caldwell v. Richmond & D. R. Co.*, 89 *Ga.* 550, 15 *S. E. Rep.* 678.

Defendant company was employed by the government to furnish transportation to prisoners of war and such soldiers as might accompany them as guards and otherwise. Plaintiff was injured by a collision while riding on a car platform, where he was stationed as a guard, not being permitted to ride inside the car, and paid no fare personally, the use of the train being paid for by the government. *Held*, that the company was liable for the injury, and it could not claim exemption on the ground that it was but an agent of the government. *Truex v. Erie R. Co.*, 4 *Lans. (N. Y.)* 198.

It seems that where, by its charter, a corporation was empowered to cut and manufacture lumber and to ship the same to market, it can, in providing means of transportation for its own products, as incidental to its own business, carry the goods of others, and passengers. *Gruber v. Washington & J. R. Co.*, 21 *Am. & Eng. R. Cas.* 438, 92 *N. Car.* 1.

2. Transportation of passengers before road is opened.—While a road was in process of construction, and before it was constructed through a deep cut, the company laid a temporary track over the

elevation and ran trains to a considerable distance beyond, at first only intended for the use of workmen and materials, but afterward the public was permitted to ride free; but at the time of the accident in question a fare was charged. On week days no cars were run except open freights with seats across them, and a box-car in which were carried provisions, etc. Ordinarily those who rode sat on the seats on the open cars; but plaintiff entered on a damp morning and went in the box-car, after being told by an employé that there were seats in the open cars. *Held*, that the company was liable for an injury to the plaintiff as a common carrier. *Nashville & C. R. Co. v. Messino*, 1 *Sneed (Tenn.)* 220. See also *Shoemaker v. Kingsbury*, 12 *Wall. (U. S.)* 369.

3. — on freight train* — Conductor's caboose. — Railroad companies, though they are carriers of passengers by their passenger trains, are not to be regarded as common carriers of passengers by their freight trains unless they make it an habitual business. *Murch v. Concord R. Co.*, 29 *N. H.* 9, 61 *Am. Dec.* 631.—FOLLOWED IN *Smith v. Boston & M. R. Co.*, 44 *N. H.* 325. REVIEWED IN *Atchison, T. & S. F. R. Co. v. Headland*, 18 *Colo.* 477.

A train having the appliances and accommodations of a freight train does not become a passenger train by the fact that persons are permitted to ride as passengers in the conductor's caboose. *Perkins v. Chicago, St. L. & N. O. R. Co.*, 21 *Am. & Eng. R. Cas.* 378, 60 *Miss.* 726.

4. Operation of trains on road of another company. — Where a company is otherwise liable for an injury to a passenger it cannot avoid liability by showing that it did not own the track. If it is operating the train at the time over the track of another road, it is a common carrier and liable as at common law. *Eureka Springs R. Co. v. Timmons*, 40 *Am. & Eng. R. Cas.* 698, 51 *Ark.* 459, 11 *S. W. Rep.* 690.

5. Distinguished from private carriers of passengers. — It is not every carrying of passengers for hire that constitutes a party a common carrier. A party having the conveniences for carrying persons may in some or perhaps many cases carry passengers for hire, when done at the instance of passengers for their accommodation, without incurring the responsibilities

of common carriers. These would be private carriers, and held accountable under rules much less stringent. *Nashville & C. R. Co. v. Messino*, 1 *Sneed (Tenn.)* 220.

When contractors for building a railroad, running a construction train, consent to take a passenger for hire on their train, they are private carriers for hire, and are only bound to exercise such care and skill in the management and running of the train as prudent and cautious men, experienced in that business, are accustomed to use under similar circumstances. The passenger, in such case, takes upon himself the risks incident to the mode of conveyance. *Shoemaker v. Kingsbury*, 12 *Wall. (U. S.)* 369.

6. Distinguished from carriers of goods.* — There is a broad distinction between the duties and liabilities of common carriers of freights and of passengers. The liability of common carriers of passengers is much more limited and qualified. The law enjoins a very high degree of care and diligence, it is true, but unless there is some failure in the exercise of such care and diligence, there is no liability for injuries to passengers. They are not insurers of their lives. *Chicago & N. W. R. Co. v. Carroll*, 5 *Ill. App.* 201.

Carriers of freight are liable for any damage not caused by the act of God or of the public enemy, and are insurers; but carriers of passengers are liable only for injuries resulting from their actual negligence or that of their employés. *Grand Rapids & I. R. Co. v. Huntley*, 38 *Mich.* 537.

The liability of a carrier of passengers is in some respects more limited than that of a carrier of merchandise: he is bound, however, to use the utmost care and foresight, and if, by the exercise of these, an accident from which an injury or loss has resulted might have been prevented, he is liable. *Caldwell v. Murphy*, 1 *Duer (N. Y.)* 233.

The duties and liabilities of railroads and other common carriers differ in regard to goods and passengers. In regard to goods, where shown to have been in possession of the carrier and injured or lost, the presump-

* See also CARRIAGE OF MERCHANDISE, 5, 6.

Distinction between liability of carriers of goods and carriers of passengers, see notes, 2 *L. R. A.* 252; 2 *Id.* 84.

Liability of a carrier of passengers for loss of merchandise intrusted to it by passenger, see note, 14 *L. R. A.* 515.

* See post, 22, 43-49, 286-297.

tion of liability arises, and can only be removed by proof of loss or injury by act of God or the public enemy. The carrier of passengers only contracts for competent skill, and that, as far as human care and foresight can go, he will transport them safely. *East Tenn., V. & G. R. Co. v. Mitchell*, 11 *Heisk. (Tenn.)* 400.—DISTINGUISHING *Horne v. Memphis & O. R. Co.*, 1 *Coldw. (Tenn.)* 72.

7. Duty to passenger distinguished from duty to employe.—The liabilities of railroads to their passengers and to their employes are to be distinguished. The highest degree of diligence is required in the one case and the lower standard in the other. *Smith v. St. Louis, K. C. & N. R. Co.*, 69 *Mo.* 32.

8. Analogy between railroads and other passenger carriers.—Public policy demands that the law should be applied as rigidly to railroad companies as to any other species of passenger carriers. *Gillenwater v. Madison & I. R. Co.*, 5 *Ind.* 339.

9. — between railroads and stage-coach companies.*—Railroad companies are not to be distinguished from stage-coach proprietors in the degree of diligence required, and the extent of liability incurred, in the carrying of passengers. *Gillenwater v. Madison & I. R. Co.*, 5 *Ind.* 339.

2. Who Are to Be Considered Passengers.

a. In General.

10. Definition.—A "passenger," in the legal sense of the word, is one who travels in some public conveyance by virtue of a contract, express or implied, with the carrier as to the payment of fare, or that which is accepted as an equivalent therefor. *Pennsylvania R. Co. v. Price*, 1 *Am. & Eng. R. Cas.* 234, 96 *Pa. St.* 256.

11. Passenger must offer himself to be carried.—The existence of the relation of passenger and carrier is only to be implied from such circumstances as will warrant an implication that the one has offered himself to be carried and the other has accepted the offer and has received him to be properly cared for until the trip is begun, and to be then carried over the railroad. *Webster v. Fitchburg R. Co.*, 58 *Am. & Eng. R. Cas.* 1, 161 *Mass.* 298, 37 *N. E.*

Rep. 165.—QUOTING *Dodge v. Boston & B. Steamship Co.*, 37 *Am. & Eng. R. Cas.* 67, 148 *Mass.* 207.

The relation of carrier and passenger must be created either by express or implied contract. The purchase of a ticket alone does not create the relation. He must in some manner indicate his purpose of becoming a passenger, and place himself in charge of the carrier. So held, where a party, instead of waiting in the station-house for a train, remained at a boarding-house some two or three hundred feet from the depot until the arrival of the train, and endeavored to get on the train after it was in motion and was injured. *Spannagle v. Chicago & A. R. Co.*, 31 *Ill. App.* 460. Compare *Gordon v. Grand St. & N. R. Co.*, 40 *Barb. (N. Y.)* 546.

12. Necessity of purchase of ticket.*—The actual purchase of a ticket before entering a railroad train is not always necessary to constitute the relation of passenger and place upon the company that degree of care which a common carrier owes a passenger. *Allender v. Chicago, R. I. & P. R. Co.*, 37 *Iowa* 264, 8 *Am. Ry. Rep.* 115.—REVIEWED IN *Raben v. Central Iowa R. Co.*, 31 *Am. & Eng. R. Cas.* 45, 74 *Iowa* 732, 34 *N. W. Rep.* 621.—*Norfolk & W. R. Co. v. Groseclose*, 88 *Va.* 267, 13 *S. E. Rep.* 454. *Norfolk & W. R. Co. v. Galliher*, 89 *Va.* 639.

Purchase of ticket alone does not create the relation of passenger and carrier. *Spannagle v. Chicago & A. R. Co.*, 31 *Ill. App.* 460. See also *Schurr v. Houston*, 10 *N. Y. S. R.* 262.

The possession of a ticket is immaterial as constituting the relation where the person was lawfully on a proper train with the knowledge of the company, for the purpose of being transported as a passenger. *Secord v. St. Paul, M. & M. R. Co.*, 5 *McCrary (U. S.)* 515, 18 *Fed. Rep.* 221.

13. — of payment of fare.†—The actual payment of fare is not essential to the status of a passenger on a train. *Florida Southern R. Co. v. Hirst*, 52 *Am. & Eng. R. Cas.* 409, 30 *Fla.* 1, 11 *So. Rep.* 506. *Murphy v. St. Louis, I. M. & S. R. Co.*, 43 *Mo. App.* 342. *Gordon v. Grand St. & N. R. Co.*, 40 *Barb. (N. Y.)* 546. See also

* See post, 24; also TICKETS AND FARES, 22, 23.

† See post, 25.

* See post, 97-105.

Pennsylvania R. Co. v. Price, 1 *Am. & Eng. R. Cas.* 234, 96 *Pa. St.* 256.

Regardless of compensation to the carrier, a party lawfully on a car and entitled to transportation is a passenger, and is entitled to recover for an injury resulting from the negligence of the carrier or its servants, if the injury occurs without fault on his part. *Gulf, C. & S. F. R. Co. v. Wilson*, 79 *Tex.* 371, 15 *S. W. Rep.* 280.

It is enough, to fix the liability of a carrier for injuries occasioned by the negligence of its servants, that the passenger be lawfully on the train, whether by reason of having paid his passage-money or by permission or invitation of officers or agents of the company. *Prince v. International & G. N. R. Co.*, 21 *Am. & Eng. R. Cas.* 152, 64 *Tex.* 144.

Where one, although he has paid no fare, is on a car with the knowledge and permission of the person in charge thereof, he is a passenger and is entitled to the same care and protection as if he had paid fare. *Muehlhausen v. St. Louis R. Co.*, 28 *Am. & Eng. R. Cas.* 157, 91 *Mo.* 332, 2 *S. W. Rep.* 315.—QUOTING *Sherman v. Hannibal & St. J. R. Co.*, 72 *Mo.* 65.—APPLIED IN *Buck v. People's St. R., E. L. & P. Co.*, 46 *Mo. App.* 555.

14. — of entry into cars.*—Entry in the cars of the company is not necessary always to create the relation of carrier and passenger. *Allender v. Chicago, R. I. & P. R. Co.*, 37 *Iowa* 264. *Gordon v. Grand St. & N. R. Co.*, 40 *Barb. (N. Y.)* 546. *Norfolk & W. R. Co. v. Galliher*, 89 *Va.* 639. *Baltimore & O. R. Co. v. State*, 21 *Am. & Eng. R. Cas.* 202, 63 *Md.* 135. *Warren v. Fitchburg R. Co.*, 8 *Allen (Mass.)* 227.

The actual entry into the cars and the payment of fare are not essential to create the relation of passenger and carrier. *Murphy v. St. Louis, I. M. & S. R. Co.*, 43 *Mo. App.* 342.—QUOTING *Smith v. St. Paul City R. Co.*, 32 *Minn.* 1.

Being within the waiting-room, waiting to take the cars, is as effectual to make a person a passenger as if he be within the body of one of the cars. *Gordon v. Grand St. & N. R. Co.*, 40 *Barb. (N. Y.)* 546.

Having purchased ticket, the waiting at the regular place of departure to take the cars constitutes one a passenger. *Central R. & B. Co. v. Perry*, 58 *Ga.* 461, 16 *Am. Ry. Rep.* 122.

15. What persons deemed passengers, generally.*—No person becomes a passenger except by the consent, expressed or implied, of the carrier. *Hoar v. Maine C. R. Co.*, 70 *Me.* 65.

A passenger has no right on a train which, under the rules of the company, does not stop at the station for which he purchased a ticket. *Chicago, St. L. & P. R. Co. v. Bills*, 104 *Ind.* 13, 3 *N. E. Rep.* 611.

The failure of those in charge of a train on which a person had wrongfully taken passage, to warn him to get off, cannot be construed into a permission to become a passenger on the train. *Brown v. Scarboro*, 58 *Am. & Eng. R. Cas.* 364, 97 *Ala.* 316, 12 *So. Rep.* 289.

Where it appears that the plaintiff, having a pass over defendant's railway to Troy, hearing the call "All out for Troy," got on the train which moved in the opposite direction to a water-tank for water for the engine, and was injured before the train returned to the station, the relation which plaintiff occupied to the railroad, whether as passenger or trespasser, will depend on his reasonable belief that the train was about to depart for Troy, justified by some conduct on the part of defendant's officers or servants having control of the movements of the train. *Brown v. Scarboro*, 58 *Am. & Eng. R. Cas.* 364, 97 *Ala.* 316, 12 *So. Rep.* 289.

While a lady passenger was waiting with two others in the waiting-room of a depot, some persons came in to clean the room. The three ladies asked the ticket agent for leave to sit in his office while the room was being cleaned, which was refused, as his office was to be cleaned also. They then asked the ticket agent for leave to sit on the platform, but this request was also refused, as against the rules of the company. The agent then told them that they might go into some empty cars standing beside the platform, which they did. They had not been there long when, without notice, the cars were suddenly and without signal moved out of the station. The occupants

* Who are deemed to be passengers, see notes, 58 *AM. & ENG. R. CAS.* 3, 12; note to 11 *L. R. A.* 720.

Who are legal passengers so as to recover for personal injuries, see note, 82 *AM. DEC.* 293.

Trespassers on train not passengers, see note, 13 *AM. & ENG. R. CAS.* 58.

Trespassers on cars and persons stealing rides not passengers, see note, 2 *L. R. A.* 166.

hurriedly passed to the end of the car (which was the rear one) and jumped. The plaintiff was injured in so doing. There was no employé of the road on the cars, and the cars were still abreast the platform when plaintiff jumped. *Held*, that the plaintiff was a passenger while in the car. *Shannon v. Boston & A. R. Co.*, 23 *Am. & Eng. R. Cas.* 511, 78 *Me.* 52, 2 *Atl. Rep.* 678.

A passenger allowed to ride on a special train, who has no notice of any want of authority to grant the permission, whether he pays fare or not, in the absence of collusion between him and the conductor to defraud the company of its fare, becomes a passenger, and, as such, is entitled to have the train on which he travels managed with the care that is due from a common carrier to passengers on a train of that character. *Wagner v. Missouri Pac. R. Co.*, 97 *Mo.* 512, 3 *L. R. A.* 156, 10 *S. W. Rep.* 486.

16. Children.*—Where a child of nine years of age enters a passenger train with her mother, who has provided herself with a ticket, the child is a passenger, whether the contract of carriage, if any, is made with her or with her mother, and as such she is not entitled to be carried unless paid for. *Beckwith v. Cheshire R. Co.*, 27 *Am. & Eng. R. Cas.* 192, 143 *Mass.* 68, 8 *N. E. Rep.* 875.

While the tender years of a plaintiff may excuse him, if he had occupied the relation of a passenger, from the effect of his own contributory negligence, it cannot create that relation. So *held*, where an infant was injured while riding on a hand-car at the invitation of employés of the company, but in violation of the rules of the company the car being provided for the exclusive use of the company's employés and their tools. *Gulf, C. & S. F. R. Co. v. Dawkins*, 77 *Tex.* 228, 13 *S. W. Rep.* 982.

By 7 & 8 Vict. c. 85, § 6, railway companies are bound to carry, by certain trains, children under three years of age without charge. A mother carrying in her arms a child of three years and two months old took a ticket for herself by one of these trains, but did not take a ticket for the child. In the course of the journey the child was injured. No question was asked by the company's servants as to the age of the child, and there was no intention on the part of the mother to defraud. *Held*, that the child was entitled to recover. *Austin*

v. Great Western R. Co., *L. R.* 2 *Q. B.* 442, 8 *B. & S.* 327, 36 *L. J. Q. B.* 201, 15 *W. R.* 863, 16 *L. T.* 320.—FOLLOWED IN *Foulkes v. Metropolitan D. R. Co.*, 41 *L. T.* 95, 48 *L. J. C. P.* 555; affirmed in *L. R.* 5 *C. P. D.* 157, 49 *L. J. C. P.* 361.

17. Persons on wrong train by mistake.—A person who, by mistake, gets on a different train from the one he intended taking passage on is a passenger on the train he boards, and the relation of passenger and carrier exists between him and the company. *International & G. N. R. Co. v. Gilbert*, 22 *Am. & Eng. R. Cas.* 405, 64 *Tex.* 536.—QUOTED IN *Gulf, C. & S. F. R. Co. v. Rather*, 3 *Tex. Civ. App.* 72. REVIEWED IN *Missouri Pac. R. Co. v. Evans*, 37 *Am. & Eng. R. Cas.* 144, 71 *Tex.* 361.—*Columbus, C. & I. C. R. Co. v. Powell*, 40 *Ind.* 37.

Where a person has bought a ticket and by mistake takes passage on the wrong train, he is a passenger so far as to entitle him to protection against the negligence of the company. *Cincinnati, H. & I. R. Co. v. Carper*, 31 *Am. & Eng. R. Cas.* 36, 112 *Ind.* 26, 11 *West. Rep.* 223, 13 *N. E. Rep.* 122, 14 *N. E. Rep.* 352.

The mere purchase of a ticket to a certain station does not create a contract on the part of the railroad company to carry the passenger on a train that does not stop at that station, and it may be negligence for the passenger to get on such train; yet if he does so, taking and punching his ticket by the conductor, after examining it, so that he cannot ride on another train, is sufficient acceptance of him as a passenger. *Schurr v. Houston*, 10 *N. Y. S. R.* 262.

18. Persons riding gratuitously, generally.*—A carrier is liable to persons whom it accepts as passengers, and of whom it demands no fare, to the same extent as it is liable to persons who pay fare. *Cleveland, C. & St. L. R. Co. v. Ketcham*, 133 *Ind.* 346, 33 *N. E. Rep.* 116.

If a person knowingly induces the conductor of a railway train to violate a rule of the company and to carry him without charge, he is guilty of a fraud on the company and cannot claim the rights of a passenger. *McVeety v. St. Paul, M. & M. R. Co.*, 47 *Am. & Eng. R. Cas.* 471, 45 *Minn.*

* Person riding free by consent of company entitled to protection due passenger, see note, 2 *L. R. A.* 167.

Liability to freight shipper who is riding free, see note, 2 *L. R. A.* 166.

* See also CHILDREN, INJURIES TO, 13-19.

268, 47 N. W. Rep. 809.—REVIEWED IN Florida Southern R. Co. v. Hirst, 30 Fla. 1. —But compare *Wagner v. Missouri Pac. R. Co.*, 97 Mo. 512, 3 L. R. A. 156, 10 S. W. Rep. 486.

19. — riding on pass.*—Common carriers are subject to the same liability for injuries resulting from negligence to persons riding on a free pass as they are to those who pay full fare. *Louisville, N. A. & C. R. Co. v. Faylor*, 126 Ind. 126, 25 N. E. Rep. 869.

One who fraudulently attempts to ride on a non-transferable pass issued to another person is not a passenger to whom the carrier owes a duty to carry safely. *Louisville, N. A. & C. R. Co. v. Thompson*, 27 Am. & Eng. R. Cas. 88, 107 Ind. 442, 8 N. E. Rep. 18, 9 N. E. Rep. 357, 57 Am. Rep. 120.

20. Attempting to ride on a non-transferable ticket.†—If a person in good faith presents a commutation ticket which was issued to another and is not transferable, and his claim to be carried thereon is recognized, and he is carried as a passenger, he is entitled to the rights of a passenger, i. e., to be carried safely, and to have a secure place to stop and leave the road. *Robostelli v. New York, N. H. & H. R. Co.*, 34 Am. & Eng. R. Cas. 515, 33 Fed. Rep. 796.—DISTINGUISHING *Toledo, W. & W. R. Co. v. Beggs*, 85 Ill. 80; *Union Pac. R. Co. v. Nichols*, 8 Kan. 505; *Houston & T. C. R. Co. v. Moore*, 49 Tex. 31; *Eaton v. Delaware, L. & W. R. Co.*, 57 N. Y. 382; *Great Northern R. Co. v. Harrison*, 10 Ex. 376; *Austin v. Great Western R. Co.*, L. R. 2 Q. B. 442.—But compare *Louisville, N. A. & C. R. Co. v. Thompson*, 27 Am. & Eng. R. Cas. 88, 107 Ind. 442, 8 N. E. Rep. 18, 9 N. E. Rep. 357, 57 Am. Rep. 120.

21. Persons riding on engine;—Trespassers.—A plaintiff who applies to an engineer for permission to ride on the engine, and is told that it is against the rules of the company to permit him to do so, but who consents, notwithstanding the rules, that he may ride, obtains no legal right on the engine by such consent, and cannot recover for injuries received while so riding. His entry upon the engine, after

notice that it was forbidden, made his act unlawful and him a wrong-doer. *Robertson v. New York & E. R. Co.*, 22 Barb. (N. Y.) 91.—QUOTED IN *Virginia Midland R. Co. v. Roach*, 34 Am. & Eng. R. Cas. 271, 83 Va. 375, 5 S. E. Rep. 175. REVIEWED IN *Little Rock & Ft. S. R. Co. v. Miles*, 13 Am. & Eng. R. Cas. 10, 40 Ark. 298, 48 Am. Rep. 10; *Florida Southern R. Co. v. Hirst*, 30 Fla. 1; *Lillis v. St. Louis, K. C. & N. R. Co.*, 64 Mo. 464.

A person who has been in the employ of a company as a fireman is charged with notice of rules prohibiting any one but the engineer and certain employes from riding on the engine, which every employé was required to learn, and if he rides upon the engine, even though it be at the invitation of the engineer and conductor, he is a trespasser upon the train, and has no claim against the company for personal injuries sustained by him through the negligence of the company's servants. *Virginia Midland R. Co. v. Roach*, 34 Am. & Eng. R. Cas. 271, 83 Va. 375, 5 S. E. Rep. 175.—QUOTING *Robertson v. New York & E. R. Co.*, 22 Barb. (N. Y.) 93.—FOLLOWED IN *Shenandoah Valley R. Co. v. Lucado*, 86 Va. 390. REVIEWED IN *Atchison, T. & S. F. R. Co. v. Headland*, 18 Colo. 477; *Florida Southern R. Co. v. Hirst*, 30 Fla. 1.

The relation of carrier and passenger does not exist by any agreement, express or implied, between a carrier and a person who furtively rides upon the engine unknown to the company and contrary to its rules, which must have been known to him; and the company is under no obligations to such person. *Chicago & A. R. Co. v. Michie*, 83 Ill. 427.

The permission of the engine-driver to a person to ride upon the engine is not the permission of the company, he having no power to give such permission, and such person is not a passenger upon the train. *Chicago & A. R. Co. v. Michie*, 83 Ill. 427.—QUOTED IN *Chicago, B. & Q. R. Co. v. Casey*, 9 Ill. App. 632.

A person who is injured while attempting to get on a freight engine, to ride for his own convenience, cannot recover for personal injuries received, though he was attempting to get on the engine by invitation of the conductor of the train, as he bears none of the relations of a passenger to the company; and it is no excuse that he had ordered the freight cars for the use of his

* See also CARRIAGE OF LIVE STOCK, 118-133, and PASSES.

Traveler with pass as gratuity passenger, see note, 13 AM. & ENG. R. CAS. 27.

† See also TICKETS AND FARES, 30, 59.

‡ See also post, 43, 46, 92-96, 461.

employers in shipping goods, and had previously been permitted to ride by invitation, and had seen others, including railroad employes, do so. *Files v. Boston & A. R. Co.*, 149 Mass. 204, 21 N. E. Rep. 311.

22. Presumption that one is a passenger.—(1) *When arises.*—Every one riding in a railroad car is presumed *prima facie* to be there lawfully as a passenger, having paid or being liable when called on to pay his fare. *Gillingham v. Ohio River R. Co.*, 51 Am. & Eng. R. Cas. 222, 35 W. Va. 588, 14 L. R. A. 798, 14 S. E. Rep. 243. *Pennsylvania R. Co. v. Books*, 57 Pa. St. 339.—DISTINGUISHED IN *Flower v. Pennsylvania R. Co.*, 69 Pa. St. 210. REVIEWED IN *Atchison, T. & S. F. R. Co. v. Headland*, 18 Colo. 477.

Where one is traveling by a passenger train and is not connected with the company, the legal presumption is that he is a passenger and traveling for a consideration. *Creed v. Pennsylvania R. Co.*, 86 Pa. St. 139.

But this presumption may be rebutted. *People v. Douglass*, 87 Cal. 281, 25 Pac. Rep. 417.

Where a person riding upon a passenger train is injured, it is a presumption of law that he is entitled to the rights and privileges of a passenger. *Atchison, T. & S. F. R. Co. v. Headland*, 58 Am. & Eng. R. Cas. 4, 18 Colo. 477, 33 Pac. Rep. 185.—REVIEWING *Murch v. Concord R. Corp.*, 29 N. H. 9.

(2) *When does not arise.*—No presumption of law or fact arises where the person is found on a car not used for the accommodation of passengers, and it is for the jury to determine whether such person is a passenger or trespasser upon the train. *People v. Douglass*, 87 Cal. 281, 25 Pac. Rep. 417.

If a person by his own solicitation or consent is carried on a vehicle or conveyance which is not used for the purpose of passenger carriage, there can be no presumption that he is a passenger, although the owner be a common carrier of passengers by other and different means of conveyance. *Snyder v. Natchez, R. R. & T. R. Co.*, 44 Am. & Eng. R. Cas. 278, 42 La. Ann. 302, 7 So. Rep. 582.

(3) — *riding on freight trains.**—The presumption that one injured while travel-

ing on a train is a passenger does not arise when the train is one manifestly designed for the carriage of freight. *Atchison, T. & S. F. R. Co. v. Headland*, 58 Am. & Eng. R. Cas. 4, 18 Colo. 477, 33 Pac. Rep. 185.

The fact that a person was found in a caboose attached to a freight train is not sufficient of itself to warrant a court in assuming that the company had undertaken, as to him, the duties and obligations of a carrier of passengers. In the absence of proof to the contrary, the presumption is that he was not a passenger. *Atchison, T. & S. F. R. Co. v. Headland*, 58 Am. & Eng. R. Cas. 4, 18 Colo. 477, 33 Pac. Rep. 185.—REVIEWING *Toledo, W. & W. R. Co. v. Brooks*, 81 Ill. 245; *Union Pac. R. Co. v. Nichols*, 8 Kan. 505; *Waterbury v. New York C. & H. R. Co.*, 17 Fed. Rep. 671; *Dunn v. Grand Trunk R. Co.*, 58 Me. 187; *Cleveland v. New Jersey Steamboat Co.*, 68 N. Y. 306; *Eaton v. Delaware, L. & W. R. Co.*, 57 N. Y. 382; *Jacobus v. St. Paul & C. R. Co.*, 20 Minn. 125; *Pennsylvania R. Co. v. Books*, 57 Pa. St. 339; *Creed v. Pennsylvania R. Co.*, 86 Pa. St. 139.

b. When the Relation Begins.*

23. Generally.—(1) *Becomes passenger.*—Where a person enters a car as a passenger, either with or without a ticket, he is rightfully there; but the instant he refuses to pay his full fare and comply with the reasonable regulations of the company he becomes a trespasser. *Lake Erie & W. R. Co. v. Mays*, 4 Ind. App. 413, 30 N. E. Rep. 1106.—QUOTING *Jeffersonville R. Co. v. Rogers*, 28 Ind. 1.

A military company bought round-trip tickets from their home to another station and back, plaintiff being a member thereof. When they arrived at their place of destination their car was pushed onto a side-track overlapping the trestle of a bridge, and a little off the depot grounds. About the time that the train was due to take them on the return trip, and at night, plaintiff and others entered the car, finding it lighted but unattended, and remained some time until the train came in. The conductor came into the car and asked the occupants to alight and assist him in pushing the car onto the main track, so it could be hitched onto the train. Plaintiff, to avoid the danger of get-

* See ante, 3; post, 43-49, 81, 116, 153 (2), 286-297, 359.

* When the relation of passenger and carrier exists, see note, 41 AM. & ENG. R. CAS. 63.

ting off between the car and the train, stepped off on the other side, fell through the trestle, and was injured. *Held*, that the relation of passenger and carrier was resumed when the conductor ordered the car to be moved for the purpose of beginning the return trip. *Bellman v. New York C. & H. R. R. Co.*, 5 N. Y. S. R. 153, 42 Hun 130; *affirmed in* 122 N. Y. 671, *mem.*, 34 N. Y. S. R. 1015.

Where a lady was invited by the station-agent to remain in a car while waiting for her train, the station-room being unfit for occupancy, assuring her that the car would not be moved, while in such car in such a manner, she was a passenger. *Shannon v. Boston & A. R. Co.*, 23 Am. & Eng. R. Cas. 511, 78 Me. 52, 2 All. Rep. 678.

If a company permits passengers to take trains at a place which is not a depot, a person taking the train at such place is not a trespasser; and when he has reached in safety the inside of a passenger car, he then, if not before, becomes a passenger. *Dewire v. Boston & M. R. Co.*, 37 Am. & Eng. R. Cas. 57, 148 Mass. 343, 19 N. E. Rep. 523, 2 L. R. A. 166.

(2) *Does not become passenger.*—A person who gets upon a train after it has started does not become a "passenger" until he reaches a place of safety inside, and no action can be maintained if he falls off the platform and is killed. *Merrill v. Eastern R. Co.*, 139 Mass. 238, 52 Am. Rep. 705, 1 N. E. Rep. 548. — REFERRING TO Commonwealth v. Boston & L. R. Co., 134 Mass. 211; *Swan v. Manchester & L. R. Co.*, 132 Mass. 116.

One who by signals causes a passenger train to stop at night at a point not a stopping-place, and while endeavoring to enter, though with reasonable caution, is injured by the sudden starting of the train, cannot recover for the injury, if his purpose to take passage is unknown to the conductor and other trainmen. Under such circumstances, when injured he had not acquired the rights of a passenger. *Georgia Pac. R. Co. v. Robinson*, 68 Miss. 643, 10 So. Rep. 60.

The facts that he succeeded in entering the car and that the conductor, finding him there, collected fare from him as from other passengers, could not give color to the past occurrences which had resulted in his injury. *Georgia Pac. R. Co. v. Robinson*, 68 Miss. 643, 10 So. Rep. 60.

24. Before purchase of ticket.*—

One who in good faith applies to an agent for a ticket for a passage on the caboose of a freight-car, and is referred by the agent to the conductor, is a passenger, and may recover for an injury received before getting on the train. *Allender v. Chicago, R. I. & P. R. Co.*, 37 Iowa 264, 8 Am. Ry. Rep. 115.

A person in good faith going to a depot for the purpose of taking passage on the cars is to be regarded as a passenger, although a ticket may not have been purchased. *Grimes v. Pennsylvania Co.*, 36 Fed. Rep. 72.

A person walking towards a station with the intention of buying a ticket and taking a train after he gets there is not a passenger before he reaches the station, even if he might be one in the same place if he had begun his journey. *June v. Boston & A. R. Co.*, 153 Mass. 79, 26 N. E. Rep. 238. But see *Buffett v. Troy & B. R. Co.*, 40 N. Y. 168; *affirming* 36 Barb. 420.

Where one enters the ticket-office of a carrier to purchase a ticket he is entitled to protection as a passenger, even though the agent refuses to sell him a ticket. *Norfolk & W. R. Co. v. Galliter*, 89 Va. 639.

25. — or payment of fare.†—It is not necessary that the fare should be paid in advance, or even tendered, to establish the relation of carrier and passenger and make the reciprocal duties incumbent on each as such; it is sufficient that it is understood that fare is to be paid. *Nashville & C. R. Co. v. Messino*, 1 Sneed (Tenn.) 220.

The time of taking up fare is not material to create the relation, whether it be taken at the office or in the car. *Gordon v. Grand St. & N. R. Co.*, 40 Barb. (N. Y.) 546.

Where a company, through its agents, consents that a party may enter its cars to ride to a certain point, he thereby rightfully becomes a passenger, whether he has paid his fare or not, and he is not in default until a demand is made upon him and he refuses to pay. Carriers may demand prepayment of fare; but if they do not they must be presumed to rely upon their lien on the passengers' baggage, or their integrity and responsibility. *Hurt v. Southern R. Co.*, 40 Miss. 391.

* See also *ante*, 12.

† See also *ante*, 13.

20. After purchase of ticket.—If one had purchased a ticket and was crossing the track by and under the direction of the ticket agent for the purpose of taking the train, he is to be considered as a passenger, and as such entitled to all the rights and protection of one. *Baltimore & O. R. Co. v. State*, 21 *Am. & Eng. R. Cas.* 202, 63 *Mo.* 135.

One who has purchased a ticket and is passing from the office where the purchase was made to the train to take his seat in the cars, on the premises belonging to the company connected with the railroad, and under the direction of the company's agent, given to him as a passenger, is a passenger and entitled to the rights of a passenger while so passing. *Warren v. Filchburg R. Co.*, 8 *Allen (Mass.)* 227.

One who has a railroad ticket and is present to take the train at the ordinary point of departure is a passenger, though he has not entered the cars. *Central R. & B. Co. v. Perry*, 58 *Ga.* 461, 16 *Am. Ry. Rep.* 123.

27. Riding to station in company's stage.—Where a railroad company runs a stage for the purpose of carrying passengers to and from its depot, a person who is riding in the stage to the station for the purpose of taking passage on a train is a passenger and entitled to recover damages for an injury received through the negligence of the stage-driver, though he has not bought a ticket nor made any declaration of his intention to do so. *Buffett v. Troy & B. R. Co.*, 40 *N. Y.* 168; *affirming* 36 *Barb.* 420.—FOLLOWING Bissell v. Michigan S. & N. I. R. Co., 22 *N. Y.* 258.

c. When the Relation Terminates.

23. Generally.—(1) *Carriage by rail.*—A passenger on a railroad car continues to be such while rightfully leaving the car and the station at which it has stopped. *McKimble v. Boston & M. R. Co.*, 21 *Am. & Eng. R. Cas.* 213, 139 *Mass.* 542, 2 *N. E. Rep.* 97.

One does not cease to be a passenger where the performance of the contract to carry is temporarily suspended on account of a washout. During the time he is being transferred to another train he is a passenger and entitled to protection as such. *Dwinelle v. New York C. & H. R. R. Co.*, 44 *Am. & Eng. R. Cas.* 384, 120 *N. Y.* 117, 24 *N. E. Rep.* 319, 30 *N. Y. S. R.* 578, 8 *L.*

R. A. 224; *reversing* 45 *Hun* 139, 9 *N. Y. S. R.* 838.

The plaintiff having entered the wrong train of cars as a passenger, the conductor stopped the train, not at a station, in order that the passenger might get off and walk along the track to a train pointed out by the conductor, which would carry him to his destination. The conduct of the passenger in availing himself of this opportunity being voluntary, he ceased to be a passenger after leaving the train, and was not entitled to recover for injuries sustained by falling into a cattle-guard on the track, he having no right to assume that there was no such ordinary obstruction on the track. *Finnegan v. Chicago, St. P., M. & O. R. Co.*, 48 *Minn.* 378, 51 *N. W. Rep.* 122.

(2) *Carriage by water.*—The voyage is not ended until passengers who remain on board a steamboat all night by invitation or permission of its captain have had a reasonable time on the next morning to leave the boat and remove their baggage. *Prickett v. New Orleans Anchor Line*, 13 *Mo. App.* 436.

Under such circumstances the carrier is liable to passengers so remaining on board for loss of baggage occasioned by the accidental burning of the vessel during the night. *Prickett v. New Orleans Anchor Line*, 13 *Mo. App.* 436.

20. After alighting from train.

(1) *Generally.*—The duty of a company under its contract to carry a passenger does not terminate until he has alighted from the cars. *St. Louis, A. & T. R. Co. v. Finley*, 79 *Tex.* 85, 15 *S. W. Rep.* 266.

The transit cannot be considered as ended until the passenger has left the car. The carrier's duty continues until the passenger has alighted from the car. *Texas & P. R. Co. v. Miller*, 79 *Tex.* 78, 15 *S. W. Rep.* 264.—QUOTING *Pennsylvania Co. v. Marion*, 27 *Am. & Eng. R. Cas.* 132, 104 *Ind.* 239.

The liability of the carrier ends only when the passenger alights safely. If the train stops long enough for him to get off, then the company has done all it could; but if by sudden jerks he is injured before he has time to get off safely, the company is liable. *Central R. Co. v. Whitehead*, 74 *Ga.* 441.

The high degree of care which a company owes to its passengers is not discharged the moment its train stops, but continues, and the same diligence must be exercised upon the part of the company until the

passenger is safely discharged. *Timpson v. Manhattan R. Co.*, 24 N. Y. S. R. 629, 52 Hun 489, 5 N. Y. Supp. 684.

It cannot properly be charged that the relation ceases as soon as a passenger has alighted safely from the car, and that from that time the carrier owes no duty to the passenger, for the relation does not necessarily cease at that time. *Ormond v. Hayes*, 60 Tex. 180.

(2) *Illustrations*.—Where the plaintiff's ticket entitled her to a passage over the defendants' road to P., and thence by steamboat, and it appeared that the defendants had built their track upon their wharf down to the steamboat, and had run their passenger train upon it for a time, and still continued to run their baggage train there; and that they directed their passengers by printed sign to use the wharf as a passageway to the boat, and it was so used; and that defendants made the wharf subsidiary and necessary to the proper use and enjoyment of their road, in an action by the plaintiff to recover for an injury upon the wharf—*held*, that the defendants were bound to exercise the same degree of care in making the wharf safe and convenient for their through passengers to travel over as is required of common carriers of passengers, although they required them to disembark at their depot, forty rods distant from the steamboat; and that this liability continued until, in the ordinary course of the passage over the wharf, the passengers reached the point where the liability of the steamboat company commenced. *Knight v. Portland, S. & P. R. Co.*, 56 Me. 234.—QUOTED IN *Alabama G. S. R. Co. v. Arnold*, 35 Am. & Eng. R. Cas. 466, 84 Ala. 159, 4 So. Rep. 359, 5 Am. St. Rep. 354.

Plaintiff entered a car without a ticket to ride to the next station, and handed the conductor a five-dollar bill from which to pay his fare. The conductor could not make the change, but promised to do so at the next station. Plaintiff left the train at his destination, and after waiting for some time without getting his change, got on the caboose about the time the train was starting, and the conductor, still unable to make the change, handed the same five dollars back, saying that he could pay some other time. While the train was moving about five miles an hour plaintiff jumped off and was injured. *Held*, that he was not a passenger at the time of the injury, and the

company owed him no duty except as to the return of his change; that the failure on the part of the conductor to return him the change at the station did not relieve him from the duty of exercising proper caution in getting off the train, and especially where he acted under no compulsion in getting off. *Pittsburgh, C. & St. L. R. Co. v. Krouse*, 30 Ohio St. 222, 15 Am. Ry. Rep. 298.—DISTINGUISHING *Filer v. New York C. R. Co.*, 49 N. Y. 47; *Delamaty v. Milwaukee & P. du C. R. Co.*, 24 Wis. 578; *Filer v. New York C. R. Co.*, 59 N. Y. 351; *Warren v. Fitchburg R. Co.*, 8 Allen (Mass.) 227; *Lambeth v. North Carolina R. Co.*, 66 N. Car. 494; *Sweney v. Old Colony & N. R. Co.*, 10 Allen (Mass.) 368; *Gaynor v. Old Colony & N. R. Co.*, 100 Mass. 208; *McIntyre v. New York C. R. Co.*, 37 N. Y. 288; *Pennsylvania R. Co. v. Kilgore*, 32 Pa. St. 292.—QUOTED IN *St. Louis, I. M. & S. R. Co. v. Rosenberry*, 45 Ark. 256.

30. After a reasonable time to alight safely.—(1) *Generally*.—The liability of the carrier for injuries to a passenger continues until the train arrives at the passenger's place of destination and he knows it, and for a reasonable time thereafter for him to get off the cars. *Imhoff v. Chicago & M. R. Co.*, 20 Wis. 344. *Jeffersonville, M. & I. R. Co. v. Parmelee*, 51 Ind. 42.

The reasonable time which the law allows a passenger to get off the cars after they arrive at the station is the time within which persons of ordinary care and prudence, under like circumstances, get off the cars. *Imhoff v. Chicago & M. R. Co.*, 20 Wis. 344.

(2) *Illustrations*.—The relation of carrier and passenger does not necessarily continue until the passenger has reached his place of destination and has actually left the car; and whether he has had time to do so may not always be decisive of the question. So where a passenger has had time and opportunity to leave the car, but remains for the purpose of assaulting an employé, he thereby forfeits the rights due him as a passenger. *Chicago, R. I. & P. R. Co. v. Barrett*, 16 Ill. App. 17.

A passenger who had reached his destination, had alighted from the train, had taken a position upon the sidewalk of the highway, and had started to cross the track, but not upon his way to the station, and who was injured while so crossing, had ceased to be a passenger before the accident. *Allen-*

ton v. Boston & M. R. Co., 34 *Am. & Eng. R. Cas.* 563, 146 *Mass.* 241, 5 *N. Eng. Rep.* 825, 15 *N. E. Rep.* 621.

Where a passenger enters a wrong train through a mistake of his own, the authority of the conductor as the representative of the carrier terminates when a safe alighting-place is provided and the passenger has voluntarily left the train in safety. In such case the carrier is not responsible for any advice or directions given by a conductor to the passenger after he has left the train, and is not liable for any injury received by him while acting upon such directions or advice, however erroneous, negligent, or misleading the same may have been. *Cincinnati, H. & I. R. Co. v. Carper*, 31 *Am. & Eng. R. Cas.* 36, 112 *Ind.* 26, 11 *West. Rep.* 221, 13 *N. E. Rep.* 122, 14 *N. E. Rep.* 352.—**DISTINGUISHING** *Carter v. Louisville, N. A. & C. R. Co.*, 98 *Ind.* 552, 49 *Am. Rep.* 780; *Evansville & T. H. R. Co. v. McKee*, 99 *Ind.* 519, 50 *Am. Rep.* 102; *Terre Haute & I. R. Co. v. Graham*, 46 *Ind.* 239; *Terre Haute & I. R. Co. v. Fitzgerald*, 47 *Ind.* 79; *Indianapolis, P. & C. R. Co. v. Anthony*, 43 *Ind.* 183; *Jeffersonville R. Co. v. Rogers*, 38 *Ind.* 116, 10 *Am. Rep.* 103; *Pennsylvania Co. v. Hoagland*, 78 *Ind.* 203; *Columbus, C. & I. C. R. Co. v. Powell*, 40 *Ind.* 37; *Great Western R. Co. v. Miller*, 19 *Mich.* 305; *Bass v. Chicago & N. W. R. Co.*, 36 *Wis.* 450, 17 *Am. Rep.* 495; *Louisville, N. A. & C. R. Co. v. Boland*, 53 *Ind.* 398; *Cincinnati & M. R. Co. v. Eaton*, 53 *Ind.* 307; *Evansville & C. R. Co. v. Dexter*, 24 *Ind.* 411; *International & G. N. R. Co. v. Gilbert*, 22 *Am. & Eng. R. Cas.* 405, 64 *Tex.* 536; *Chance v. St. Louis, I. M. & S. R. Co.*, 10 *Mo. App.* 351; *Hulbert v. New York C. R. Co.*, 40 *N. Y.* 145.

31. While remaining on company's premises, generally.—As long as one bears the relation of passenger to the carrier, the latter is bound to exercise toward him the utmost care and diligence in providing against those injuries which can be avoided by human foresight; and the relation continues not only while the passenger is in the cars, but so long as he is on the company's premises. *Gaynor v. Old Colony & N. R. Co.*, 100 *Mass.* 208.

The duty of a company to its passengers does not cease the moment they alight from its trains, by its invitation, at a place selected by the company, but continues until the passengers have had a reasonable oppor-

tunity to leave the company's premises in the direction ordinarily taken, which way of egress it is the duty of the company to make reasonably safe for the passengers. *Burnham v. Wabash Western R. Co.*, 91 *Mich.* 523, 52 *N. W. Rep.* 14.

32. Remaining on premises to aid in removing baggage.—The relation of carrier and passenger does not necessarily cease where the latter, after alighting from the car, aids the carrier's servants in removing his baggage from the car; nor does the act of so aiding make him a servant of the carrier. *Ormond v. Hayes*, 60 *Tex.* 180.

33. Alighting from car on wrong side.—The relation of carrier and passenger continues while the latter is leaving the car at his place of destination; and the relation does not cease because he may leave the car negligently on the wrong side, if the company has also been negligent in not notifying him that it was dangerous to do so. *McKimble v. Boston & M. R. Co.*, 21 *Am. & Eng. R. Cas.* 213, 139 *Mass.* 542, 2 *N. E. Rep.* 97.

34. While cleaning headlight at the request of employe.—When a passenger on a train, at the request of a fireman, undertakes to clean the headlight of the engine, he does not lose the character of a passenger. *Brown v. Scarboro*, 58 *Am. & Eng. R. Cas.* 364, 97 *Ala.* 316, 12 *So. Rep.* 289.

35. — or cutting cars loose.—A conductor of private freight cars not in employ of a railroad company, at the request of the company's conductor of the train, cut loose the cars following his own, fell off the train, and was injured. The court charged that "if the injury was not caused by drawing the bolt, but by negligence or misconduct of the engineer in increasing the motion of the cars with a violent, unnecessary, and unusual jerk, after plaintiff had resumed his proper position on the car, such as he could not anticipate and guard against, he might recover." *Held*, not to be error. Plaintiff, after performing the duty he voluntarily undertook, having resumed his proper place as a passenger, became entitled to the protection which such relation gave him. *Cumberland Valley R. Co. v. Myers*, 55 *Pa. St.* 288.

36. Misconduct of passenger.—Misconduct on the part of the passenger

* See also *post*, 404.

may justify the carrier in rescinding the contract for carriage and ejecting the passenger, but the penalty for such misconduct must not be enforced unreasonably or oppressively. *Chicago, R. I. & P. R. Co. v. Barrett*, 16 Ill. App. 17.

37. Intoxicated passengers.*—When a passenger has safely alighted from a train and left the depot at his destination, the company does not owe him any further or peculiar duty from the fact that he may be intoxicated. *Rozwadowskie v. International & G. N. R. Co.*, 1 Tex. Civ. App. 487, 20 S. W. Rep. 872.—**DISTINGUISHING** *Louisville, C. & L. R. Co. v. Sullivan*, 81 Ky. 624.

d. At Intermediate or Transfer Stations.†

38. Generally.—It seems a passenger on a train does not lose his character as such by alighting at a regular station, although he has not yet arrived at the terminus of his journey. *Parsons v. New York C. & H. R. R. Co.*, 113 N. Y. 355, 21 N. E. Rep. 145, 22 N. Y. S. R. 697, 3 L. R. A. 683; affirming 48 Hun 615, 15 N. Y. S. R. 1016, mem.—**QUOTED IN** *Murphy v. Rome, W. & O. R. Co.*, 32 N. Y. S. R. 381, 10 N. Y. Supp. 354, 56 Hun 645.

When such passenger thus leaves the car and is on the platform or near the track when his train is about to start, or the coming train has signaled its approach, the corporation, through its officer or servant, should give reasonable and seasonable notice for such passenger to return to the car, by using proper diligence, caution, and care; and if there be an established signal by the blowing of the whistle for passengers to resume their places in the cars, that should also be given. *State v. Grand Trunk R. Co.*, 58 Me. 176.

But if the passenger go out of sight, and out of the reach of the voice which gives the usual loud and distinct notice for all passengers to repair on board, the corporation is not required to go after him. *State v. Grand Trunk R. Co.*, 58 Me. 176.

A passenger for hire, traveling upon a steamboat, has a right to go ashore at any

* See post, 101, 115, 147, 312, 353, 400, 434.

† Interruption or termination of the relation of passenger and carrier caused by passenger leaving train before it stops at passenger's destination, see note, 21 AM. & ENG. R. CAS. 215.

Rights of passenger who temporarily leaves train at intermediate station, see note, 2 L. R. A. 83.

point where such boat may land, before arriving at his destination, without forfeiting his rights as a passenger to safe ingress and egress. *Dice v. Willamette T. & L. Co.*, 8 Oreg. 60.—**DISTINGUISHING** *State v. Grand Trunk R. Co.*, 58 Me. 176. **FOLLOWING AND REVIEWING** *Montgomery & W. P. R. Co. v. Boring*, 51 Ga. 582.

Where a passenger enters a train and pays his fare to a particular place, his contract does not obligate the company to furnish him with means of egress and ingress at an intermediate station; and if he leaves the train at such a station he, for the time being, surrenders his place as a passenger and takes upon himself the responsibility of his own movements; but if he leaves without objection on part of the company, he does no illegal act and has a right to re-enter and resume his journey. *De Kay v. Chicago, M. & St. P. R. Co.*, 39 Am. & Eng. R. Cas. 463, 41 Minn. 178, 4 L. R. A. 632, 43 N. W. Rep. 182.

When nearing an intermediate station a passenger asked the conductor how long the train would stop at that station, and he answered, "five minutes." Upon the arrival of the train at the station the passenger left the cars to inquire after some business matter, and had gone but a few steps when he heard the train start, and in attempting to get on it while in motion was thrown down and injured. It seems that the train started in much less time than five minutes. *Held*, that the answer of the conductor that the train would wait five minutes created no obligation to hold the train that length of time. *Missouri Pac. R. Co. v. Foreman*, 73 Tex. 311, 11 S. W. Rep. 326.

39. At refreshment and eating stations.*—The same duty is imposed upon the company toward a passenger who, while on a continuous journey, is going to and returning from the eating stations provided by the company for the accommodation of passengers. *Atchison, T. & S. F. R. Co. v. Shean*, 58 Am. & Eng. R. Cas. 360, 18 Colo. 368, 33 Pac. Rep. 108.

It is not necessary that a person should be on the train in order to be regarded as a passenger. As a passenger he has the right to stand or walk on the platforms provided at stations for the convenience of passengers while the train is stopping for

* See also REFRESHMENT-ROOMS; and post, 260.

refreshments, and in a street alongside of the track and platforms; and the servants of the railway company are bound to exercise the care of a reasonable and prudent man in the discharge of their duties on said platforms and street, and have no right to throw sticks of wood from the train upon such platforms or street, without first ascertaining whether such action would endanger any passenger standing or walking there. *Jeffersonville, M. & I. R. Co. v. Riley*, 39 Ind. 568, 10 Am. Ry. Rep. 325.—DISTINGUISHED IN *Central R. Co. v. Peacock*, 69 Md. 257.

In an action to recover damages for personal injuries, it appeared that the plaintiff was a passenger upon a steamboat belonging to the defendant; that meals were served on board to such passengers as chose to pay for them or whose tickets entitled them thereto; that the plaintiff's ticket did not entitle him to meals; that he attempted to land for the purpose of obtaining breakfast at a wharf where the boat was accustomed to remain a considerable time; and that it was the custom of many passengers to do so at that place. *Held*, that the plaintiff, as a passenger, could properly go on shore to get his breakfast, and that he had a passenger's right to protection during his egress from the steamer. *Dodge v. Boston & B. Steamship Co.*, 37 Am. & Eng. R. Cas. 67, 148 Mass. 207, 19 N. E. Rep. 373, 2 L. R. A. 83.—DISTINGUISHING *State v. Grand Trunk R. Co.*, 58 Me. 176. RE-VIEWING *Keokuk N. L. Packet Co. v. True*, 88 Ill. 608.

40. Stops to allow other trains to pass.—And when a train turns out upon a side-track, at an intermediate station, and there stops to await the crossing of another train out of time, and a passenger not destined to that station, without objection made or notice given, leaves the car, he thereby does no illegal act, but for the time surrenders his place as a passenger and takes upon himself the direction and responsibility of his motions during his absence. *State v. Grand Trunk R. Co.*, 58 Me. 176.—DISTINGUISHED IN *Central R. Co. v. Peacock*, 69 Md. 257; *Dodge v. Boston & B. Steamship Co.*, 37 Am. & Eng. R. Cas. 67, 148 Mass. 207, 19 N. E. Rep. 373, 2 L. R. A. 83; *Dice v. Willamette T. & L. Co.*, 8 Oreg. 60.—See also *Wandell v. Corbin*, 17 N. Y. S. R. 718, 1 N. Y. Supp. 795.

While, if a company permits the practice

of passengers leaving and re-entering their train while on a side-track at an intermediate station for the purpose of letting another train pass on the main track, it is bound to use reasonable care not to expose such passengers to unnecessary danger; yet it is not bound to so regulate its business as to make the side-track as safe a place of ingress or egress as the station platform; nor does it give any assurance, under such circumstances, to passengers that no trains will pass while they are crossing or recrossing the main track. Neither does the call of "All aboard!" by the conductor of the side-tracked train give an assurance to those who have left their train that they may cross the main track in safety, without looking for approaching trains. *De Kay v. Chicago, M. & St. P. R. Co.*, 39 Am. & Eng. R. Cas. 463, 41 Minn. 178, 4 L. R. A. 632, 43 N. W. Rep. 182.—DISTINGUISHING *Terry v. Jewett*, 78 N. Y. 338; *Brassell v. New York C. & H. R. R. Co.*, 84 N. Y. 241; *Klein v. Jewett*, 26 N. J. Eq. 474.

41. Stopping over before reaching station of destination.*—The contract for the transportation of a passenger is an entirety, and if he stops off at an intermediate station without a stop-over privilege he thereby loses the right to be carried the remainder of the journey. *Stone v. Chicago & N. W. R. Co.*, 47 Iowa 82, 17 Am. Ry. Rep. 461.—RECONCILING *Palmer v. Charlotte, C. & A. R. Co.*, 3 So. Car. 580.

By leaving the train before he has arrived at the point to which his ticket entitles him to ride, a passenger voluntarily terminates his contract with the company to carry him to such point. *Drew v. Central Pac. R. Co.*, 51 Cal. 425, 12 Am. Ry. Rep. 222.

If a passenger's ticket is silent as to the privilege of stopping over at an intermediate point, but he, nevertheless, stops, he cannot afterward resume the journey on the same ticket. *Drew v. Central Pac. R. Co.*, 51 Cal. 425, 12 Am. Ry. Rep. 222.

42. At transfer stations.—The party injured was a passenger, with a ticket that entitled him to be carried safely from H. to F. By the regular route and mode of carriage it was necessary for him to change cars at W. and to cross over the intervening

* See also TICKETS AND FARES, 40-51.

Continuous passage. Stop-over privilege, see note, 16 AM. & ENG. R. CAS. 55, 386.

Passenger's right to stop over, see note, 18 AM. & ENG. R. CAS. 308.

track of the defendant from one train to another. *Held*, that in making this transit from one train to the other he continued to be a passenger of the defendant and entitled to the protection that the highest degree of care on the part of the defendant could afford under the circumstances. *Baltimore & O. R. Co. v. State*, 12 *Am. & Eng. R. Cas.* 149, 60 *Md.* 449. See also *Knight v. Portland, S. & P. R. Co.*, 56 *Me.* 234.

e. Persons Riding on Freight Trains or Hand-cars.*

43. Generally.—(1) *Who are passengers.*—A person having a ticket for passage upon a railroad, who boards a freight train which does not carry passengers, believing the ticket good on that train, is to be treated as a passenger and is not a trespasser. *Bogges v. Chesapeake & O. R. Co.*, 37 *W. Va.* 297, 16 *S. E. Rep.* 525.

Where an agent of the company, such as a conductor of a freight train, permits a person to ride upon a freight train which is forbidden by the rules of the company to carry passengers, nevertheless, if the person acted in good faith he will be held entitled to all the rights of a passenger. *Everett v. Oregon S. L. & U. N. R. Co.*, 9 *Utah* 340, 34 *Pac. Rep.* 289.

It is immaterial what reason a brakeman had for permitting a person to ride upon a train in violation of the rules of the company, because it seems that what would excuse the brakeman's negligence would not excuse the railroad company. *Everett v. Oregon S. L. & U. N. R. Co.*, 9 *Utah* 340, 34 *Pac. Rep.* 289.

Where a company has adopted the system of carrying passengers on freight trains, a person who goes upon a freight train in good faith, supposing it to be also a train for carrying passengers, is entitled to all the rights and remedies of a passenger as against the company, at least until he is informed that he is mistaken in the character of the train; and he is not chargeable with notice that the train will not carry him, from the fact that it was not brought to the platform and that the ticket-office was not open for the sale of tickets about the time of its arrival, nor from the fact that the caboose was not convenient for passengers, where there was nothing from its external appear-

ance to indicate that it was not suited to carrying passengers. *Lucas v. Milwaukee & St. P. R. Co.*, 33 *Wis.* 41.

(2) *Who are not—Trespassers.**—The fact that a conductor of a freight train after discovering a person in the caboose did not eject him, does not constitute the latter a passenger. *Atchison, T. & S. F. R. Co. v. Headland*, 58 *Am. & Eng. R. Cas.* 4, 18 *Colo.* 477, 33 *Pac. Rep.* 185.—*REVIEWING* *Elkins v. Boston & M. R. Co.*, 23 *N. H.* 275.

An offer to pay the fare to an employé on the train unauthorized to receive the same is not an offer to the company, and in such case does not entitle the person to a place on a freight train as a passenger. *Cleveland, C. & C. R. Co. v. Bartram*, 11 *Ohio St.* 457.—*APPROVED IN* *Whitehead v. St. Louis, I. M. & S. R. Co.*, 39 *Am. & Eng. R. Cas.* 410, 99 *Mo.* 263, 11 *S. W. Rep.* 751.

A person who has purchased no ticket and paid no fare, who goes to a caboose attached to a freight train, and, without the knowledge of those in charge of such train, attempts to get into said car at a place where the company is not accustomed to receive passengers, is not a passenger, and if he is injured in such attempt to board the train, and those in charge of it have no knowledge of his presence, the company is not liable for the injury. *Haase v. Oregon R. & N. Co.*, 44 *Am. & Eng. R. Cas.* 360, 19 *Oreg.* 354, 24 *Pac. Rep.* 238.

44. Lawfully riding on such trains.—If plaintiff, who was injured while riding on a freight train, was on the car in which the company allowed people to travel, with the knowledge of the company or any of its agents, for the purpose of being transported, and was properly there, he was a passenger. Whether the plaintiff had a ticket or not was immaterial, and the company is liable for any negligence on its part whereby the plaintiff was not transported safely. *Secord v. St. Paul, M. & M. R. Co.*, 5 *McCrory (U. S.)* 515, 18 *Fed. Rep.* 221.

45. At the invitation or direction of company's agents.†—(1) *Generally.*—The question of liability does not depend upon the uses to which the train is usually devoted; and where there are no rules of the company prohibiting it, or even if there be such rules, and the officers making such rules relax or dispense with them in a par-

* See *ante*, 3, 22; *post*, 81, 116, 153 (a), 286-300, 359.

2 D. R. D.—21.

* See also *ante*, 21; *post*, 46 (a), 92-96.

† See also *post*, 296.

ticular instance, and passengers are taken on trains or cars not generally used for their transportation, or with the expectation of paying fare when demanded, they are lawfully upon the train, and the company owes them the duty of safe transportation. *Prince v. International & G. N. R. Co.*, 21 Am. & Eng. R. Cas. 152, 64 Tex. 144.

The conductor is charged with the administration of the rules of the company for the regulation of those who travel on its cars, and if he permits a passenger to ride in a caboose attached to the train, and an accident occurs through the negligence of the company whereby the passenger is injured, he may recover damages. *Creed v. Pennsylvania R. Co.*, 86 Pa. St. 139.—FOLLOWING *Lackawanna & B. R. Co. v. Chene-weth*, 52 Pa. St. 382. OVERRULING *O'Donnell v. Allegheny Valley R. Co.*, 59 Pa. St. 239.—DISTINGUISHED IN *Smith v. Louisville, E. & St. L. R. Co.*, 124 Ind. 394. QUOTED IN *Thirteenth & F. St. P. R. Co. v. Boudrou*, 2 Am. & Eng. R. Cas. 30, 92 Pa. St. 475, 37 Am. Rep. 707; *Fry v. People's Pass. R. Co.*, 17 Phila. (Pa.) 61. REVIEWED IN *Atchison, T. & S. F. R. Co. v. Headland*, 18 Colo. 477.

A person who goes aboard a freight train by the invitation and permission of the conductor cannot be regarded as a passenger, where it does not appear that the company, either by usage or by its rules and regulations, permits passengers on its freight trains. *Smith v. Louisville, E. & St. L. R. Co.*, 124 Ind. 394, 24 N. E. Rep. 753.

(2) *Against rule not brought to passenger's notice.*—Where plaintiff was directed by the company's agent, whose duty it was to direct passengers what trains they should enter, to take passage on a freight train, he became upon his entrance a passenger, notwithstanding, under the rules of the company, which were unknown to the plaintiff, passengers were not permitted to ride upon that train. *McGee v. Missouri Pac. R. Co.*, 31 Am. & Eng. R. Cas. 1, 92 Mo. 208, 10 West. Rep. 282, 4 S. W. Rep. 739.

(3) *Illustrations.*—In an action for injuries received by plaintiff in being thrown from the platform of a caboose attached to a freight train of a defendant company, where it appeared that the company permitted passengers to be carried upon some of its freight trains, and that plaintiff went aboard

of said caboose, not knowing that the train was not one of those authorized to carry passengers, and not being informed to the contrary before going aboard nor before receiving such injuries, but having been directed to the train and permitted to go aboard of it by a person whom the jury, from the evidence, might have found to be an employé of the company, and perhaps one of the conductors of the train—*held*, that upon these facts the jury might find that plaintiff was lawfully aboard such caboose as a passenger. *Lucas v. Milwaukee & St. P. R. Co.*, 33 Wis. 41.—REVIEWING *Dunn v. Grand Trunk R. Co.*, 58 Me. 187.—DISTINGUISHED IN *Smith v. Louisville, E. & St. L. R. Co.*, 124 Ind. 394; *Whitehead v. St. Louis, I. M. & S. R. Co.*, 22 Mo. App. 60.

Where it appeared that plaintiff, section foreman of the defendant, got upon a train to go to Salt Lake, on account of sickness in his family there urgently requiring his presence, and without knowing it boarded an extra freight train because the passenger train had gone, and paid the conductor of the train one dollar, which was less than the regular fare, although plaintiff did not know it, and the conductor told him to get into a box-car, claiming that the caboose was full, and afterwards the same man helped him out of the car into the caboose, shortly after which he was badly injured because of freight cars being violently and negligently driven by a switch-engine against the caboose, and the train was in fact a train forbidden by the rules to carry passengers, which fact plaintiff did not know, but thought it was a regular freight train which was in the habit of carrying passengers—*held*, that the plaintiff was on the train in good faith as a passenger; that even if he was guilty of contributory negligence defendant could have avoided injuring him, and hence plaintiff was entitled to recover. *Everett v. Oregon S. L. & U. N. R. Co.*, 9 Utah 340, 34 Pac. Rep. 289.

46. Within the knowledge or with the permission of company.—(1) *When deemed passenger.*—It seems that a person riding on a freight train on which passengers are not allowed to be carried is to be regarded as a passenger, although he may have boarded the train without the knowledge or permission of the conductor, and paid no fare, if the conductor, after becoming aware of his presence, permits him

to remain. *Sherman v. Hannibal & St. J. R. Co.*, 4 *Am. & Eng. R. Cas.* 589, 72 *Mo.* 62, 37 *Am. Rep.* 423.—APPLIED IN *Buck v. People's St. R.*, E. L. & P. Co., 46 *Mo. App.* 555. QUOTED IN *Muehlhausen v. St. Louis R. Co.*, 28 *Am. & Eng. R. Cas.* 159, 91 *Mo.* 332.

If a person enters the saloon-car of a freight train, and when the train starts, without being requested to leave, remains there as a passenger, contrary to the rules of the company but with the knowledge of the conductor, who receives from him the usual fare of a first-class passenger, the corporation incurs the same liability for his safety as if he were in their regular passenger train. *Dunn v. Grand Trunk R. Co.*, 58 *Me.* 187.—REVIEWING *Zemp v. Wilmington & M. R. Co.*, 9 *Rich. (So. Car.)* 84; *Watson v. Northern R. Co.*, 24 *U. C. B.* 98.—APPROVED IN *Whitehead v. St. Louis, I. M. & S. R. Co.*, 39 *Am. & Eng. R. Cas.* 410, 99 *Mo.* 263, 11 *S. W. Rep.* 751. DISTINGUISHED IN *Florida Southern R. Co. v. Hirst*, 30 *Fla.* 1; *Way v. Chicago, R. I. & P. R. Co.*, 64 *Iowa* 48, 52 *Am. Rep.* 431; *Whitehead v. St. Louis, I. M. & S. R. Co.*, 22 *Mo. App.* 60; *Eaton v. Delaware, L. & W. R. Co.*, 57 *N. Y.* 382. QUESTIONED IN *Houston & T. C. R. Co. v. Moore*, 49 *Tex.* 31. QUOTED IN *Hanson v. Mansfield R. & T. Co.*, 38 *La. Ann.* 111, 58 *Am. Rep.* 162. REVIEWED IN *Kentucky C. R. Co. v. Thomas*, 79 *Ky.* 160; *Lucas v. Milwaukee & St. P. R. Co.*, 33 *Wis.* 41; *Atchison, T. & S. F. R. Co. v. Headland*, 18 *Colo.* 477.

(2) *When not — Trespasser.*—The conductor of a freight train refused to carry deceased, a crippled applicant for free transportation, but some time after the train had started found him in the caboose. It being late at night and out in the country, the conductor from motives of humanity forbore to eject him, and he was killed by a subsequent collision. *Held*, that the deceased was not a passenger within *Mills' Ann. St.* § 1508, furnishing a right of action where the death of a passenger results from the defect or deficiency of a railroad. *Atchison, T. & S. F. R. Co. v. Headland*, 58 *Am. & Eng. R. Cas.* 4, 18 *Colo.* 477, 33 *Pac. Rep.* 185.—DISTINGUISHING *Dunn v. Grand Trunk R. Co.*, 58 *Me.* 187; *Cleveland v. New Jersey Steamboat Co.*, 68 *N. Y.* 306;

Jacobus v. St. Paul & C. R. Co., 20 *Minn.* 125; *Pennsylvania R. Co. v. Books*, 57 *Pa. St.* 339; *Creed v. Pennsylvania R. Co.*, 86 *Pa. St.* 139. FOLLOWING *Eaton v. Delaware, L. & W. R. Co.*, 57 *N. Y.* 382. REVIEWING *Elkins v. Boston & M. R. Co.*, 23 *N. H.* 275; *Murch v. Concord R. Corp.*, 29 *N. H.* 9; *Toledo, W. & W. R. Co. v. Brooks*, 81 *Ill.* 245; *Union Pac. R. Co. v. Nichols*, 8 *Kan.* 505; *Virginia Midland R. Co. v. Roach*, 83 *Va.* 375; *Waterbury v. New York C. & H. R. R. Co.*, 17 *Fed. Rep.* 671.

47. Effect of acceptance of fare.—While a company may not ordinarily carry passengers on its freight trains or locomotives, or hold them out to the public for that purpose, yet if, through its authorized agents, the company accepts a passenger for reward upon such trains or engines, it will be bound to exercise care and diligence for the safety of such passenger. *Lake Shore & M. S. R. Co. v. Brown*, 31 *Am. & Eng. R. Cas.* 61, 123 *Ill.* 162, 14 *N. E. Rep.* 197.

In a suit for damages it was no error to charge that "if defendant accepted plaintiff's fare and allowed him to ride upon a freight train he was a passenger within the meaning of the law, and defendant was bound by the same degree of care as though it was a passenger train." *International & G. N. R. Co. v. Irvine*, 23 *Am. & Eng. R. Cas.* 518, 64 *Tex.* 529.

48. On trains habitually carrying passengers.—A person who enters a freight train which habitually carries passengers, and at the time receives no notice that he cannot ride thereon, becomes a passenger as he would on a regular passenger train. *Burke v. Missouri Pac. R. Co.*, 51 *Mo. App.* 491.—QUOTING *Hobbs v. Texas & P. R. Co.*, 49 *Ark.* 357.

Where a person having knowledge of the custom of a freight train to carry passengers, and relying on such custom enters said train for the purpose of passage, it is the duty of the conductor, if he intends to obey the rules and disregard the custom, to give notice thereof when he entered. *Burke v. Missouri Pac. R. Co.*, 51 *Mo. App.* 491.

If it is the custom of a freight train to carry passengers though forbidden by the company's rules to do so, of which rules there was no notice save on the time-table for the use of its trainmen; and if a person knowing of the custom but not of the rules enter the caboose of said train to be carried, and has no notice of the rules until

* See also *ante*, 43 (2).

after the train has started, he becomes a passenger, and cannot be ejected if he offers to pay his fare. *Burke v. Missouri Pac. R. Co.*, 51 Mo. App. 491.

Where one was lawfully in the cab of a freight train, treating for passage, as had frequently been done, and was still being done at the time of the trial, by other persons on the same train, as to an injury inflicted upon him by the conductor, he stands within the reason and spirit of the authorities in reference to like injuries done to passengers. *Turner v. A. R. Co.*, 57 N. Y. 383. *Turner*, 28 Am. & Eng. R. Cas. 455, 72 Ga. 292, 53 Am. Rep. 842.

49. Unlawfully riding on such trains.*—A person riding unlawfully on a freight car is not a passenger. *Plans v. Boston & A. R. Co.*, 157 Mass. 377, 32 N. E. Rep. 356.

A person who is riding upon a freight train without paying fare, and after having been refused permission to ride by the conductor, is not a passenger within the meaning of the second subdivision of the Colorado statute. *Atchison, T. & S. F. R. Co. v. Headland*, 58 Am. & Eng. R. Cas. 4, 18 Colo. 477, 33 Pac. Rep. 185.—REVIEWING *Virginia Midland R. Co. v. Roach*, 83 Va. 375.

If a person is informed by the conductor that the company's rules prohibit passengers from traveling upon freight trains, and such person nevertheless enters the train, he is not a passenger and cannot recover for injuries sustained, although a brakeman may have told him to get on the train subsequently to the refusal of the conductor to carry him. *Gulf, C. & S. F. R. Co. v. Campbell*, 41 Am. & Eng. R. Cas. 100, 76 Tex. 174, 13 S. W. Rep. 19.

50. Riding on construction trains.†—W., a boy thirteen years of age, asked and obtained leave to ride upon a construction train, from the conductor, who had been instructed by the company not to permit passengers to ride on his train, but the instruction had not been communicated to W. The train had a caboose car attached, such as are attached to the freight trains of that road, and upon which passengers are carried. It also appeared that, notwithstanding the instruction mentioned, passengers were frequently carried on that and other

construction trains. While W. was riding upon the caboose a collision with another train occurred through the negligence of the railroad company, which resulted in W.'s death. *Held*, that, under the circumstances, W. was lawfully upon the train, and the company was held to the exercise of reasonable care and diligence towards him. *St. Joseph & W. R. Co. v. Wheeler*, 26 Am. & Eng. R. Cas. 173, 35 Kan. 185, 10 Pac. Rep. 461.—DISTINGUISHING *Eaton v. Delaware, L. & W. R. Co.*, 57 N. Y. 383.—APPLIED IN *Buck v. People's St. R., E. L. & P. Co.*, 46 Mo. App. 555.

51. Riding on hand-cars.*—One transported on a hand-car which is used by a company for the convenience of its employes, and on which the carrying of passengers is forbidden by the rules of the company, is not a passenger, though he may be ignorant of such rules, when such carrying is done not by an authorized agent of the company but by those in charge of the hand-car to do other work. *Gulf, C. & S. F. R. Co. v. Dawkins*, 77 Tex. 228, 13 S. W. Rep. 982.

f. Persons Riding in Mail or Express Cars; Express Agents; Postal Clerks.†

52. Riding in express cars, generally.—A person who was injured while in an express car of a passenger train had, up to six weeks prior to the accident out of which the action arose, been an express messenger, and had run on the same train with the conductor of the colliding passenger train, but had left such employment, and at the time of the accident was engaged in other business not connected with the railroad. On boarding the train he went into the passenger car. He had funds sufficient to pay his fare, but the conductor, who, there was evidence to show, was aware of these facts, omitted, without fault of the party, to ask him for his fare, and gave as a reason for this omission that he thought the party was in the employ of the express company. *Held*, that the evidence did not justify a conclusion that the party had at no time the legal status of a passenger thereon. *Florida Southern R. Co. v. Hirst*,

* See *post*, 300.

† See also *post*, 340, 494-498; CARRIAGE OF MAILS, 17, 18; EXPRESS COMPANIES, 13.

* See also *post*, 294, 356, 359.

† See *post*, 298.

52 *Am. & Eng. R. Cas.* 409, 30 *Fla.* 1, 11 *So. Rep.* 506.

Where a railway company is transporting freight and messengers for an express company, and a person not in the employ of the express company goes into the baggage car with the regular express messenger for the purpose of learning the route, and assists the regular express messenger along the route, and the conductor of the train, supposing such person to be an express messenger in the employ of the express company, allows him to ride without paying his fare, and said person is injured, in an action by such person against the railway company for damages—*held*, that the plaintiff was not a passenger, nor entitled to the rights of a passenger. *Union Pac. R. Co. v. Nichols*, 8 *Kan.* 505, 3 *Am. Ry. Rep.* 419.—DISTINGUISHED IN *Robostelli v. New York, N. H. & H. R. Co.*, 34 *Am. & Eng. R. Cas.* 515, 33 *Fed. Rep.* 796. REVIEWED IN *Atchison, T. & S. F. R. Co. v. Headland*, 18 *Colo.* 477; *Way v. Chicago, R. I. & P. R. Co.*, 64 *Iowa* 48, 52 *Am. Rep.* 431; *Lillis v. St. Louis, K. C. & N. R. Co.*, 64 *Mo.* 464.

53. Express messengers.—(1) *Generally*.—Where a railroad company, without any express contract, undertakes to carry an express messenger in a car provided by it for the use of the express company, it owes to him the same duty to use every reasonable precaution to carry him safely that it owes to an ordinary passenger. *Fordyce v. Jackson*, 56 *Ark.* 594, 20 *S. W. Rep.* 528, 597.

If an express company hires its freight transported on the steamer or railroad of a company engaged in transporting freight and passengers for hire, as common carriers, and hires an agent to take charge of such freight, whose passage is paid for in the contract, such agent occupies the position of an ordinary passenger, as to the liability of the common carrier, for injuries he may sustain, caused by the negligence of its employes. *Yeomans v. Contra Costa S. Nav. Co.*, 44 *Cal.* 71.

Where there is no express exemption provided by contract, a railroad company is liable for the consequences of its own or its servants' negligence to persons traveling upon its trains, as messengers or agents of an express company, to the same extent as to other passengers, although no charge is made for their fare. *Blair v. Erie R. Co.*,

66 *N. Y.* 313.—DISTINGUISHING *Eaton v. Delaware, L. & W. R. Co.*, 57 *N. Y.* 382. REVIEWING *Smith v. New York C. R. Co.*, 24 *N. Y.* 222; *Bissell v. New York C. R. Co.*, 25 *N. Y.* 442; *Poucher v. New York C. R. Co.*, 49 *N. Y.* 263.—DISTINGUISHED IN *Carpenter v. Boston & A. R. Co.*, 21 *Am. & Eng. R. Cas.* 331, 97 *N. Y.* 494, 49 *Am. Rep.* 540. FOLLOWED IN *Libby v. Maine C. R. Co.*, 85 *Me.* 34; *Seybolt v. New York, L. E. & W. R. Co.*, 18 *Am. & Eng. R. Cas.* 162, 95 *N. Y.* 562, 47 *Am. Rep.* 75. QUOTED IN *Cleveland, C., C. & St. L. R. Co. v. Ketcham*, 133 *Ind.* 346.

One temporarily supplying the place of an express messenger stands in the same position with him and is entitled to the same protection. *Blair v. Erie R. Co.*, 66 *N. Y.* 313.

(2) *Illustrations*.—In an action to recover for injuries caused by the negligence of a railway company in operating one of its trains, it is no defense that the company was carrying the plaintiff as an express messenger, under a contract with an express company, and that he was required by the nature of his employment to occupy a place on the train more dangerous than was occupied by ordinary passengers. The messenger, in accepting his employment, took upon himself the risk of accidents incident to the nature of the business, but not the risks resulting from the negligence of the railroad company in the management of its trains. *Pennsylvania Co. v. Woodworth*, 26 *Ohio St.* 585.

Deceased was an express messenger, and as such was being carried on the defendants' train at the time of his death, without a ticket or payment of fare, under a contract between the defendants and the express company. *Held*, that the deceased being lawfully on the train, the defendants were liable for negligence in causing his death. *Jennings v. Grand Trunk R. Co.*, 15 *Ont. App.* 477.—DISTINGUISHING *Blackmore v. Toronto St. R. Co.*, 38 *U. C. Q. B.* 172. QUOTING *Austin v. Great Western R. Co.*, *L. R.* 2 *Q. B.* 442.

Held, also, that the deceased was the servant of the express company, and was not in any sense engaged in any common employment with the servants of the railway company. *Jennings v. Grand Trunk R. Co.*, 15 *Ont. App.* 477.—QUOTING *Tunney v. Midland R. Co.*, *L. R.* 1. C. P. 291.

In an action brought to recover damages for the death of B., plaintiff's intestate, who was killed while traveling in an express car in one of defendant's trains, by an accident caused by defendant's negligence, it appeared that B., at the time of his death, was in the employ of the U. S. Express Co. as messenger; that said company had entered into a contract with a railway company, to the rights and duties of which the defendant had succeeded, by which said railway company agreed to transport the messengers of the express company and certain specified property free of charge, the latter assuming all transportation risks and other liabilities arising in respect thereof, and agreeing to indemnify and protect the former therefrom. The responsibility of the railway company in transporting express freight was limited to cases of negligence, it "in no event, whether of negligence or otherwise," to be responsible for property "carried by the railway company free of charge." There was no evidence that B. had any knowledge or information of the provisions of the contract. *Held*, that defendant was liable; that B. was a passenger and could not, without his knowledge or consent, be chargeable with the stipulations in the contract; and that while, when he entered into the service of the express company, he assumed the ordinary hazards incident to that business, there was no presumption or implied understanding that he took upon himself the risks of injury which he might suffer through defendant's negligence. *Brewer v. New York, L. E. & W. R. Co.*, 47 *Am. & Eng. R. Cas.* 485, 124 *N. Y.* 59, 26 *N. E. Rep.* 324, 35 *N. Y. S. R.* 60; *affirming* 45 *Hun* 595, *mem.*—**DISTINGUISHING** *Seybolt v. New York, L. E. & W. R. Co.*, 95 *N. Y.* 562.

It seems that, as the contract between the companies did not purport to relieve the defendant from its duty to exercise due care for the protection of the messenger, whatever right it could claim to relief from the consequences of its negligence in that respect arose by way of indemnity upon the stipulation of the express company. *Brewer v. New York, L. E. & W. R. Co.*, 47 *Am. & Eng. R. Cas.* 485, 124 *N. Y.* 59, 26 *N. E. Rep.* 324, 35 *N. Y. S. R.* 60; *affirming* 45 *Hun* 595, *mem.*—**EXPLAINED IN** *Kenney v. New York C. & H. R. R. Co.*, 125 *N. Y.* 422.

54. Postal clerks—Mail agents.*—

The relation of carrier and passenger exists in every case in which the carrier receives and agrees to transport another not in its employment, whether this be by contract between them or between the carrier and some other person in whose employment the person to be carried is, for the purpose of transacting on the train the business of his employer, as in case of mail agents, express agents, etc. *Gulf, C. & S. F. R. Co. v. Wilson*, 79 *Tex.* 371, 15 *S. W. Rep.* 280.

A mail clerk, traveling upon a train in the service of the government, is a passenger for hire, so far as the company's liability for personal injuries to him is concerned. *Arrowsmith v. Nashville & D. R. Co.*, 57 *Fed. Rep.* 165. *Cleveland, C., C. & St. L. R. Co. v. Ketcham*, 133 *Ind.* 346, 33 *N. E. Rep.* 116. *Libby v. Maine C. R. Co.*, 85 *Me.* 34, 26 *Atl. Rep.* 943. *Magoffin v. Missouri Pac. R. Co.*, 47 *Am. & Eng. R. Cas.* 489, 102 *Mo.* 540, 15 *S. W. Rep.* 76. *Mellor v. Missouri Pac. R. Co.*, 47 *Am. & Eng. R. Cas.* 450, 105 *Mo.* 455, 16 *S. W. Rep.* 849. *Nolton v. Western R. Corp.*, 15 *N. Y.* 444; *affirming* 10 *Haw. Pr.* 97. *Seybolt v. New York, L. E. & W. R. Co.*, 18 *Am. & Eng. R. Cas.* 162, 95 *N. Y.* 562, 47 *Am. Rep.* 75; *affirming* 31 *Hun* 100. *Hammond v. North Eastern R. Co.*, 6 *So. Car.* 130. *Houston & T. C. R. Co. v. Hampton*, 22 *Am. & Eng. R. Cas.* 291, 64 *Tex.* 427. *Collett v. London & N. W. R. Co.*, 16 *Q. B.* 984, 15 *Jur.* 1053, 20 *L. J. Q. B.* 411.

g. Employés.†

55. Generally.—Where a party sues for personal injuries, and there is conflicting evidence as to whether he was a passenger or an employé, he does not become a passenger upon proof that the conductor received and treated him as such. *Texas & P. R. Co. v. Scott*, 64 *Tex.* 549.

Employés of a company who borrow an engine and car from the yard-master, for

* Mail agents as passengers, see note, 18 *AM. & ENG. R. CAS.* 169, 275.

Injury to United States postal clerks on railroad trains, see 47 *AM. & ENG. R. CAS.* 491, *abstr.*

Liability for personal injuries to mail agents, see note, 47 *AM. REP.* 83.

Liability for injury to postal clerks on trains, see note, 19 *L. R. A.* 339.

† See also **EMPLOYÉS**, 4, 5.

When servant is such and is not a passenger, see note, 15 *AM. & ENG. R. CAS.* 229.

their own purpose, are not passengers, and there can be no recovery if one of such employes is killed by the negligent management of the engine. *Davis v. Chicago, St. P., M. & O. R. Co.*, 45 *Fed. Rep.* 543.

Where an engineer, while under pay of the company and under direction of the yard-master, takes an engine and passenger coach some two miles down the track, and brings a car full of the company's employes to the depot to attend a meeting, and returns the same, the yard-master acting as conductor, there is some evidence to establish the relation of carrier and passenger, though there is no evidence that any fares were paid. *Bryant v. Chicago, St. P., M. & O. R. Co.*, 58 *Am. & Eng. R. Cas.* 15, 53 *Fed. Rep.* 997, 4 *C. C. A.* 146.

An employe in charge of a train engaged in carrying persons over the line of the road will be presumed to have authority from the carrier to accept such persons as passengers; and where it appears that at the time of a collision an employe of the company was riding over its road, through its yard, in one of its coaches which had brought him over with others a few hours before, drawn by one of its engines, operated by one of its engineers, and conducted by its general yard-master, there is evidence tending to show the relation of carrier and passenger such as will require submission of the question to the jury. *Bryant v. Chicago, St. P., M. & O. R. Co.*, 58 *Am. & Eng. R. Cas.* 15, 53 *Fed. Rep.* 997, 4 *C. C. A.* 146.

A popcorn vender who travels on a train under a contract with the company to pay a certain sum annually in money and to supply the passengers with ice-water, is a passenger while so traveling, and not an employe. *Commonwealth v. Vermont & M. R. Co.*, 108 *Mass.* 7, 7 *Am. Ry. Rep.* 394.

56. In the course of employment or in performance of duty.—Where the plaintiff was in the employ of the company, painting depots, bridges, tanks, and switches along the line of the road, and was transported over the road, to discharge the duties of his employment, in a small steam-car used only by the officers and employes of the railroad company, which car was propelled by steam and was something after the shape of a hand-car—*held*, that plaintiff was merely an employe of the railroad company, riding upon the road in the steam hand-car, in consequence of his employment and as an employe, without paying any fare; there-

fore he was not a passenger within the true sense of that term, nor entitled to the rights of a passenger. *McQueen v. Central Branch U. P. R. Co.*, 15 *Am. & Eng. R. Cas.* 226, 30 *Kan.* 689; 1 *Pac. Rep.* 139.—REVIEWED IN *Ewald v. Chicago & N. W. R. Co.*, 33 *Am. & Eng. R. Cas.* 326, 70 *Wis.* 420, 36 *N. W. Rep.* 12.

The statement that the plaintiff was received on the train "to be safely carried" did not imply that a special bargain was made "to safely carry," but only that the plaintiff was to be safely carried as one of their workmen in the course of his employment, and that there was no cause of action. *May v. Ontario & Q. R. Co.*, 26 *Am. & Eng. R. Cas.* 337, 10 *Ont.* 70.

57. Going to and returning from work.—(1) *When deemed passengers.*—Where one employed by a railroad was carried to and from his work as part of his wages—*held* not to be in the employ of the company while being so carried, but a passenger, and entitled to protection as such. *O'Donnell v. Allegheny Valley R. Co.*, 59 *Pa. St.* 239.—QUOTING *Catawissa R. Co. v. Armstrong*, 49 *Pa. St.* 186.—OVERRULED IN *Vick v. New York C. & H. R. Co.*, 17 *Am. & Eng. R. Cas.* 609, 95 *N. Y.* 267. QUOTED IN *State v. Western Md. R. Co.*, 21 *Am. & Eng. R. Cas.* 503, 63 *Md.* 433.

Defendant employed plaintiff to build a bridge on its road, and while he was engaged in the work, directed him to proceed in their cars to a certain point and assist in loading timbers for the bridge. While thus on their cars the servants of defendant, who had in charge the running of the train, so carelessly managed and ran the same, without the leave, sanction, or consent of the company, that they were thereby run off the track, by means of which plaintiff's right hand was fractured and permanently injured. *Held*, that plaintiff was a passenger and that the company was liable for the injury. *Gillenwater v. Madison & I. R. Co.*, 5 *Ind.* 339.—DISTINGUISHED IN *Higgins v. Hannibal & St. J. R. Co.*, 36 *Mo.* 418; *Moss v. Johnson*, 22 *Ill.* 633. DOUBTED IN *Slattery v. Toledo & W. R. Co.*, 23 *Ind.* 81. NOT FOLLOWED IN *Columbus & I. C. R. Co. v. Arnold*, 31 *Ind.* 174.

A carrier employing a servant to work at a terminal point, and contracting to transport him to and from work, cannot through its train officials lawfully require him to vacate a seat which he is occupying in the

car to which he has been duly assigned. *New York, L. E. & W. R. Co. v. Burns*, 51 N. J. L. 340, 17 Atl. Rep. 630.

(2) *When not.*—A person in the employment of a company, riding from his home to his employment in a caboose-car attached to a freight train without paying fare, according to the custom and the understanding of the parties from which car and trains all persons except employés of the company are excluded, of which exclusion such person has full knowledge, is not a passenger, but only an employé of the company. *Kansas Pac. R. Co. v. Salmon*, 11 Kan. 83.

Where a construction hand voluntarily placed himself on a freight train to ride to his work, paying no fare, and not at the request of the owners of the road, without any contract to be carried, and with full knowledge of the condition of the road, he was not a passenger so as to recover for an injury not the result of the negligence or mismanagement of defendants. *Moss v. Johnson*, 22 Ill. 633.—DISAPPROVING *Allen v. Parish*, 3 Ohio 201; *Morgan v. Mason*, 20 Ohio 415; *Dixon v. Ranken*, 1 Am. R. Cas. 569. DISTINGUISHING *Gillenwater v. Madison & I. R. Co.*, 5 Ind. 339; *Fitzpatrick v. New Albany & S. R. Co.*, 7 Ind. 436; *Louisville & N. R. Co. v. Yandell*, 17 B. Mon. (Ky.) 587. FOLLOWING *Illinois C. R. Co. v. Cox*, 21 Ill. 20.—DISTINGUISHED IN *Chicago & N. W. R. Co. v. Taylor*, 69 Ill. 461. FOLLOWED IN *Chicago & A. R. Co. v. Keefe*, 47 Ill. 108.

A person in the service of a contractor engaged in getting out timbers for a railroad, who, with his fellow-workmen, rides on a train which is intended only for the use of the railroad employés, knowing that no other persons are allowed to ride on it without the consent of the superintendent, paying no fare, but using the train as an accommodation in going to and returning from his work, is not to be regarded as a passenger, nor entitled to that degree of care which the law gives to passengers; nor can he be regarded as a mere trespasser when it is shown that the workmen so used the train for several months, with the knowledge of the conductor and without objection from him, and there is also evidence tending to show that the superintendent had knowledge of the fact; yet if the superintendent had not in fact given permission, his knowledge and implied acquiescence in

the use of the car by the workmen so employed would only operate as a mere license to them and impose on them all risks of the carriage, "except such as might result from wanton or intentional wrong, or a failure to exercise due care to avert injury after the danger is apparent." *McCauley v. Tennessee C., I. & R. Co.*, 47 Am. & Eng. R. Cas. 580, 93 Ala. 356, 9 So. Rep. 611.

58. While on car to receive wages.—An employé on a train by invitation to receive his wages is in the position of a passenger and the company must exercise the same degree of care for his safety as if he were such. *Louisville & N. R. Co. v. Stacker*, 86 Tenn. 343, 6 Am. St. Rep. 840, 6 S. W. Rep. 737.

59. While off duty.—A person who is employed by a company as a day-laborer, reporting daily for service, and subject to call, but allowed to attend to other business when not needed for the day, and who gets on a train for his own purposes when "off duty," occupies the position of a passenger and not of an employé. *McDaniel v. Highland Ave. & B. R. Co.*, 90 Ala. 64, 8 So. Rep. 41.

Where an employé is riding upon a gravel train back to the working camp to get a coat which he had left there, it not being the habit of the company to transport employés for this purpose, he cannot be considered as a trespasser, and the company is responsible for injuries sustained by him through defects in the track. *Rosenbaum v. St. Paul & D. R. Co.*, 34 Am. & Eng. R. Cas. 274, 38 Minn. 173, 36 N. W. Rep. 447.

3. Rules and Orders of Carrier.*

a. In General.

60. Power to make and adopt rules.—Carriers may adopt such rules for

* See also *ante*, 40; *post*, 204, 351, 359, 360, 371 (2), 452, 479, 495, 508.

Rules and regulations of companies generally, see notes, 33 AM. & ENG. R. CAS. 496; 9 Id. 304.

Reasonable rules that company may make, such as prohibiting passengers from riding on freight cars, requiring purchase of tickets before entering train, keeping ticket-office open at certain hours, etc., see note, 5 L. R. A. 817.

Tickets for passenger trains; regulations, see note, 34 AM. & ENG. R. CAS. 267.

Discrimination in favor of passenger purchasing ticket at office, see note, 11 AM. ST. REP. 650.

Validity of rule requiring ejectment from train of passengers who refuse to produce ticket

the regulation of their business as may seem fit and proper. *Boster v. Chesapeake & O. R. Co.*, 52 Am. & Eng. R. Cas. 357, 36 W. Va. 318, 15 S. E. Rep. 158.

Railroad companies as carriers of passengers may make reasonable rules for the following purposes:

For the management of trains. *McRae v. Wilmington & W. R. Co.*, 18 Am. & Eng. R. Cas. 316, 88 N. Car. 526, 43 Am. Rep. 745. *Britton v. Atlanta & C. A. L. R. Co.*, 18 Am. & Eng. R. Cas. 391, 88 N. Car. 536, 43 Am. Rep. 749.

For conducting their business. *Houston & T. C. R. Co. v. Moore*, 49 Tex. 31. *Eddy v. Rider*, 79 Tex. 53. *Norfolk & W. R. Co. v. Wysor*, 26 Am. & Eng. R. Cas. 234, 82 Va. 250.

For the dispatch of their business. *Chicago, St. L. & P. R. Co. v. Graham*, 3 Ind. App. 28, 29 N. E. Rep. 170.

For the government of their employes in the conduct of their business upon trains. *Crawford v. Cincinnati, H. & D. R. Co.*, 26 Ohio St. 580, 13 Am. Ry. Rep. 387.

For the conduct of their employes, and also for the conduct of passengers. *Chicago, B. & Q. R. Co. v. McLallen*, 84 Ill. 109, 16 Am. Ry. Rep. 425. *State v. Chovin*, 7 Iowa 204.

For the safety of passengers. *Florida Southern R. Co. v. Hirst*, 52 Am. & Eng. R. Cas. 409, 30 Fla. 1, 11 So. Rep. 506.

For the safe and orderly conduct of their business, and to protect themselves against impositions. *Wightman v. Chicago & N. W. R. Co.*, 73 Wis. 169, 2 L. R. A. 185, 40 N. W. Rep. 189.

For the transportation of passengers from point to point. *Gray v. Cincinnati Southern R. Co.*, 11 Fed. Rep. 683.

For the management of the business of conveying passengers and their baggage. *Avery v. New York C. & H. R. R. Co.*, 121 N. Y. 31, 24 N. E. Rep. 20, 30 N. Y. S. R. 471; reversing 2 N. Y. Supp. 101, 17 N. Y. S. R. 417.

Respecting the mode of their performance of their duties as carriers of passengers. *Johnson v. Concord R. Corp.*, 46 N. H. 213.

Respecting the admission of passengers

or pay fare, see note, 33 AM. & ENG. R. CAS. 556.

Regulations which companies may make respecting passengers and others not employes, see note, 41 AM. DEC. 471.

to their trains, provided such rules are reasonable and do not subject the passenger to unnecessary inconvenience and annoyance. *Northern C. R. Co. v. O'Connor*, 52 Am. & Eng. R. Cas. 176, 76 Md. 207, 16 L. R. A. 449, 24 Atl. Rep. 449.

61. Rules must be reasonable.*—Carriers' rules must be reasonable to bind passenger. *Central R. & B. Co. v. Strickland*, 52 Am. & Eng. R. Cas. 216, 90 Ga. 562, 16 S. E. Rep. 352. *Norfolk & W. R. Co. v. Wysor*, 26 Am. & Eng. R. Cas. 234, 82 Va. 250.

The right to be carried is a right superior to the rules and regulations of the carrier, and cannot be affected by them; but the accommodation of passengers while being carried is subject to such rules and regulations as the carrier may think proper to make, provided they be reasonable. *Day v. Owen*, 5 Mich. 520.—FOLLOWED IN *Britton v. Atlanta & C. A. L. R. Co.*, 88 N. Car. 536. QUOTED IN *Brown v. Memphis & C. R. Co.*, 4 Fed. Rep. 37. REVIEWED IN *Stewart v. Brooklyn & C. T. R. Co.*, 90 N. Y. 588, 43 Am. Rep. 185.

Rules cannot be made and enforced, if violative of the law, without liability to a person injured by their enforcement. *Eddy v. Rider*, 79 Tex. 53.—DISTINGUISHED IN *Mahoney v. Detroit St. R. Co.*, 93 Mich. 612.

Rule must not be in conflict with company's legal liability, and must not exempt it from liability for negligence or improper conduct. *Norfolk & W. R. Co. v. Wysor*, 26 Am. & Eng. R. Cas. 234, 82 Va. 250.

All rules will be deemed reasonable which are suitable to enable the company to perform the duties it undertakes, and to secure its own just rights and insure the safety and comfort of passengers. *State v. Chovin*, 7 Iowa 204.

62. Reasonableness, when a question of law.—The reasonableness of a rule prescribed by a company for the government of its business is purely a question of law to be decided by the court, and not a question of fact to be passed upon by juries. *South Fla. R. Co. v. Rhodes*, 37 Am. & Eng. R. Cas. 100, 25 Fla. 40, 5 So. Rep. 633, 3 L.

* Reasonableness of rule that passenger shall not stop over unless authorized, as evidenced by ticket, see note, 45 AM. DEC. 192.

† Test of reasonableness of regulations. Who is to judge of reasonableness, see note, 41 AM. DEC. 471.

R. A. 733. *Louisville, N. & G. S. R. Co. v. Fleming*, 18 *Am. & Eng. R. Cas.* 347, 14 *Lea (Tenn.)* 128. *Norfolk & W. R. Co. v. Wysor*, 26 *Am. & Eng. R. Cas.* 234, 82 *Va.* 250.

Whether the regulation as to the carriage of passengers is a reasonable one is, where the facts are undisputed, a question of law. *Chilton v. St. Louis & I. M. R. Co.*, 114 *Mo.* 88, 21 *S. W. Rep.* 457.

And a submission of the question to the jury is error. *Avery v. New York C. & H. R. R. Co.*, 121 *N. Y.* 31, 24 *N. E. Rep.* 20, 30 *N. Y. S. R.* 471; reversing 2 *N. Y. Supp.* 101, 17 *N. Y. S. R.* 417. *St. Louis, I. M. & S. R. Co. v. Adcock*, 40 *Am. & Eng. R. Cas.* 682, 52 *Ark.* 406, 12 *S. W. Rep.* 874. *Illinois C. R. Co. v. Whittemore*, 43 *Ill.* 420.

The erroneous submission, however, of such question to the jury will be deemed harmless where its finding thereon is correct. *Chilton v. St. Louis & I. M. R. Co.*, 114 *Mo.* 88, 21 *S. W. Rep.* 457.

The question whether the regulation of a corporation which affects third persons is reasonable is a question of fact for the jury; but the validity of a by-law of a corporation which only affects its members, and not third persons, is a question of law for the court. *Morris & E. R. Co. v. Ayres*, 29 *N. J. L.* 393.—FOLLOWED IN *Brown v. Memphis & C. R. Co.*, 4 *Fed. Rep.* 37; *Compton v. Van Volkenburgh*, 34 *N. J. L.* 134.

Under the Iowa statute providing that an extra charge of ten cents may be made where a party has a reasonable opportunity to purchase a ticket before entering a train and fails to do so, the reasonableness of a regulation of the carrier requiring such extra charge is a question of law, and it is error to instruct the jury that it is a question of fact for their determination. *Hoffbauer v. Davenport & N. W. R. Co.*, 52 *Iowa* 342, 3 *N. W. Rep.* 121.

63. — when a question of fact.—When the reasonableness or unreasonableness of a rule of a company depends upon the existence of particular facts and circumstances, it is a question for the jury, under proper instructions; but if the facts are undisputed the question is a proper one for the court. *Pittsburg, C. & St. L. R. Co. v. Lyon*, 37 *Am. & Eng. R. Cas.* 231, 123 *Pa. St.* 140, 16 *Atl. Rep.* 607.

64. — when a mixed question of law and fact.—The general rule is that the reasonableness of regulations of the

carrier, such as setting apart a car for the separate use of women, and men traveling with them, is a mixed question of law and fact, to be determined by the jury under proper instructions by the court. *Bass v. Chicago & N. W. R. Co.*, 36 *Wis.* 450, 9 *Am. Ry. Rep.* 101.—QUOTED IN *Brown v. Memphis & C. R. Co.*, 4 *Fed. Rep.* 37.

Whether a regulation of a carrier excluding women from the ladies' car who are of notoriously bad character is reasonable or not is a mixed question of law and fact to be determined by the jury under proper instructions, and it will not be determined by the court as a question of law raised on demurrer. *Brown v. Memphis & C. R. Co.*, 4 *Fed. Rep.* 37.—FOLLOWING *State v. Overton*, 24 *N. J. L.* 435; *Morris & E. R. Co. v. Ayres*, 29 *N. J. L.* 393. QUOTING *Chicago & N. W. R. Co.*, 36 *Wis.* 450; *Owen*, 5 *Mich.* 520. To the same effect substantially, see the rule as applied in the case of transportation by steamer, *Day v. Owen*, 5 *Mich.* 520.

65. Notice of rules, generally.—Reasonable rules are binding upon the passenger when notified thereof. *Norfolk & W. R. Co. v. Wysor*, 26 *Am. & Eng. R. Cas.* 234, 82 *Va.* 250.

When a passenger knows that on one side of the track no platform or place for alighting from trains has been provided, and that there is a safe and convenient platform upon the other side for the use of passengers in entering and leaving trains, such knowledge is notice of a rule of the company that passengers shall get on and off trains at said platform. *Drake v. Pennsylvania R. Co.*, 137 *Pa. St.* 352, 20 *Atl. Rep.* 994.

66. Duty of passenger to inform himself of rules.*—It is the duty of a passenger to inform himself of the regulations governing the transit and conduct of trains, if such rules are reasonable. *Southern Kan. R. Co. v. Hinsdale*, 34 *Am. & Eng. R. Cas.* 256, 38 *Kan.* 507, 16 *Pac. Rep.* 937.

It is the duty of a person about to take passage on a train to inform himself when, where, and how he can go, or stop, according to the regulations of the company. *Atchison, T. & S. F. R. Co. v. Gants*, 38 *Kan.* 608.

The purchaser of a ticket is bound to inform himself of such regulations, and must conform to the custom of the road in the

* See also *post*, 258, 259, 368.

transportation of its passengers. *McRae v. Wilmington & W. R. Co.*, 18 *Am. & Eng. R. Cas.* 316, 88 *N. Car.* 526, 43 *Am. Rep.* 745.—FOLLOWING *Deitrich v. Pennsylvania R. Co.*, 71 *Pa. St.* 432.

If a passenger disregards regulations adopted by a company as to the purchase of tickets or the running of trains, by failure upon his part to make any inquiries, and such neglect is not induced by the company's agent who has authority in the matter, the company is not liable therefor. *Southern Kan. R. Co. v. Hinsdale*, 34 *Am. & Eng. R. Cas.* 256, 38 *Kan.* 507, 16 *Pac. Rep.* 937.

A passenger desiring to know the regulations of a railroad should make proper inquiry, and it is not necessary that notice of a proper regulation should be brought home to the carrier to bind him thereby. So where a railroad adopts a rule requiring tickets to be used on the day of their sale, a passenger is bound thereby, though he did not have personal knowledge of the rule, and it took the place of a different rule with which he was familiar. *Johnson v. Concord R. Corp.*, 46 *N. H.* 213.

Passengers are not required to know the rules and regulations made by the directors of a company for the control of the action of its agents and the management of its affairs. *Hufford v. Grand Rapids & I. R. Co.*, 64 *Mich.* 631, 31 *N. W. Rep.* 544.—REVIEWED IN *New York, L. E. & W. R. Co. v. Winters*, 143 *U. S.* 60, 12 *Sup. Ct. Rep.* 356.

67. Presumption of knowledge of rules.—A passenger is not presumed to know the private or secret rules given by a company to its conductors, but has a right to rely upon their statement as to what the rules are in contracting with them. *Georgia R. & B. Co. v. Murden*, 86 *Ga.* 434, 12 *S. E. Rep.* 630.

The law does not presume that one about to become a passenger, or one who has become a passenger, on a railway knows the rules and regulations of the company. But one who neglects to inform himself as to the rules and regulations has no greater right under his ticket than if he had acquired actual knowledge of the terms of his contract. *Lake Shore & M. S. R. Co. v. Rosenzweig*, 26 *Am. & Eng. R. Cas.* 489, 113 *Pa. St.* 519, 6 *Atl. Rep.* 545.—EXPLAINING *Horan v. Weiler*, 41 *Pa. St.* 470.

68. Publication and posting of rules.—The provisions of California Civ.

Code, § 484, providing that every railroad corporation must have printed and conspicuously posted on the inside of its passenger cars its rules and regulations regarding fare and conduct of its passengers, is sufficiently complied with where a passenger enters a higher-class car than his ticket entitles him to and is informed by the conductor that he must pay an extra fare or go into another car, and at the same time calls his attention to a card posted up in the car stating the terms and rules for regulation of passengers, and informs him that it is a regulation of the company. *Wright v. California C. R. Co.*, 78 *Cal.* 360, 20 *Pac. Rep.* 740. And see *Baltimore City Pass. R. Co. v. Wilkinson*, 30 *Md.* 224.

A railroad has the right to make reasonable regulations for running its trains, and if the purchaser of a ticket has notice of same, or the company had given such a publicity to same in the ticket-office, and by posters in the cars, that a person of ordinary intelligence, by the use of reasonable care and caution, would or might obtain all requisite information, then he is bound by the regulations. *Trottinger v. East Tenn., V. & G. R. Co.*, 13 *Am. & Eng. R. Cas.* 49, 11 *Lea (Tenn.)* 533.

Proof that a copy of the by-laws of the company was affixed at the stations at which the passengers against which it was attempted to enforce them got into and left the train, is sufficient proof of the publication of such by-laws under § 110 of the Railway Clauses Act 1845, without showing that copies were affixed at all other stations. *Motteram v. Eastern Counties R. Co.*, 7 *C. B. N. S.* 58, 6 *Jur. N. S.* 583, 29 *L. J. M. C.* 59.

Where a notice of a rule that passengers must not stand on the platform is posted on the door of a car, passengers will be presumed to know such rule, and the burden of proof is upon the party disclaiming such knowledge to establish such fact. *Macon & W. R. Co. v. Johnson*, 38 *Ga.* 409.

69. Waiver or modification of rules.*—A railway conductor cannot be required by a passenger to deviate from his train rules on the latter's statement of an alleged agreement with the company conflicting therewith. Every one is bound to know that a conductor has no general

* Regulations as to stoppage of trains; authority of conductor to waive, see note, 44 *AM. & ENG. R. CAS.* 293. See also *post*, 480, 496.

power to run his train except in conformity to the schedule. *Lake Shore & M. S. R. Co. v. Pierce*, 3 Am. & Eng. R. Cas. 340, 47 Mich. 277, 11 N. W. Rep. 157.

The conductor, like the master, must be presumed to know the custom and habit of carrying passengers on freight trains where it has prevailed for a year or more. As to the public, custom modifies the rule forbidding such carrying, and it can only be abrogated by notice. *Burke v. Missouri Pac. R. Co.*, 51 Mo. App. 491.

The fact that the company has permitted persons residing north of its road to cross its right of way and track on foot, at different points in the vicinity of its station building, in going between different parts of the town, is not a waiver of its regulations affecting its passengers, nor a permission to them to alight on the north side. *Drake v. Pennsylvania R. Co.*, 137 Pa. St. 352, 20 Atl. Rep. 994.

Where one is directed by the agents of the railroad, whose duty it is to inform passengers what trains they should enter, to take passage on a freight train, he becomes a passenger, notwithstanding, under the rules of the company, but which are unknown to him, passengers are not permitted to ride on freight trains. *McGee v. Missouri Pac. R. Co.*, 31 Am. & Eng. R. Cas. 1, 92 Mo. 208, 10 West. Rep. 282, 4 S. W. Rep. 739.

70. Obedience to and enforcement of rules.*—(1) *Passenger's duty to obey.*—Passengers should conform to the reasonable rules prescribed by the carrier. *Crawford v. Cincinnati, H. & D. R. Co.*, 26 Ohio St. 580, 13 Am. Ry. Rep. 387. *Florida Southern R. Co. v. Hirst*, 52 Am. & Eng. R. Cas. 409, 30 Fla. 1, 11 So. Rep. 506.

The passenger must inform himself of and conform to rules and regulations for the government and direction of trains. *Britton v. Atlanta & C. A. L. R. Co.*, 18 Am. & Eng. R. Cas. 391, 88 N. Car. 536, 43 Am. Rep. 749.

Passengers must observe rules made by carriers, except so far as they may be opposed to law or in themselves unreasonable. *Boster v. Chesapeake & O. R. Co.*, 52 Am. & Eng. R. Cas. 357, 36 W. Va. 318, 15 S. E. Rep. 158.

A passenger is not bound to comply with

the rules unless they are reasonable. *Central R. & B. Co. v. Strickland*, 52 Am. & Eng. R. Cas. 216, 90 Ga. 562, 16 S. E. Rep. 352.

In the enforcement of order upon the train, and in the execution of reasonable regulations for the safety and comfort of the passengers and for the security of the train, the authority of the officers, exercised upon the responsibility of the company, must be obeyed by the passengers. *Bass v. Chicago & N. W. R. Co.*, 36 Wis. 450, 9 Am. Ry. Rep. 101.—QUOTING *Stephen v. Smith*, 29 Vt. 160.—DISTINGUISHED AND QUOTED IN *Cincinnati, H. & I. R. Co. v. Carper*, 31 Am. & Eng. R. Cas. 36, 112 Ind. 26, 11 West. Rep. 223, 13 N. E. Rep. 122. QUOTED IN *Randolph v. Hannibal & St. J. R. Co.*, 18 Mo. App. 609.

(2) *Facilities for compliance.*—A carrier of passengers may insist upon a compliance with its rules on the part of all who seek transportation; but it is bound to afford reasonable facilities to enable a passenger to comply with its rules and regulations. *Chicago, St. L. & P. R. Co. v. Graham*, 3 Ind. App. 28, 29 N. E. Rep. 170. *Brown v. Kansas City, Ft. S. & G. R. Co.*, 38 Kan. 634, 16 Pac. Rep. 942.

(3) *Enforcement.*—A company has authority to enforce observance of its regulations only by preventing the breach thereof. *Smith v. Manhattan R. Co.*, 45 N. Y. S. R. 865, 18 N. Y. Supp. 759.

The enforcement of reasonable rules and regulations for the admission to trains in a crowded depot, where trains are constantly departing for different points and directions, is an actual necessity; and the railroad company must have power to make and require to be observed such reasonable rules and regulations. *Baltimore & O. R. Co. v. Carr*, 71 Md. 135, 17 Atl. Rep. 1052.

It is the duty of the conductor of a train to enforce a rule of the company requiring passengers to ride in the passenger cars, but the obligation upon passengers of and the protection to the company by a rule of this kind is not dependent upon the fidelity of the conductor or other agent charged with its enforcement. *Florida Southern R. Co. v. Hirst*, 52 Am. & Eng. R. Cas. 409, 30 Fla. 1, 11 So. Rep. 506.

Where a by-law of a company imposes certain duties on passengers, and lays correlative duties on the company, the company must strictly have complied with the

* See also *post*, 294, 351, 359, 369, 371 (2), 452, 479, 495.

by-law on their part to entitle them to enforce it against the passenger. *Jennings v. Great Northern R. Co.*, 35 L. J. Q. B. 15, L. R. 1 Q. B. 7, 1 Ry. & C. T. Cas. 15.

Passengers being obliged to conform to the regulations prescribed by carriers, so far as to enable them to avoid imposition, a corresponding duty is imposed upon the latter to show all becoming courtesy towards the former in demanding the evidence of their compliance with such rules. *Baltimore & O. R. Co. v. Blocher*, 27 Md. 277.

71. Orders to employes.—An accident having occurred on a railroad by means of an obstruction put on the roadway by an unknown third person at a particular trestle in mile 60, the superintendent issued a written order to the employes of the passenger trains to slow up, run carefully, and keep a sharp lookout at mile 60; and while the order was still being acted on another accident occurred from a similar obstruction at the same trestle, by which the plaintiff was injured. *Held*, that the order required the engineer to slow up enough to stop the train on short notice when the emergency did arise, and the court properly instructed the jury to that effect. *Louisville & N. R. Co. v. McKenna*, 18 Am. & Eng. R. Cas. 276, 13 Lea (Tenn.) 280.

b. Various Particular Rules.

72. Dividing passengers into classes.*—A company may divide passengers and freight into classes, with descriptive distinctions, and charge different rates for different classes for a given service; but the charge must be uniform upon all persons and freights embraced within each class. *Chicago, B. & Q. R. Co. v. Parks*, 18 Ill. 460.—APPROVED IN *McDuffee v. Portland & R. R. Co.*, 52 N. H. 430. COMMENTED ON IN *Johnson v. Pensacola & P. R. Co.*, 16 Fla. 623, 667.

As to the right to classify passengers according to sex or color, it is not decided; but if the right exists, equal accommodations must be provided for all who pay equal fares. *Gray v. Cincinnati Southern R. Co.*, 11 Fed. Rep. 683.

73. Providing separate cars for ladies.†—A rule setting apart a car for the

exclusive use of ladies, and gentlemen accompanied by ladies, is a reasonable rule, and it may be enforced. *Chicago & N. W. R. Co. v. Williams*, 55 Ill. 185, 1 Am. Ry. Rep. 531.

A regulation setting apart, in the first instance, one car of a train for females traveling alone, or with male relatives or friends, is a proper and reasonable one; and the corporation has the right to enforce such a regulation, even to the extent of forcibly removing from the car so set apart a male who enters it having no female under his care. For an excess of force, however, upon the part of its employes, beyond what is needful to effect the result, the corporation is liable. *Peck v. New York C. & H. R. R. Co.*, 70 N. Y. 587; affirming 8 Hun 286, and confirming 4 Hun 236, 6 T. & C. 436.—FOLLOWING *Putnam v. Broadway & S. A. R. Co.*, 55 N. Y. 108.

A carrier of passengers may make and enforce reasonable regulations touching the car in which a passenger may be required to take passage, provided equal and proper accommodations are furnished to all passengers holding first-class tickets; and a regulation by which a particular coach of a train is set apart for the exclusive accommodation of ladies, and gentlemen traveling with ladies, is reasonable, there being provided equal accommodations for other passengers in other coaches of the train. *Memphis & C. R. Co. v. Benson*, 31 Am. & Eng. R. Cas. 112, 85 Tenn. 627, 4 Am. St. Rep. 776, 4 S. W. Rep. 5.—REVIEWING *Chesapeake, O. & S. W. R. Co. v. Wells*, 85 Tenn. 613.

In view of the crowds of men of all sorts, conditions, and habits constantly traveling by railroad, it is not only a reasonable regulation, but almost, if not quite, a humane duty, to appropriate a car of each train for women, and men accompanying them, from which men unaccompanied by women should be excluded, and even women, or men accompanying women, of offensive character or habits, so as to keep women of good character on the train sheltered, so far as practicable, from annoyance and insult. Such a regulation to be valid need not be strictly and uniformly enforced. The occasional admission into the ladies' car of persons not admissible under the regulation will not of itself abrogate the regulation. *Bass v. Chicago & N. W. R. Co.*, 36 Wis. 450, 9 Am. Ry. Rep. 101.—APPLIED IN

* See also COLORED PERSONS, §.

† See also *post*, 208, 324.

Rule providing separate cars for ladies, see note, 41 AM. DEC. 481.

Brown v. Memphis & C. R. Co., 1 Am. & Eng. R. Cas. 247, 7 Fed. Rep. 51.

74. —excluding notorious women from ladies' car.*—If a female passenger behaves herself in a ladylike and proper manner she cannot be excluded from the ladies' car and compelled to take a seat in the gentlemen's smoking-car on account of an alleged want of chastity; and this is so whether she is white or colored. *Brown v. Memphis & C. R. Co.*, 5 Fed. Rep. 499.

A carrier is bound to carry good, bad, and indifferent, and has nothing to do with the morals of his passengers if their behavior be proper while traveling. Neither can the carrier use the character for chastity of his female passengers as a basis of classification, so that he may put all chaste women, or women who have the reputation of being chaste, in one car and those known or reputed to be unchaste in another car. Such a regulation would be contrary to public policy and unreasonable. *Brown v. Memphis & C. R. Co.*, 5 Fed. Rep. 499; *adhered to on rehearing in 1 Am. & Eng. R. Cas.* 247, 7 Fed. Rep. 51.

While there may be cases which would justify a carrier in excluding a female passenger from the ladies' car, whose conduct at the time, or reputation, is so bad as to furnish reasonable ground for belief that she will be offensive, yet the general rule is that the carrier has nothing to do with the private character or conduct of his passengers, except so far as it furnishes him with evidence of a probable injury about to be inflicted upon his other passengers. He must carry all who come properly dressed and who behave genteelly, and cannot classify them according to their general moral reputation. *Brown v. Memphis & C. R. Co.*, 1 Am. & Eng. R. Cas. 247, 7 Fed. Rep. 51; *adhering to 5 Fed. Rep.* 499.—**APPLYING** *Bass v. Chicago & N. W. R. Co.*, 36 Wis. 450. **EXPLAINING** *Jencks v. Coleman*, 2 Sumn. (U. S.) 221.

75. Regulating admission into trains, generally.—Rules for admission to trains in crowded depots should not be unreasonably obstructive of the rights and convenience of the passenger; nor should they be enforced in an arbitrary and unreasonable manner to the unnecessary hindrance and delay of the passenger, or in a manner to subject him to indignity or un-

necessary annoyance. *Baltimore & O. R. Co. v. Carr*, 71 Md. 135, 17 Atl. Rep. 1052.

A company has the right to prescribe reasonable conditions for the admittance of way passengers upon its freight trains; and payment of fare to its office agents, or procuring a ticket prior to taking passage on such trains, is not an unreasonable condition. *Cleveland, C. & C. R. Co. v. Bartram*, 11 Ohio St. 457.

76. Prohibiting going through gate without ticket.—A company has the right to make police regulations for the government and control of its business in connection with its depots, among which is a regulation that the gate-keeper at a depot shall not permit passengers to go through except those entitled by their tickets to go upon a particular train. *Watkins v. Pennsylvania R. Co.*, (D. C.) 52 Am. & Eng. R. Cas. 159.

77. Prohibiting boarding train without producing ticket.—A rule adopted by a company requiring conductors to station their brakemen and porters on the depot platforms and to allow no one to get aboard without a ticket or pass is a reasonable regulation, and is not in conflict with the Texas act of April 10, 1883, § 9, nor is it in any way affected by said act, nor in conflict with any law of the state. *International & G. N. R. Co. v. Goldstein*, 2 Tex. App. (Civ. Cas.) 206.

78. Fixing place of entering cars.—A rule that passengers to travel in a coach attached to a freight train shall enter the car at a point other than the station or place where persons traveling in the ordinary passenger trains are received is not an unreasonable regulation, provided the way by which the passengers are required to pass from the place where tickets are furnished to the point of embarking is kept in proper condition. *Browne v. Raleigh & G. R. Co.*, 47 Am. & Eng. R. Cas. 544, 108 N. Car. 34, 12 S. E. Rep. 958.

79. Forbidding certain persons from traveling on cars.—A company has no power to adopt rules and regulations prohibiting decently behaved persons, who will pay their fare and conform to all reasonable regulations for the safety and comfort of passengers, from traveling on the road. *Chicago & A. R. Co. v. Pillsbury*, (Ill.) 8 N. E. Rep. 803.

80. Prohibiting travel on certain trains, generally.—A regulation that

* See also *post*, 208, 324; **COLORED PERSONS**, 5, 6.

persons purchasing tickets for an excursion shall travel upon the train provided for that special purpose, and not upon a regular train, is a reasonable regulation. *McKae v. Wilmington & W. R. Co.*, 18 Am. & Eng. R. Cas. 316, 88 N. Car. 526, 43 Am. Rep. 745.

81. — on freight trains.*—A company being a carrier of freight and of passengers may use separate trains for each, and may exclude freight from one class and passengers from the other. *Farber v. Missouri Pac. R. Co.*, 116 Mo. 81, 22 S. W. Rep. 631.—QUOTING *Whitehead v. St. Louis, I. M. & S. R. Co.*, 99 Mo. 263.—*Illinois C. R. Co. v. Johnson*, 67 Ill. 312.

A company has the power to make, and in a reasonable manner to enforce, a rule or regulation to carry passengers on its freight trains, either not at all or only upon the condition that they provide themselves with tickets. *Burlington & M. R. R. Co. v. Rose*, 1 Am. & Eng. R. Cas. 253, 11 Neb. 177, 8 N. E. Rep. 433.

A regulation that freight and passengers will be carried on its road in separate trains is reasonable, and the company has the right to enforce it when it furnishes sufficient accommodations for each. *Houston & T. C. R. Co. v. Moore*, 49 Tex. 31.—APPROVED AND REVIEWED IN *Florida Southern R. Co. v. Hirst*, 30 Fla. 1.

A rule that the conductors of freight trains shall not allow any persons to travel thereon as passengers without the written order of the superintendent is reasonable, and the conductor may refuse to receive or may eject any person holding a ticket which entitles him only to travel upon passenger trains. *Thomas v. Chicago & G. T. R. Co.*, 37 Am. & Eng. R. Cas. 108, 72 Mich. 355, 40 N. W. Rep. 463.

82. Prohibiting riding in express car, etc.—A rule of a company requiring that passengers shall remain in the cars provided for them and, consequently, that they shall not ride in an express car, or other place of increased danger set apart for another purpose, is reasonable. *Florida Southern R. Co. v. Hirst*, 52 Am. & Eng. R. Cas. 409, 30 Fla. 1, 11 So. Rep. 506.

* See also *ante*, 3, 49; *post*, 116, 294, 295, 359.

Rules as to carrying passengers on freight trains, see note, 41 AM. DEC. 478.

Rule prohibiting passengers from riding on freight cars, see note, 5 L. R. A. 817.

† See *ante*, 52, 53; *post*, 498.

83. Regulating the stopping of trains at certain stations.*—(1) *Generally*.—A company has the right, in the absence of statutory regulations, to determine for itself the trains which shall stop at particular stations, and the traveling public must accommodate itself to the regulations the company has adopted. *Sira v. Wabash R. Co.*, 115 Mo. 127, 21 S. W. Rep. 905. *Texas & P. R. Co. v. Ludlam*, 57 Fed. Rep. 481. *Pennsylvania Co. v. Wentz*, 3 Am. & Eng. R. Cas. 478, 37 Ohio St. 333. *Chicago & A. R. Co. v. Randolph*, 53 Ill. 510.

A company has power, subject to liability for damages for any breach of contract involved, to determine for itself what trains shall stop at particular places. *Lake Shore & M. S. R. Co. v. Pierce*, 3 Am. & Eng. R. Cas. 340, 47 Mich. 277, 11 N. W. Rep. 157.

A company which, for the accommodation of its patrons, allows them to ride in a coach attached to the freight train, has the right to make reasonable rules regulating the place of stopping of such train. *Connell v. Mobile & O. R. Co.*, (Miss.) 7 So. Rep. 344.

The power of a company to make and enforce a regulation that one or more designated passenger trains on its road shall not stop at specified stations or places is subject to legislative control; and by the act of 1852, § 26, as amended in 1867 (S. & S. 114, Ohio Rev. St. § 3320), such power is taken away as to municipal corporations containing three thousand inhabitants. *Pennsylvania Co. v. Wentz*, 3 Am. & Eng. R. Cas. 478, 37 Ohio St. 333.

The court will not interfere with the arrangements respecting the number of trains that stop, or the times at which they stop, at any particular station, unless it be distinctly shown that such arrangements do not sufficiently provide for the accommodation of the public. *Caterham R. Co. v. London, B. & S. C. R. Co.*, 1 C. B. N. S. 410, 26 L. J. C. P. 16, 1 Ry. & C. T. Cas. 32.

(2) *Illustrations*.—A company may adopt a regulation that one of its through or fast trains, running regularly on its road, shall only stop at certain designated stations or places. *Atchison, T. & S. F. R. Co. v. Gants*, 34 Am. & Eng. R. Cas. 290, 38 Kan. 608, 17 Pac. Rep. 54.

A company allowed passengers to ride on

* See *post*, 250-259.

Regulations that certain trains shall not stop at designated stations; validity of, see note, 44 AM. & ENG. R. CAS. 292.

way freight trains, under a rule that "passengers will not be carried on way trains unless they are provided with tickets; way freights will not stop at stations where tickets are not sold to receive nor to let off passengers." *Held*, that the rule was reasonable. *Lake Shore & M. S. R. Co. v. Greenwood*, 79 Pa. St. 373.

A rule that one train each way should not stop at all stations was a reasonable one under Texas Rev. St. art. 4236. *Texas & P. R. Co. v. White*, 4 Tex. App. (Civ. Cas.) 451, 17 S. W. Rep. 419.

A regulation that two through passenger trains running daily each way between Chicago and St. Paul should not stop at the small stations south of Elroy, there being two other passenger trains daily each way between Chicago and Elroy which did stop at such stations—*held*, reasonable. *Plott v. Chicago & N. W. R. Co.*, 21 Am. & Eng. R. Cas. 319, 63 Wis. 511, 23 N. W. Rep. 412.

84. Train approaching station where another train is discharging passengers.—A rule of a company prohibiting their trains from approaching a station while another train is at the station and discharging passengers has no application to a case where two trains are each approaching a station and both in motion. *Goldberg v. New York C. & H. R. R. Co.*, 4 Situ. App. (N. Y.) 166.

85. Regulating conduct of passengers.—It is not an unreasonable regulation to seat passengers so as to preserve order and decorum and prevent contacts and collisions arising from natural and well-known repugnancies, which are liable to breed disturbances, by promiscuous sitting. *West Chester & P. R. Co. v. Miles*, 55 Pa. St. 209.

It is the duty of passenger carriers to repress all disorderly and indecent conduct in their cars, and persons guilty of rude or profane conduct should be at once expelled. *Pittsburgh & C. R. Co. v. Pillow*, 76 Pa. St. 510.

It is the duty of the conductor of a passenger train to preserve order on his train, to protect passengers from insult and injury from their fellow-passengers; and if it be necessary to enable him to discharge this duty, he should stop the train and summon

to his aid his fellow-employees on it, and passengers who are willing to assist, and eject from the train any person or passenger guilty of disorderly, insulting, or threatening conduct. *New Orleans, St. L. & C. R. Co. v. Burke*, 53 Miss. 200, 9 Am. Ry. Rep. 308. And see also *Putnam v. Broadway & S. A. R. Co.*, 55 N. Y. 108, 14 Am. Rep. 190, 15 Abb. Pr. N. S. 383; *reversing 4 J. & S.* 195. *Chicago, B. & Q. R. Co. v. Griffin*, 68 Ill. 499.

86. Forbidding standing on platform.—A rule for the conduct of passengers that they must not stand upon the platform of the cars is a reasonable regulation. *Macon & W. R. Co. v. Johnson*, 38 Ga. 409.

87. — or wearing company's uniform cap.—A rule adopted by a company which inhibited passengers on their trains from wearing the uniform cap of a line of steamers running in opposition to a line of steamers running in connection with the company was not reasonable, and hence not binding on the public. *South Fla. R. Co. v. Rhodes*, 37 Am. & Eng. R. Cas. 100, 25 Fla. 40, 3 L. R. A. 733, 5 So. Rep. 633.

88. Rule as to checking baggage.† —A regulation by a company which has five passenger stations within the corporate limits of a city to sell tickets only to the station which forms the terminus of the road, and only to check baggage to that station, though the other stations are regular stopping-places for passenger trains, is unreasonable and void as matter of law, even though it be made for the purpose of preventing the transfer of passengers and baggage to a rival road. *Pittsburg, C. & St. L. R. Co. v. Lyon*, 37 Am. & Eng. R. Cas. 231, 123 Pa. St. 140, 16 Atl. Rep. 607.

4. Rights of Persons Not Passengers.‡

a. Licensees.§

89. Generally.—The doctrine sometimes held that a carrier owes no duty to persons other than passengers and em-

* See also *post*, 472-483.

† See also BAGGAGE, 55-59.

‡ See also EMPLOYÉS, INJURIES TO.

§ See also LICENSEES, INJURIES TO; STATIONS AND DEPOTS, 73-75.

¶ Duty of company to persons on its train who are not passengers or employes, see note, 23 AM. & ENG. R. CAS. 467.

Duty of company toward persons with whom it has no contract relations, but who are lawfully on its cars or premises, see exhaustive note, 90 AM. DEC. 55.

* Rules prohibiting disorderly conduct on cars, see note, 41 AM. DEC. 481.

ployés, aside from the duty not to wantonly or intentionally injure them, has never received the sanction of courts in Texas. *Galveston C. R. Co. v. Hewitt*, 67 Tex. 473, 3 S. W. Rep. 705.

A company is not bound to hold a train for one who has not put himself in the relation of a passenger, and is not liable to him for an injury occurring while attempting to get on the train after it is started. *Spannagle v. Chicago & A. R. Co.*, 31 Ill. App. 460.

One who gets upon a fast mail-train during one of its fixed stops at a station where these stops are too short for him to transact his business and get off, has no right to notice, by signal or otherwise, to alight before the train resumes its journey, it not appearing that the conductor or other proper agent knew that he had come aboard, nor that there was any usage or custom to give notice or make signals for the benefit of such visitors. *Coleman v. Georgia R. & B. Co.*, 40 Am. & Eng. R. Cas. 690, 84 Ga. 1, 10 S. E. Rep. 498.—DISTINGUISHING *Louisville & N. R. Co. v. Crunk*, 119 Ind. 542, 21 N. E. Rep. 31. LIMITING *Stiles v. Atlanta & W. P. R. Co.*, 65 Ga. 375.—APPROVED IN *Yarnell v. Kansas City, Ft. S. & M. R. Co.*, 113 Mo. 570.

Plaintiff came to a station intending to buy a ticket and become a passenger, but the ticket agent refused to sell him a ticket, claiming that he was drunk, which seems, however, not to have been the fact. *Held*, that after he failed to buy the ticket he was still lawfully upon the station, with the duty of leaving it with ordinary promptness, and of not loitering there, or of using it for any other purpose than of leaving it. *McKernan v. Manhattan R. Co.*, 22 J. & S. (N. Y.) 354.

Where such person refuses to leave the station after being requested to do so, the company's agents have a right to use necessary force to compel him to do so. *McKernan v. Manhattan R. Co.*, 22 J. & S. (N. Y.) 354.

But if the agents employ more force than is necessary to compel a removal, the company is liable, although the manner of the excessive force was selected by the agent to gratify his own passion or wilfulness. *McKernan v. Manhattan R. Co.*, 22 J. & S. (N. Y.) 354.

If one enters a pay-train for the purpose of riding thereon, and by the rules and

regulations of the company passengers are not allowed to ride on such trains, it is his duty to leave the train as soon as he prudently can, when notified of such rule. *Southwestern R. Co. v. Singleton*, 66 Ga. 252.

90. Friends and relatives of the passenger.*—(1) *Generally*.—It is the duty of the company to keep its premises in safe condition for the use of a friend of its passenger aiding him to enter or leave its cars. *Texas & P. R. Co. v. Best*, 66 Tex. 116.—FOLLOWING *Hamilton v. Tex. & P. R. Co.*, 64 Tex. 251.

This duty extends to the case of one who, having an appointment with a passenger, enters the company's premises, intending, in case the appointment be met, to become a passenger himself. *Texas & P. R. Co. v. Best*, 66 Tex. 116.

The agents of railroad companies are liable for injuries caused by the want of ordinary care, where the person injured was at the train to meet with or part from a passenger, although not himself a passenger or employé. *Doss v. Missouri, K. & T. R. Co.*, 59 Mo. 27, 8 Am. Ry. Rep. 462.

By virtue of the relation between a passenger and a company, there is an implied invitation to accompanying friends of departing passengers to occupy the company's premises, and it owes them a consequent duty to use due care to have its premises reasonably safe as to access, use, and departure therefrom; but this duty does not extend to those at the station at an unusual hour for the purpose of bidding farewell to a person about to leave on a freight train in charge of live stock, and who is a passenger only in a limited and restricted sense. *Dowd v. Chicago, M. & St. P. R. Co.*, 58 Am. & Eng. R. Cas. 18, 84 Wis. 105, 54 N. W. Rep. 24.

(2) *Illustrations*.—If, while a father attends his daughter to aid her and her infant children to enter the train and procure seats as passengers, the train starts, he must either remain until he can make known his wish to get off, or take the risk of alighting whilst the train is in motion. *Coleman v. Georgia R. & B. Co.*, 40 Am. & Eng. R. Cas. 690, 84 Ga. 1, 10 S. E. Rep. 498.—DISTINGUISHED IN *Little Rock & Ft. S.*

* See also **LICENSEES. INJURIES TO, 15; STATIONS AND DEPOTS, 74.**

Liability for injuries to friends of a passenger when about station platform, see 25 AM. & ENG. R. CAS. 142, *abstr.*

R. Co. v. Lawton, 55 Ark. 428. FOLLOWED IN *McLarin v. Atlanta & W. P. R. Co.*, 35 Ga. 504.

Where defendant's passenger train was temporarily stopped some distance from the depot for receiving and delivering passengers, until two freight trains in advance of it could be moved out of the way, and the plaintiff boarded such train in search of his wife and child, who were thereon as passengers, and in attempting to move from one car to another by passing around an intervening car, stepped off the platform into a culvert fifteen or twenty feet deep, which he could not see on account of the darkness of the night, thereby sustaining serious personal injury, the company was not liable therefor, even though the lights in some of the cars had been blown out by drunken and disorderly men. The exercise of ordinary care on the part of the plaintiff would have avoided the injury. *Stiles v. Atlanta & W. P. R. Co.*, 8 Am. & Eng. R. Cas. 195, 65 Ga. 370.—LIMITED IN *Coleman v. Georgia R. & B. Co.*, 84 Ga. 1.

Plaintiff went to a station at night to meet his wife, who was an incoming passenger. He did not observe her descent from the car, and after some little delay, and seeing the passengers and baggage generally out, he entered a sleeping-car to inquire for her, and was referred to the next car, but was thrown down by the sudden start of the car, and was injured. The employes of the train did not know that he was on the car or was expected. There was some conflict of evidence as to how long the train stopped, or whether any signals were given, indicating its readiness to start. Held, that the company was not liable for the injury. *Griswold v. Chicago & N. W. R. Co.*, 23 Am. & Eng. R. Cas. 463, 64 Wis. 652, 26 N. W. Rep. 101.—QUOTING *Central R. Co. v. Letcher*, 69 Ala. 106. REVIEWING *Keller v. Sioux City & St. P. R. Co.*, 27 Minn. 178; *Gillis v. Pennsylvania R. Co.*, 59 Pa. St. 129; *Doss v. Missouri, K. & T. R. Co.*, 59 Mo. 27; *Sutton v. New York C. & H. R. R. Co.*, 66 N. Y. 248; *Gautret v. Egerton, L. R. 2 C. P. 374*.—APPROVED IN *Yarnell v. Kansas City, Ft. S. & M. R. Co.*, 113 Mo. 570.

91. Persons assisting passenger to get on or off train.*—A gentleman go-

* Rights of persons assisting passengers on or off trains, see note, 21 L. R. A. 354.

Duty to persons assisting passengers on or off cars, see note, 29 AM. ST. REP. 54.

Injuries to persons assisting passengers to board cars, see note, 41 AM. & ENG. R. CAS. 168.

ing to a station to assist a female relative and her infant child is entitled to sufficient time to escort her to a seat in the car and then to leave the train; and if sufficient time is not allowed or the train is started without the usual notice, and he is injured, the company is liable. *Doss v. Missouri, K. & T. R. Co.*, 59 Mo. 27, 8 Am. Ry. Rep. 462.—APPROVING *Lucas v. New Bedford & T. R. Co.*, 6 Gray (Mass.) 64; *Gautret v. Egerton, L. R. 2 C. P. 371*. REVIEWING *Gillis v. Pennsylvania R. Co.*, 59 Pa. St. 129; *Holmes v. North Eastern R. Co.*, L. R. 4 Ex. 254.—DISTINGUISHED IN *Little Rock & Ft. S. R. Co. v. Lawton*, 55 Ark. 428. REVIEWED IN *Griswold v. Chicago & N. W. R. Co.*, 23 Am. & Eng. R. Cas. 463, 64 Wis. 652.

It is not negligence for a carrier to start his train before a person who has assisted a passenger on board has had time to get off, unless its servants had notice of his intention to get off. *Yarnell v. Kansas City, Ft. S. & M. R. Co.*, 113 Mo. 570, 21 S. W. Rep. 1.—APPROVING *Griswold v. Chicago & N. W. R. Co.*, 23 Am. & Eng. R. Cas. 463, 64 Wis. 652; *Coleman v. Georgia R. & B. Co.*, 40 Am. & Eng. R. Cas. 690, 84 Ga. 1; *Little Rock & Ft. S. R. Co. v. Lawton*, 55 Ark. 428, 18 S. W. Rep. 543; *Lucas v. New Bedford & T. R. Co.*, 6 Gray (Mass.) 64; *Imhoff v. Chicago & M. R. Co.*, 20 Wis. 344.

A person who enters a coach to assist a woman to a seat cannot recover damages for injuries sustained in leaving the train by reason of the failure of the trainmen to hold the train a reasonable time for him to get off, unless they had notice of his intention to do so. *Little Rock & Ft. S. R. Co. v. Lawton*, 52 Am. & Eng. R. Cas. 260, 55 Ark. 428, 18 S. W. Rep. 543.—DISTINGUISHING *Lucas v. New Bedford & T. R. Co.*, 6 Gray (Mass.) 64; *Doss v. Missouri, K. & T. R. Co.*, 59 Mo. 34; *Coleman v. Georgia R. & B. Co.*, 84 Ga. 1. OVERRULING *Louisville & N. R. Co. v. Crunk*, 119 Ind. 542, 21 N. E. Rep. 31.

If a company agrees to receive upon its train a passenger who is so sick and feeble as to render it necessary for him to be carried into the car, and the conductor had knowledge of the fact that a person entered the car as an assistant in carrying the passenger into it, the company owes such person the same duty, while he is rendering assistance to the passenger and while he is leaving the car, that it owes to any of its passengers for hire. *Louisville & N. R. Co.*

v. Crunk, 41 *Am. & Eng. R. Cas.* 158, 119 *Ind.* 542, 21 *N. E. Rep.* 31.

If a person rightfully enters a car to assist in carrying a sick passenger, and the conductor knows or ought to have known that such person had entered the car, it is the duty of the company to cause the car to remain stationary such length of time as is reasonably sufficient to enable the assistant to leave the car while it is standing; and if the train is started before a reasonable time has elapsed, and the assistant attempts to leave the car while in motion, but while the motion was slow and a person of ordinary caution and prudence would apprehend no danger in leaving, and if, when he was in the act of stepping from the car to the station platform, the motion of the train is suddenly increased by the fault or negligence of the company's employes and such person is thereby thrown down and injured, he is entitled to recover. *Louisville & N. R. Co. v. Crunk*, 41 *Am. & Eng. R. Cas.* 158, 119 *Ind.* 542, 21 *N. E. Rep.* 31.—REVIEWED IN *Carr v. Eel River & E. R. Co.*, 98 *Cal.* 366.

If the railway employes offer to assist a woman to a seat, her escort has no right to enter the coach for that purpose, and the company owes him no duty, except to refrain from wilful or wanton injury. *Little Rock & Ft. S. R. Co. v. Lawton*, 52 *Am. & Eng. R. Cas.* 260, 55 *Ark.* 428, 18 *S. W. Rep.* 543.

A notice that all persons not having business with the company were positively forbidden to enter any of its cars does not apply to a person who attends a passenger to render needed assistance. *Little Rock & Ft. S. R. Co. v. Lawton*, 52 *Am. & Eng. R. Cas.* 260, 55 *Ark.* 428, 18 *S. W. Rep.* 543.

A person not a passenger, who enters a car for the purpose of assisting an aged relative who is a passenger, cannot maintain an action against the carrier for injuries received, unless it appears that he exercised due care and that there was negligence on the part of the carrier which caused the injury; and if the train starts before he is off, he cannot recover, if his own act in proceeding to get off after the train is in motion contributes to the injury. And this is so though the carrier was guilty of negligence in suddenly starting the train without any special notice of the time of its departure. *Lucas v. New Bedford & T. R. Co.*, 6 *Gray (Mass.)* 64.—APPLIED IN *Morrison v. Erie R.*

Co., 56 *N. Y.* 302. APPROVED IN *Doss v. Missouri & T. R. Co.*, 59 *Mo.* 27; *Yarnell v. Kansas City, Ft. S. & M. R. Co.*, 113 *Mo.* 570. DISTINGUISHED IN *Little Rock & Ft. S. R. Co. v. Lawton*, 55 *Ark.* 428. FOLLOWED IN *Gavett v. Manchester & L. R. Co.*, 16 *Gray (Mass.)* 501. REVIEWED IN *Burrows v. Erie R. Co.*, 63 *N. Y.* 556.

b. Trespassers.*

92. Who are deemed trespassers.†—

One who, having entered a train as a passenger, persistently refuses to pay his fare and becomes boisterous and uses profane and obscene language is a trespasser, not a passenger. *Louisville & N. R. Co. v. Johnson*, 47 *Am. & Eng. R. Cas.* 611, 92 *Ala.* 204, 9 *So. Rep.* 269.

The failure of those in charge of a train on which a person had wrongfully taken passage to warn him to get off cannot be construed into a permission to become a passenger on the train. *Brown v. Scarboro*, 58 *Am. & Eng. R. Cas.* 364, 97 *Ala.* 316, 12 *So. Rep.* 289.

The plaintiff, without invitation or payment of fare, was traveling upon a timber-train, forbidden to carry passengers, upon defendant's road. In a collision brought about by the negligence of defendant's servants in operating this timber-train the plaintiff, in leaping from the train, was injured. Held, that the plaintiff was a trespasser and not entitled to recover, except for wilful, wanton, or intentional injury by defendant, and the court should have so instructed the jury. *Illinois C. R. Co. v. Meacham*, 91 *Tenn.* 428, 19 *S. W. Rep.* 232.

Where a passenger has full knowledge that a railroad schedule has been changed so that one train each way will not stop at all stations, and that there are other trains giving ample accommodation, but where he persists in entering the train which does not stop at the station at which he wishes to get off, it is proper to instruct the jury, in a suit by him for being carried past the station, that the regulation of the company was reasonable and one which the company had a right to make, and that if plaintiff entered the train with knowledge and refused to leave after notice that it would not stop at his station, he was a trespasser, and was not entitled to recover for a failure to stop,

* See also TRESPASSERS, INJURIES TO; STATIONS AND DEPOTS, 75.

† See also *ante*, 21, 43 (2), 46 (2).

and that he was not entitled to recover for injury to his feelings if he unnecessarily took offense at the language of the conductor in telling him that the train would not stop. *Texas & P. R. Co. v. White*, 4 *Tex. App. (Civ. Cas.)* 451, 17 *S. W. Rep.* 419.

Where a person, by giving a tip or bribe to the conductor of a train not intended for the conveyance of ordinary passengers, as he had reason to know, induces the conductor of such train to permit him to travel on the train contrary to the regulations of the company, he travels at his own risk; and if, while so traveling, he is injured by a collision, he is not entitled to be indemnified by the company for any damage to person or property sustained by him. *Canadian Pac. R. Co. v. Johnson*, 6 *Montr. L. R.* 213.

93. Who are not deemed trespassers.*—A passenger is not a trespasser because he walks on the track of his carrier when he sees no train coming. *Central R. Co. v. Thompson*, 76 *Ga.* 770.

A person riding without paying fare, by permission of the conductor, is not a trespasser, though the train is not intended and operated for the carriage of passengers, and though the conductor has no authority to permit such person to ride. *Alabama G. S. R. Co. v. Yarbrough*, 83 *Ala.* 238, 3 *Am. St. Rep.* 715, 3 *So. Rep.* 447.

One upon a train with the consent or permission of the conductor, though not a passenger in the ordinary sense of the term, is not a trespasser, and may maintain an action for injuries received by reason of the negligence of those in charge of the train; at least in the absence of proof that the conductor was without authority to give such permission. *Gradin v. St. Paul & D. R. Co.*, 11 *Am. & Eng. R. Cas.* 644, 30 *Minn.* 217, 14 *N. W. Rep.* 881.

Plaintiff, at M., desiring to go to W., entered one of defendant's regular passenger trains about to start for the latter place. Before he learned he could get no seat the train was going at a high rate of speed. He asked the conductor to provide him a seat, but the conductor refused. On his fare being demanded, plaintiff offered to pay it if a seat were provided him, but refused to pay it unless a seat were provided. *Held*, that plaintiff had a right so to refuse to pay

the fare, and he did not thereby become a trespasser on the train, for a passenger has a right to be provided with a seat. *Hardenbergh v. St. Paul, M. & M. R. Co.*, 34 *Am. & Eng. R. Cas.* 359, 39 *Minn.* 3, 38 *N. W. Rep.* 625, 12 *Am. St. Rep.* 610.—*REVIEWING* *Maples v. New York & N. H. R. Co.*, 38 *Conn.* 557.

94. Carrier's duty to trespassers.*—Even if a person knows he is on a train in violation of the company's rules, still, being there with the consent of the master of the train, the company owes him at least ordinary care, and for a breach of that duty it is liable in damages. *Whitehead v. St. Louis, I. M. & S. R. Co.*, 39 *Am. & Eng. R. Cas.* 410, 99 *Mo.* 263, 11 *S. W. Rep.* 751.

Where a car was left on a grade in such a position that when the brake was unfastened it would move down the track at the rate of ten miles per hour, and there was a rule against persons entering the car before a certain time, the company was guilty of negligence in not locking the car doors and in not securing the brakes so that they could not be unfastened by a boy eight years of age. *Western Md. R. Co. v. Herold*, 74 *Md.* 510, 22 *Atl. Rep.* 323.

95. — degree of care required.†—While common carriers of passengers for hire must exercise the highest degree of care toward passengers who pay, ordinary care is sufficient toward trespassers. *Higley v. Gilmer*, 3 *Mont.* 90.—*DISTINGUISHING* *Columbus, C. & I. C. R. Co. v. Powell*, 40 *Ind.* 37; *Philadelphia & R. R. Co. v. Derby*, 14 *How. (U. S.)* 483; *Wilton v. Middlesex R. Co.*, 107 *Mass.* 108; *Nolton v. Western R. Corp.*, 15 *N. Y.* 444; *Daley v. Norwich & W. R. Co.*, 26 *Conn.* 591.

The obligation of a company for the safe transportation of a passenger is one arising from contract imposing duties growing out of the relation between the parties, involving trust and confidence, and requiring the exercise of the utmost diligence and care; while towards a stranger no such relation exists, each party, being in the lawful pursuit of his own business or the lawful exercise of his own rights, is not bound by the same rigorous rule, but is required to exercise such reasonable care to avoid injuring the

* When passenger on ordinary train is not trespasser by entering sleeping-car, see note, 26 *AM. ST. REP.* 339.

* Duty to intruders and trespassers, see notes, 10 *L. R. A.* 139, 35 *AM. ST. REP.* 660.

† Company owes drunken person trespassing on cars no higher duty than a sober person, see note, 10 *L. R. A.* 139.

other as ordinary prudence suggests. *Baltimore & O. R. Co. v. Breinig*, 25 Md. 378. —APPROVING *Brand v. Schenectady & T. R. Co.*, 8 Barb. (N. Y.) 376. REVIEWING *Baltimore & O. R. Co. v. Worthington*, 21 Md. 275.

The amount or degree of care which the above rule requires must vary according to circumstances, and should be commensurate with the risk or danger of inflicting injury upon others. *Baltimore & O. R. Co. v. Breinig*, 25 Md. 378.

A person traveling on a free pass issued to a different person, which is not transferable, and passing himself as the person therein named, is guilty of such fraud as to bar his right to recover for a personal injury, except for gross negligence on the part of the company amounting to wilful injury. *Toledo, W. & W. R. Co. v. Beggs*, 85 Ill. 80. —DISTINGUISHED IN *Robostelli v. New York, N. H. & H. R. Co.*, 34 Am. & Eng. R. Cas. 515, 33 Fed. Rep. 796. QUOTED IN *Way v. Chicago, R. I. & P. R. Co.*, 64 Iowa 48, 52 Am. Rep. 431.

A woman entered a passenger car falsely representing herself to be the wife of a man holding a pass over the road, for the purpose of avoiding paying the fare. While riding she was injured by the cars being thrown from the track. Held, that the company owed her no duty except that it should abstain from intentional injury or that it should not be guilty of gross negligence. *Handley v. Houston & T. C. R. Co.*, 2 Tex. Unrep. Cas. 282.

96. Liability for assault upon trespasser.*—Plaintiff jumped upon the platform of a baggage-car on defendant's road, to ride to a place where the cars were being backed to make up a train. Defendant's rules forbade all persons, except certain employes, riding on baggage-cars, and directed baggage-men to rigidly enforce the rule. As plaintiff's evidence tended to show, defendant's baggage-man ordered plaintiff off while the car was in motion. A pile of wood was near the track. Plaintiff replied that he could not get off because of the wood, whereupon the baggage-master kicked him off; he fell against the wood and then under the cars, and was injured. In an action to recover damages—held, that the fact that plaintiff was a trespasser was not a

defense, and that the evidence was sufficient to authorize the submission of defendant's liability to a jury. *Rounds v. Delaware, L. & W. R. Co.*, 64 N. Y. 129, 21 Am. Rep. 597; affirming 3 Hun 329, 5 T. & C. 475.—NOT FOLLOWED IN *Deans v. Wilmington & W. R.*, 107 N. Car. 686.—See also *Porter v. Chicago, R. I. & P. R. Co.*, 41 Iowa 358.

5. Analogous Rules Relating to Stage-coach Companies.

97. Obligation to receive and carry.*—The proprietors of a stage-coach, who hold themselves out as common carriers of passengers, are bound to receive all who require a passage, so long as they have room, and there is no legal excuse for a refusal. And it is not a lawful excuse that they run their coach in connection with another coach, which extends the line to a certain place, and have agreed with the proprietor of such other coach not to receive passengers who come from that place on certain days, unless they come in his coach. *Bennett v. Dutton*, 10 N. H. 481. —APPLIED IN *Denver & N. O. R. Co. v. Atchison, T. & S. F. R. Co.*, 15 Fed. Rep. 650. FOLLOWED IN *Moses v. Boston & M. R. Co.*, 24 N. H. 71.

98. Degree of care demanded.†—Carriers of passengers are held to the exercise of the highest degree of care and skill to preserve the safety of passengers and prevent accidents and injuries, and such rule applies to the proprietors of hacks and stage-coaches equally with other carriers. *Bonce v. Dubuque St. R. Co.*, 53 Iowa 278, 5 N. W. Rep. 177.—QUOTING *Frink v. Coe*, 4 Greene (Iowa) 555; *Sales v. Western Stage Co.*, 4 Iowa 547.

Carriers of passengers by stages are liable for injuries resulting from the slightest negligence on the part of the driver or proprietor of the stage; and they are bound to use the utmost care and diligence of cautious persons to prevent injury to the passengers. *Farish v. Reigle*, 11 Gratt. (Va.) 697.—QUOTING *Jackson v. Tollett*, 2 Stark. 37, 3 E. C. L. 307.—*Maury v. Talmadge*, 2 McLean (U. S.) 157. *Gallagher v. Bowie*, 66 Tex. 265.

It is the duty of the carriers of passengers, as far as they are capable by human care and foresight, to carry safely those whom

* See also *post*, 307, 308, 315, 326, and ASSAULT, CIVIL ACTION FOR, 11.

* See also *post*, 106-118.

† See also *post*, 137-160.

they take into their coaches, and they are responsible for any—even the slightest—neglect; and when the passenger suffers injury by the breaking down or overturning of the coach, the presumption, *prima facie*, is that it was occasioned by some negligence of the carrier, and the *onus probandi* is upon him to establish that there has been on his part no negligence whatever, and that the injury has been occasioned by inevitable casualty, or by some cause which human care and foresight could not prevent. *Lemon v. Chanslor*, 68 Mo. 340.

99. Duty to provide good coaches, harness, etc.*—Carriers of passengers by stages are bound to provide not only good coaches, harness, etc., of the kind used on their line, but they are bound to provide such as will best secure the safety of the passengers. *Farish v. Reigle*, 11 Gratt. (Va.) 697.—REVIEWING *Ingalls v. Bills*, 9 Metc. (Mass.) 1.—*Peck v. Neil*, 3 McLean (U. S.) 22.

And they are answerable to a passenger for an injury which happens by reason of any defect in a coach, which might have been discovered by the most careful and thorough examination, but not for an injury which happens by reason of a hidden defect which could not, upon such examination, have been discovered. *Ingalls v. Bills*, 9 Metc. (Mass.) 1.—DISTINGUISHING *Sharp v. Grey*, 9 Bing. 457.—DISTINGUISHED IN *Hegeman v. Western R. Corp.*, 13 N. Y. 9. REVIEWED IN *Farish v. Reigle*, 11 Gratt. (Va.) 697.

100. Liability for driver's negligence.†—A stage proprietor is responsible for the skill and prudence of his drivers. *Peck v. Neil*, 3 McLean (U. S.) 22.—FOLLOWED IN *Peck v. Neil*, 3 McLean (U. S.) 26.

It is the duty of a stage proprietor to employ a competent driver, and he is liable for injuries occasioned by the negligence of the driver. *Gallagher v. Bowie*, 66 Tex. 265.

If the stage-drivers are guilty of negligence by which an injury is done to another, their employers are responsible. *Johnson v. Small*, 5 B. Mon. (Ky.) 25.

Although the accident may have occurred through the recklessness of the driver of another stage, who may be liable, and also his employers, yet if the driver of the stage to which the accident occurred be in any

respect wanting in the exercise of skill and prudence, his principals are liable. *Peck v. Neil*, 3 McLean (U. S.) 22.

It is the duty of a driver to caution the passengers when he is about to pass over a piece of road, bridge, etc., attended with danger. *Mauvy v. Talmadge*, 2 McLean (U. S.) 157.

The proprietors are responsible if the coach is driven out of the usual track and an injury is consequently done. *Mauvy v. Talmadge*, 2 McLean (U. S.) 157.

Where the plaintiff imputes the accident to the misconduct of the driver, it is incumbent upon the defendant to prove that the driver possessed and exercised that degree of skill which competent drivers, employed in like business, usually possess and ought to possess, in order to convey the passenger with safety and comfort, and that he exercised at the time of the accident the utmost prudence and caution. *Saltonstall v. Stockton*, 1 Taney (U. S.) 11.

101. — negligence of drunken driver.—Proprietors of stage-coaches are liable for any injury that a passenger may receive on account of their negligence to furnish prudent, skillful, and sober drivers. *Schafer v. Gilmer*, 13 Nev. 330.

Where a stage-coach was so carelessly driven by a drunken driver that he capsize the coach and greatly injured a female passenger, causing her to miscarry, the carrier is liable for all the immediate results, and he cannot complain that such passenger was not in a condition to have a stage upset. *Sawyer v. Dulany*, 30 Tex. 479.—REVIEWED IN *Shenandoah Valley R. Co. v. Moose*, 83 Va. 827.

102. Upsetting of coach.—(1) *Generally.*—Though a proprietor of a coach may show that it was reasonably strong, with suitable harness, trappings, and equipments of sufficient strength, and properly made, and that the driver was careful, of reasonable skill and good habits, with steady horses not likely to endanger the safety of passengers; yet, if the upsetting of the coach is caused by the running off of the horses, which might have been prevented if the utmost care and diligence of very cautious persons had been exercised, the proprietors of the coach are liable for the injuries sustained by a passenger. *Farish v. Reigle*, 11 Gratt. (Va.) 697.

If the coach is upset by the running off of the horses, and if they ran off not be-

* See also *post*, 180-196.

† See also *post*, 129-132.

cause they were accidentally frightened, but because the blocks were out of the brake, causing the stage to run upon them, and if the running off of the horses might have been prevented if the horses had been properly harnessed, or if the utmost care and diligence of a cautious person had been used to secure the blocks in the brake, the proprietors are liable. *Farish v. Reigle*, 11 *Gratt. (Va.)* 697.

(2) *Presumption of negligence.**—Where a passenger is injured by the upsetting of a coach, the presumption is that it occurred by the negligence of the driver; and the burden of proof is on the proprietors of the coach to show that there was no negligence whatsoever. *Farish v. Reigle*, 11 *Gratt. (Va.)* 697. *Stokes v. Saltonstall*, 13 *Pet. (U. S.)* 181.—APPROVED IN *Louisville & N. R. Co. v. Northington*, 91 *Tenn.* 56. DISTINGUISHED IN *Pennsylvania R. Co. v. MacKinney*, 37 *Am. & Eng. R. Cas.* 153, 124 *Pa. St.* 462. REVIEWED IN *Atchison, T. & S. F. R. Co. v. Walton*, 3 *N. Mex.* 319.

103. — In consequence of too much baggage on top.—If a coach is upset in consequence of having too much baggage on the top, the proprietors are liable for any injury sustained by a passenger by such upsetting of the coach. *Farish v. Reigle*, 11 *Gratt. (Va.)* 697.

104. Injury caused by unusually cold weather.—If the driver of the coach was fully competent the owner is not liable if the accident was due to the driver becoming chilled by unusually cold weather. *Stokes v. Saltonstall*, 13 *Pet. (U. S.)* 181.—DISTINGUISHED IN *Chicago, B. & Q. R. Co. v. Hazzard*, 26 *Ill.* 373. QUOTED IN *Philadelphia, W. & B. R. Co. v. Anderson*, 72 *Md.* 519. REVIEWED IN *Maury v. Talmadge*, 2 *McLean (U. S.)* 157.

105. Recovery over by coach proprietor against road company.—Where passengers injured by the upsetting of a coach have recovered against the proprietors, the damages assessed in such action cannot be recovered by the coach proprietors from the road company, for failing to keep the road in repair, which, in some degree, occasioned the accident; but a recovery may be had for the injury done to the coach. *Talmadge v. Zanesville & M. R. Co.*, 11 *Ohio* 197.—REVIEWED IN *Chicago W. D. R. Co. v. Rend*, 6 *Ill. App.* 243.

II. DUTIES AND LIABILITIES OF CARRIER; NEGLIGENCE.*

1. *Obligation to Receive and Carry.†*

106. Generally.—(1) *Nature of the obligation.*—The undertaking of a common carrier of passengers is to carry the latter without fault or negligence. *Leslie v. Wabash, St. L. & P. R. Co.*, 26 *Am. & Eng. R. Cas.* 229, 88 *Mo.* 50.

The obligation of a carrier for the safe transportation of a passenger is one arising from contract imposing duties growing out of the relation between the parties involving trust and confidence, and requiring the utmost care. *Baltimore & O. R. Co. v. Breinig*, 25 *Md.* 378.

Railroads, as public highways, created for public use and subject to state jurisdiction, are handed over exclusively to corporate management and control, because it is for the best interests of the public that their functions should be performed for the state, as public trusts by corporate bodies; and the acceptance of such trusts on the part of the corporation makes it the agency of the state, whereby it contracts to accept the duty of carrying all persons and property, within the scope of its charter, as a public trust. The exclusive enjoyment of use to the corporation imposes the corporate duty to furnish every requisite facility for carrying passengers and freight, and to carry both in such manner and at such times as the public needs may require. *People v. New York C. & H. R. R. Co.*, 9 *Am. & Eng. R. Cas.* 1, 28 *Hun (N. Y.)* 543, 3 *Civ. Pro.* 11, 2 *McCar.* 345; *reversing* 2 *Civ. Pro.* 82.—QUOTING *Olcott v. Supervisors of Fond du Lac County*, 16 *Wall. (U. S.)* 678. REVIEWING *Bloodgood v. Mohawk & H. R. R. Co.*, 18 *Wend. (N. Y.)* 9.

(2) — *as affected by statutes.*—The provision in the Maine act of 1857, ch. 122, chartering the Portland & Oxford Central R. Co., to the effect that "the corporation shall be obliged to receive at all proper

* Obligations and liabilities of carriers of passengers, see note, 7 *L. R. A.* 687.

Duty that company owes to passengers, see note, 11 *L. R. A.* 720.

Liability for injury to passengers, see note, 1 *AM. ST. REP.* 200.

Rights of a passenger upon a "limited" train, see note, 26 *AM. & ENG. R. CAS.* 505.

† See also *ante*, 97.

Compulsory duty of common carrier to serve public, see note, 15 *L. R. A.* 321.

* See also *post*, 586.

times and places, and convey persons and articles," means that the times and places mentioned shall be reasonable and consistent with, and in aid of the rights of the public in the use of the road; and whether such times and places are of this description must be ultimately determined by the courts, and not by the directors of the company. *Railroad Com'rs v. Portland & O. C. R. Co.*, 63 Me. 269.

U. S. Rev. St. §§ 4464-4466, respecting the number of passengers that may lawfully be carried by a passenger steamer, have no application to a ferry-boat, though temporarily employed as an excursion boat. *Schwerin v. North Pac. C. R. Co.*, 13 Sawy. (U. S.) 507.

(3) *Sufficiency of performance.*—Where a company answers showing that it runs a daily passenger train each way over a road which cannot, with proper management, be made to keep up repairs and pay running expenses, it is a sufficient defense to an application for a mandamus. *Ohio & M. R. Co. v. People ex rel.*, 30 Am. & Eng. R. Cas. 509, 120 Ill. 200, 11 N. E. Rep. 347, 9 West. Rep. 167.

(4) *On special trains.*—A company is not bound to receive or transport passengers on special trains running for the particular purposes of the road, and not for the convenience of the traveling public; but it is its privilege to do so, and if it receives a person on such train for the purpose of being transported from one place to another it assumes toward him the same duties as if he had been a passenger traveling on the same train on its regular trips, and the passenger in such case assumes no risks other than on a regular trip, except such as are necessarily incident to the character of the train and the purposes for which it is being run. *Wagner v. Missouri Pac. R. Co.*, 97 Mo. 512, 3 L. R. A. 156, 10 S. W. Rep. 486. —APPLIED IN *Buck v. People's St. R., E. L. & P. Co.*, 46 Mo. App. 555.

107. Obligations arising by implication of law.—A carrier by its acceptance of a passenger as a passenger, comes under an obligation to take due and reasonable care for his safe carriage, which obligation arises by implication of law and independent of contract, so that it may exist although the contract of carriage is illegal, or there is no express contract of carriage. *New York, L. E. & W. R. Co. v. Ball*, 53 N. J. L. 283, 21 Atl. Rep. 1052.

The duty of common carriers with respect to the transportation of persons or property is a duty independent of contract, arising by implication of law from the fact that persons or property are received in the course of the business of such employments. *Delaware, L. & W. R. Co. v. Trantwein*, 41 Am. & Eng. R. Cas. 187, 52 N. J. L. 169, 7 L. R. A. 435, 19 Atl. Rep. 178.—QUOTING *Austin v. Great Western R. Co.*, 2 Q. B. 442.

The duty of exercising extreme care in the operation of a passenger train on a railway results not alone from the contract of carriage, express or implied. It arises also from the hazardous character of the business and the fact that human life is imperiled by it. *Galveston C. R. Co. v. Hewitt*, 67 Tex. 473, 3 S. W. Rep. 705.

The duty imposed by law upon the carrier of passengers to carry them safely, as far as human skill and foresight can go, exists independently of contract. For a negligent injury to a passenger an action lies against the carrier, although there be no contract and the service he is rendering is gratuitous; and whether the action is brought upon contract or from failure to perform the duty, the liability is the same. *Carroll v. Staten Island R. Co.*, 58 N. Y. 126, 7 Am. Ry. Rep. 25, 9 Am. Ry. Rep. 486; affirming 65 Barb. 32.—FOLLOWED IN *Webber v. Herkimer & M. St. R. Co.*, 34 Am. & Eng. R. Cas. 580, 109 N. Y. 311, 16 N. E. Rep. 358, 15 N. Y. S. R. 262.

108. What persons may be carried, generally.—Every person is *prima facie* entitled to become a passenger on a railway train. *Norfolk & W. R. Co. v. Galliher*, 89 Va. 639.

The law requires the carrier to transport with impartiality and safety all those who offer. *Winnegar v. Central Pass. R. Co.*, 34 Am. & Eng. R. Cas. 462, 85 Ky. 547, 4 S. W. Rep. 237.

The law requires carriers of passengers to take and carry every one who desires to go, provided they have the room and there be no objection on account of the condition, habits, character, deportment, or purpose of the passenger. *Chicago & A. R. Co. v. Pillsbury*, (Ill.) 8 N. E. Rep. 803.

A common carrier of passengers is one who undertakes for hire to carry all persons indifferently who may apply for passage, so long as there is room and there is no legal excuse for refusing. *Gillingham v. Ohio River R. Co.*, 51 Am. & Eng. R. Cas. 222,

35 *W. Va.* 588, 14 *L. R. A.* 798, 14 *S. E. Rep.* 243.

A company as a carrier of passengers is bound, when not overcrowded, to take all proper persons who may apply for transportation over its line on their complying with all reasonable rules. *Thurston v. Union Pac. R. Co.*, 4 *Dill. (U. S.)* 321.

Every railroad chartered and constructed under the California general railroad act of 1861 is a common carrier and must convey all passengers and freights offered. *Contra Costa C. M. R. Co. v. Moss*, 23 *Cal.* 323.—QUOTED IN *Colorado Eastern R. Co. v. Union Pac. R. Co.*, 44 *Am. & Eng. R. Cas.* 10, 41 *Fed. Rep.* 293.

A carrier of passengers is bound, unless there are reasonable grounds for refusal, to take all persons who apply for passage and their baggage, not exceeding the number of pounds prescribed by the rules of the company, and to take the same when offered for transportation by the accompanying passenger. *Waldron v. Chicago & N. W. R. Co.*, 1 *Dak.* 351, 1 *Dak. T.* 336, 46 *N. W. Rep.* 456.

Such company is responsible, when duly delivered and accepted, for the safe conveyance and delivery of such baggage and packages to and at the point for which they are destined, unless prevented by an act of the public enemy, by act of law, or by an irresistible superhuman cause. *Waldron v. Chicago & N. W. R. Co.*, 1 *Dak.* 351, 1 *Dak. T.* 336, 46 *N. W. Rep.* 456.—REVIEWING *Camden & A. R. Co. v. Belknap*, 21 *Wend. (N. Y.)* 354.

100. Persons who pay fare and conduct themselves properly.—As a common carrier it is the clear duty of a railroad company to receive all passengers who are ready to pay the usual fare and to comply with the reasonable regulations of the company. *State v. Chovin*, 7 *Iowa* 204.

Those who undertake the business of carrying persons are regarded by law as in the public service, and they cannot refuse to take any one of good character who conducts himself properly and pays the usual fare (provided there is room for him). The right to be carried does not grow out of a contract with the carrier, but is a right secured by law. *Saltonstall v. Stockton*, 1 *Taney (U. S.)* 11.

The privilege of making a railroad and taking tolls thereon, when granted to an individual or a company, is a franchise.

The public have an interest in the use of the road, and the owners of the franchise are liable to respond in damages if they refuse to transport an individual or his property upon such road, without any reasonable excuse, upon being paid the usual rate of fare. *Beckman v. Saratoga & S. R. Co.*, 3 *Paige (N. Y.)* 45.—APPROVED IN *Slatten v. Des Moines Valley R. Co.*, 29 *Iowa* 148. QUOTED IN *Gibson v. Mason*, 5 *Nev.* 283; *Davis v. Mayor, etc.*, of N. Y., 14 *N. Y.* 506.

110. Persons who are ill.—Persons who are ill have a right to enter and travel in the cars, and as a common carrier of passengers the company has no right to prevent them; but the increased risk arising from conditions of health, affecting their fitness to travel, certainly where such conditions are unknown to the carrier, must be assumed by the passenger. *Pullman Palace Car Co. v. Barker*, 4 *Colo.* 344.

111. Non-union laborer.—A company is not justified in refusing to receive a person as a passenger in its conveyance simply because that person's exercise of his legal rights (being, for instance, a non-union laborer) has become offensive to his unreasonable neighbors and provokes from such neighbors unreasonable demonstrations of hostility against his person. *Chicago & A. R. Co. v. Pillsbury*, (Ill.) 8 *N. E. Rep.* 803.

112. What persons may be refused transportation, generally.*—A company as a common carrier is not bound to carry all persons at all times, or it might be utterly unable to protect itself from ruin. It would not be obliged to carry one whose ostensible business might be to injure the line; one fleeing from justice; one going upon the train to assault a passenger, commit larceny or robbery, or for interfering with the proper regulations of the company, or for gambling in any form, or committing any crime; nor is it bound to carry persons infected with contagious diseases, to the danger of other passengers. But if such objectionable character has bought a ticket the amount paid should be paid back or

* What persons company can refuse to admit to its trains, see note, 26 *AM. & ENG. R. CAS.* 248.

Company not bound to afford accommodations to improper persons, see note, 13 *AM. & ENG. R. CAS.* 48.

Right of company to exclude passengers because of apprehended danger, see note, 87 *AM. DEC.* 716.

tendered before he is expelled. *Thurston v. Union Pac. R. Co.*, 4 Dill. (U. S.) 321.

A carrier may exclude a person who wishes to travel for the purpose of soliciting business in conflict or competition with that in which the carrier is engaged, and may refuse transportation to such person, though he is willing to pay the regular fare. *Barney v. Oyster Bay & H. Steamboat Co.*, 67 N. Y. 301; *affirming 2 T. & C.* 598.

113. Disabled persons without attendants.*—A company is not bound to accept as a passenger on its cars, without an assistant, one who, because of physical and mental disability, is unable to take care of himself; but if it voluntarily accepts such a person as a passenger, without an assistant, rendering it necessary that special care be taken, the company is negligent if such care and assistance is not given. *Croom v. Chicago, M. & St. P. R. Co.*, 52 Minn. 296, 53 N. W. Rep. 1128.

114. Insane persons.†—A carrier is not obliged, as a matter of law, to receive as a passenger an insane person, or one whose physical or mental condition is such that his presence upon the vehicle may cause injury or substantial discomfort to the other passengers; and such insane person may be refused, where he is known to be insane, though at the time of offering to become a passenger he is apparently harmless and conducts himself in no way differently from other persons. *Meyer v. St. Louis, I. M. & S. R. Co.*, 58 Am. & Eng. R. Cas. 111, 54 Fed. Rep. 116, 10 U. S. App. 677, 4 C. C. A. 221.—**FOLLOWING** *Putnam v. Broadway & S. A. R. Co.*, 55 N. Y. 108; *Pearson v. Duane*, 4 Wall. (U. S.) 605.—*Pearson v. Duane*, 4 Wall. (U. S.) 605.

115. Intoxicated persons.‡—The fact that a man is intoxicated does not alone deprive him of the right to ride upon a railroad car; nor does it free the company from its duty to render to him, as a passenger, due care. *Milliman v. New York C. & H. R. R. Co.*, 66 N. Y. 642; *affirming 4 Hun* 409, 6 T. & C. 585.—**EXPLAINING** *Putnam v. Broadway & S. A. R. Co.*, 55 N. Y. 108.

A common carrier is not obliged as a

matter of law to receive as a passenger an insane or drunken person, or one whose physical or mental condition is such that his presence may cause injury or subsequent discomfort to the other passengers; and the carrier may exclude any one whose condition is such that a possibility of danger may be thrown upon the other passengers if he is admitted as a passenger. *Meyer v. St. Louis, I. M. & S. R. Co.*, 58 Am. & Eng. R. Cas. 111, 54 Fed. Rep. 116, 10 U. S. App. 677, 4 C. C. A. 221. See also *Pearson v. Duane*, 4 Wall. (U. S.) 605.

A company may refuse to receive and carry as a passenger any person who is so intoxicated as to be disgusting, offensive, disagreeable, or annoying, as long as he continues in that condition, though he may have purchased a ticket entitling him to passage. *Pittsburgh, C. & St. L. R. Co. v. Vandyne*, 57 Ind. 576, 18 Am. Ry. Rep. 454.

Slight intoxication, such as would not seriously affect the conduct of the passenger, will not justify a company in refusing to receive and carry him. *Pittsburgh, C. & St. L. R. Co. v. Vandyne*, 57 Ind. 576, 18 Am. Ry. Rep. 454.

116. Persons seeking transportation on freight trains.*—A company may use separate trains for freight and for passengers, and may exclude freight from one and passengers from the other. *Whitehead v. St. Louis, I. M. & S. R. Co.*, 39 Am. & Eng. R. Cas. 410, 99 Mo. 263, 11 S. W. Rep. 751.—**APPROVING** *Cleveland, C. & C. R. Co. v. Bartram*, 11 Ohio St. 459; *Dunn v. Grand Trunk R. Co.*, 58 Me. 187.

A company has the right to make a rule that no one shall be carried as a passenger on its freight trains. But when it is in the habit of so carrying passengers and had its regular hour for departure posted at the station, it will not be justified in refusing to carry a passenger from such station or putting him off such train. *Illinois C. R. Co. v. Johnson*, 67 Ill. 312.—**FOLLOWING** *Chicago & A. R. Co. v. Flagg*, 43 Ill. 364.—**RECONCILED IN** *Jones v. Wabash, St. L. & P. R. Co.*, 17 Mo. App. 158.

117. Rule where an unusual number of passengers seek transportation.—A company is not bound under all circumstances to furnish a sufficient number of cars to accommodate all with seats who

* See also *post*, 145.

† See also *post*, 146.

‡ See also *ante*, 37, 101; *post*, 147, 312, 333, 400, 434.

Expulsion of intoxicated passengers, see note, 21 Am. & Eng. R. Cas. 428.

* See also *ante*, 3, 43-49, 81; *post*, 286-297.

may apply for transportation. Unforeseen emergencies may often arise where the performance of such duty would involve an impossibility. Such carriers are only required to furnish suitable sitting accommodations for the ordinary amount of travel, or for an extraordinary number upon reasonable notice. *Chicago & N. W. R. Co. v. Carroll*, 5 Ill. App. 201.

A company is not bound to receive an unusual number of passengers beyond the number it might reasonably be required to provide for; but if it does receive them, without condition or notice of its inability to provide for their safety, it assumes all the obligations usually incumbent upon a carrier. *Evansville & C. R. Co. v. Duncan*, 28 Ind. 441.

It is the duty of a carrier to provide sufficient means of transportation for all freight and passengers which its business naturally brings to it, and an unusual occasion by which a greater demand upon it is temporarily made will not relieve it of the obligation if, by the use of reasonable foresight, it could have been provided for. *Purcell v. Richmond & D. R. Co.*, 47 Am. & Eng. R. Cas. 457, 108 N. Car. 414, 12 S. E. Rep. 954, 956.—QUOTING *Branch v. Wilmington & W. R. Co.*, 77 N. Car. 347.

When an unusual and extraordinary demand for transportation occurs, the carrier should be held only to such diligence as may be reasonably exercised under the circumstances. In determining what is reasonable diligence it is proper to consider the notice given to the carrier of the probable requirement, the time in which it might act, and the means at hand, as well as other considerations involved. *Chicago & A. R. Co. v. Fisher*, 31 Ill. App. 36.

118. Remedy for refusal to transport.—The wrongful refusal or failure of a carrier to carry passengers is a tort for which an action will lie. *Lake Erie & W. R. Co. v. Acres*, 28 Am. & Eng. R. Cas. 112, 108 Ind. 548, 9 N. E. Rep. 453.

Common carriers owe a duty to the public, a refusal to perform which will subject them to an action. Out of the duty to carry springs a license to every person having no notice to keep off, to go upon the cars; but with such notice the license is withdrawn, and whether rightful or wrongful, such right cannot be enforced *vi et armis*. The remedy of a person so aggrieved is by action. *North Chicago St. R. Co. v. Olds*,

40 Ill. App. 421.—QUOTING *Chicago, B. & Q. R. Co. v. Griffin*, 68 Ill. 499.

2. Duty to Carry Promptly; Delays.*

119. Duty to start train at certain time.—A company is not bound to have a train ready to start at the time at which a passenger is led to expect it when he purchases his ticket. *Hurst v. Great Western R. Co.*, 19 C. B. N. S. 310, 11 Jur. N. S. 730, 34 L. J. C. P. 264, 13 W. R. 950, 12 L. T. 634.

120. Liability for delay, generally.—The party contracting for the transportation of passengers is liable for damages arising from unreasonable delay along the route, occasioned by the fault or neglect of those legitimately engaged in the line of transportation. *Van Buskirk v. Roberts*, 31 N. Y. 661.

In an action to recover damages for a failure to carry the plaintiff within the appointed time to the place for which he had taken passage, by reason whereof he did not perform his errand there, and was detained at expense and to the injury of his business at home, he must produce some evidence that if he had arrived at the appointed time he might have done his errand and would have promptly returned, or that he could not, with due effort, accomplish his errand by reason of his delay in arriving. Nor can the plaintiff, in such action, recover his expenses and the damages to his business during a sojourn of several days, without some proof as to the time when he first ascertained that he could not accomplish his errand and might, therefore, return. *Benson v. New Jersey R. & T. Co.*, 9 Bosw. (N. Y.) 412.

The fact that his errand was to receive a loan of money, previously promised to him, and that, not receiving it, he was without money for the expenses of returning until he received it from home, is not enough to show a necessity for delaying his return if he made no effort to borrow, and does not show that there was any difficulty in his doing so. *Benson v. New Jersey R. & T. Co.*, 9 Bosw. (N. Y.) 412.

121. Delays caused by floods.—Common carriers cannot be held responsible for delays caused by storms and tempests, without the intervention of human agency. *Compton v. Long Island R. Co.*, 1 N. Y. S. R. 554, 41 Hun 642.

* See also *post*, 625, 642.

Where a company has by its advertisements only contracted to use due diligence to have a train reach a junction in time to catch a connecting train, and its failure to do so arises from unavoidable causes (floods), it is not bound to forward a passenger by special train. *Fitzgerald v. Midland R. Co.*, 34 L. T. 771.

122. Failure to observe published schedule.*—A company which fails to run a train according to its published schedule, unless prevented by some valid reason, is liable to a person sustaining injury from such failure for the damages actually sustained by him as the direct and necessary result thereof, but not for conjectural or unproved damages. *Savannah, S. & S. R. Co. v. Bonaud*, 58 Ga. 180.

A company is liable to a passenger for damages sustained in consequence of a train not running as advertised, although the company had given notice in its time-table that it would not guarantee the arrival or departure of trains at the time stated. *Denton v. Great Northern R. Co.*, 5 El. & Bl. 860, 2 Jur. N. S. 185, 25 L. J. Q. B. 129.

Where a company issues an excursion ticket reading, "B. to L. and back—Excursion ticket—To return by the trains advertised for that purpose on any day not beyond fourteen days after date hereof," and advertises a morning and evening return excursion train on Saturdays, it contracts to carry the passenger back to B. on any day within the fourteen days that he might choose and by any of the advertised trains that he might select. If the passenger selects a train which becomes so crowded that he cannot find room in it, and the company does not send him by that train, there is a breach of its contract, and if it takes him by second train only a part of the way on his return journey, without previous notice, this is a second breach and the passenger may recover the expense of hiring a carriage to take him the balance of the way. *Great Northern R. Co. v. Hawcroft*, 21 L. J. Q. B. 178, 16 Jur. 196. And see also *Gordon v. Manchester & L. R. Co.*, 52 N. H. 596. *Buckmaster v. Great Eastern R. Co.*, 23 L. T. 471, 3 Ry. & C. T. Cas. xxiv. *Thompson v. Midland R. Co.*, 34 L. T. 34. *Woodgate v. Great Western R. Co.*, 51 L. T. 826, 33 W. R. 428, 49 J. P. 196. *Sears v. Eastern R. Co.*, 14 Allen (Mass.)

433. *Nelson v. Chicago, M. & St. P. R. Co.*, 22 Am. & Eng. R. Cas. 391, 60 Wis. 320, 19 N. W. Rep. 52.

123. Failure to make connection.

—The plaintiff had taken a ticket at defendants' station in L. for S., via L. In consequence of delay on the journey plaintiff arrived at L. after the ordinary train had left, and, though traveling for pleasure only, he took a special train thence to S. In an action to recover the cost of the special train—*held*: (1) that the facts and documents which formed the contract were the taking and granting of the ticket, the ticket, the time-table, and the conditions; (2) that the defendants thereby contracted to make every reasonable effort to insure punctuality; (3) that although a delay of a few minutes would not be evidence of a want of reasonable effort, yet a long or unusual delay was evidence calling upon the company to show that it arose in spite of such reasonable effort, and that there was evidence that such delay was the cause of the plaintiff's missing the corresponding train at L.; (4) that the cost of the special train was not recoverable as damages. *Le Blanche v. London & N. W. R. Co.*, L. R. 1 C. P. D. 286, 45 L. J. C. P. D. 521, 3 Ry. & C. T. Cas. xxiii.

The plaintiff took a ticket from B. to L., by a train which was advertised to arrive at L. at 10.10 P. M. Between B. & D. the train was delayed by the floods, and consequently failed to catch the corresponding train from D. to L. On arriving at D. the plaintiff found that no other train would go to L. that night. The plaintiff claimed to recover damages from the railway company for breach of an absolute contract to carry from B. to L. on the day when the ticket was taken. *Held*, that the railway company had only contracted to use due diligence to reach D. in time to catch the corresponding train to L., and that as they had failed to do so from unavoidable causes they were not bound to forward the plaintiff by special train. *Fitzgerald v. Midland R. Co.*, 34 L. T. 771, 3 Ry. & C. T. Cas. xxii.

124. Delay in transportation of theatrical troupe.—Where tickets are sold to a theatrical company with notice of their business and their next engagement, the company will be liable for a failure to transport them, if it be reasonably within its power, according to contract, so as to meet its engagements. *Missouri Pac. R.*

* See also TIME-TABLES, 3.

Co. v. Curtis, 3 *Tex. App. (Civ. Cas.)* 379. See also *Georgia R. Co. v. Hayden*, 71 *Ga.* 518.

125. Recovery of expenses incurred in avoiding delay.*—Where the time-tables of a company contain a condition which in effect provides that the company refuses to guarantee the punctuality of its trains according to the time mentioned, such condition forms a part of the contract with a passenger, and no recovery can be had for expenses to which the passenger is put by reason of trains failing to connect as provided in the time-table. *McCartan v. North Eastern R. Co.*, 54 *L. J. Q. B. D.* 441.

The failure of a company to start an ordinary passenger train owing to the neglect of the fireman of the engine to get steam up, is not an accident, but an act of negligence; and a passenger who suffers loss by the delay may recover his reasonable damage, as well as the sum which he was compelled to pay for a special train to carry him to his destination. *Buckmaster v. Great Eastern R. Co.*, 23 *L. T.* 471.

If a passenger takes a special train in order to avoid a delay that has arisen through the negligence of a company, the question whether he can recover the cost will depend on whether the taking it was a reasonable thing to do, having regard to all the circumstances. One mode of determining what would be reasonable is to consider whether, under the circumstances, a prudent person would have taken a special train at his own expense to avoid a delay that had arisen through his own fault. *Le Blanche v. London & N. W. R. Co.*, 24 *W. R.* 808, 34 *L. T.* 667, 45 *L. J. C. P. D.* 521, *L. R.* 1 *C. P. D.* 286.

3. Care Demanded of Carrier.†

a. In General.

126. Necessity of negligence to raise liability.—Carriers of passengers are liable only for injuries resulting from their actual negligence or that of their employés. *Grand Rapids & I. R. Co. v. Huntley*, 38 *Mich.* 537. *McClenaghan v. Brock*, 5 *Rich. (So. Car.)* 17. *Jeffersonville R. Co. v. Hendricks*, 26 *Ind.* 228.

Although a carrier is held to a strict re-

sponsibility he is only liable for negligence or carelessness, though liable for the least possible degree of it. *Tennery v. Pippinger*, 1 *Phila. (Pa.)* 543.

To the liability of a company as a passenger carrier, two things are requisite—that the company be guilty of some negligence or omission which mediately or immediately produced or enhanced the injury, and that the passenger should not be guilty of any want of ordinary care and prudence which contributed to the injury. *George v. St Louis, I. M. & S. R. Co.*, 1 *Am. & Eng. R. Cas.* 294, 34 *Ark.* 613.

A carrier of passengers for hire is liable for all injuries resulting from the misconduct of the carrier or his employé. *Springer Transp. Co. v. Smith*, 16 *Lea (Tenn.)* 498, 1 *S. W. Rep.* 280.

A passenger upon a train takes all the risks attending that mode of travel, except such as are caused or increased solely by the negligence of the carrier. *Grand Rapids & I. R. Co. v. Boyd*, 65 *Ind.* 526.

127. What amounts to negligence—"Legal negligence."—(1) Generally.—

In cases where the common experience of mankind and the common consensus of prudent persons have recognized that to do or omit to do certain acts is prolific of danger, we may call the doing or omission of them "negligence *per se*," or "legal negligence." The omission of a duty enjoined by law for the protection and safety of the public by a common carrier, or the doing of an act by such a carrier, which by the common experience and consensus of prudent persons would create danger to passengers, is legal negligence. *Carrico v. West Virginia C. & P. R. Co.*, 52 *Am. & Eng. R. Cas.* 393, 35 *W. Va.* 389, 14 *S. E. Rep.* 12.

The exposure of a passenger to danger, which the exercise of a reasonable foresight might have anticipated and due care avoided, is negligence on the part of a carrier. *Lehr v. Steinway & H. P. R. Co.*, 118 *N. Y.* 556, 23 *N. E. Rep.* 889, 30 *N. Y. S. R.* 1; affirming 44 *Hun* 627, 8 *N. Y. S. R.* 813.

The negligence for which the carrier is liable includes negligence concerning the condition of its road, the character of its machinery, the quality of its cars, the sufficiency of its equipments, the conduct of its agents and employés, and every other thing necessary to the safety of a passenger who himself is not at fault. *Grand Rapids & I. R. Co. v. Boyd*, 65 *Ind.* 526.

* And see also *post*, 625, 642.

† Liability for negligently injuring passenger, see note, 82 *AM. DEC.* 290.

(2) *Illustrations*.—Where the employés of a company engaged in operating one of its trains have notice, such as a person of ordinary prudence would believe and act upon, that a passenger had stepped or fallen from the train, while moving at a high rate of speed, onto the track, where he is exposed, in a helpless condition, to the danger of injury from another of its trains, the company owes him the duty of observing due care to prevent his being so injured, although he was guilty of negligence in so stepping or falling from the train, which is known to the employés thereon; and in such case the company should, in the exercise of proper care, stop the train from which the passenger fell and remove him from the track, if that could be done without danger to the passengers or employés on the train, or notify those in charge of the train from which he was in danger of receiving injury, and cause it to be operated with a due regard for his safety, or adopt some other reasonable precaution to avoid injury to him. The omission to use such care, if injury in consequence ensued, is actionable negligence. *Cincinnati, H. & D. R. Co. v. Kasen*, 52 Am. & Eng. R. Cas. 427, 49 Ohio St. 230, 16 L. R. A. 674, 31 N. E. Rep. 282.

A drunken passenger was, owing solely to his condition, carried past his destination, and then, failing to comprehend his liability to pay further fare or to get off the train, he was removed lawfully from the train by the conductor and assistants, and placed a short distance from the track. Subsequently he wandered upon the track, where he was run over and killed by another train at a point where those in charge of the latter train did not and could not see him in time to prevent the accident. *Held*, that the company was not liable for his death, and was not chargeable with notice of his condition or whereabouts. *McClelland v. Louisville, N. A. & C. R. Co.*, 18 Am. & Eng. R. Cas. 260, 94 Ind. 276.—DISTINGUISHED IN *Indianapolis, P. & C. R. Co. v. Pitzer*, 25 Am. & Eng. R. Cas. 313, 109 Ind. 179, 58 Am. Rep. 387.

128. Negligence must be proximate cause.*—(1) *Statement of the rule*.—Carriers of passengers are responsible for the natural, ordinary, and proximate consequences of their acts, but not for such as are remote and extraordinary. *Francis v.*

St. Louis Transfer Co., 5 Mo. App. 7.—DISTINGUISHED IN *Evans v. St. Louis, I. M. & S. R. Co.*, 11 Mo. App. 463. FOLLOWED IN *Morse v. Duncan*, 8 Am. & Eng. R. Cas. 374, 14 Fed. Rep. 396. REVIEWED IN *Brown v. Chicago, M. & St. P. R. Co.*, 3 Am. & Eng. R. Cas. 444, 54 Wis. 342, 41 Am. Rep. 41.

Those intrusted with the management of a railroad are only responsible for the direct and immediate consequences of errors committed by themselves. *Pennsylvania R. Co. v. Aspell*, 23 Pa. St. 147. *Conroy v. Pennsylvania R. Co.*, 1 Pittsb. (Pa.) 440.

A company as a carrier of passengers is not necessarily responsible for any act a passenger may do in consequence of some breach of duty on the part of its employés. It is liable only for such results as are natural and probable consequences of such breach of duty. The agents of the company are not chargeable with knowledge of a passenger's "intelligence and experience in life." They are authorized to act upon appearances before them, where they have no other notice of the facts. *Spohn v. Missouri Pac. R. Co.*, 101 Mo. 417, 14 S. W. Rep. 880.

(2) *Illustrations*.—A train on which plaintiff was being carried was side-tracked for a night, and in the morning, when the passengers were outside, the train suddenly started without signal or warning. Plaintiff jumped on the platform of a car next to his, and in attempting to pass from one to the other the cars separated and he fell between them and was injured. The cars had been uncoupled to divide the train. A brakeman was present but gave no warning. *Held*, that the negligence of the company was the proximate cause of the injury, and it was liable. The question of plaintiff's contributory negligence was for the jury. *Andrist v. Union Pac. R. Co.*, 30 Fed. Rep. 345.

The failure of a company to permit a passenger to alight at a station to which the company had contracted to carry such passenger, and its act in directing the passenger to alight at the next station and walk back to the place of destination, although a violation by the company of its contract, for which the passenger is entitled to an action of damages, does not give such passenger the right to walk back over the track to the proper station, and is not the proximate cause of an injury occasioned to the pas-

* See also *post*, 267, 344, 416, 482.

senger while so walking upon the track. *Benson v. Central Pac. R. Co.*, 54 Am. & Eng. R. Cas. 126, 98 Cal. 45, 32 Pac. Rep. 809, 33 Pac. Rep. 206.

Where a person is killed or injured by attempting to jump from a train while it is crossing a public street, the negligence of the company in failing to ring its locomotive bell while crossing the street, as required by law, while it is clearly negligence, does not contribute to the injury; and of such failure plaintiff cannot complain; and such failure is therefore no cause for a recovery by one so injured. *Central R. Co. v. Harris*, 76 Ga. 501.

A passenger was carried a little past his station on a dark night, and on leaving the train was misinformed by the conductor as to where he was. He discovered that he was south of a road he meant to take in going home, instead of north of it, as he was told when he landed. He knew the neighborhood, and knew that where the road crossed the track there were cattle-guards and culverts on both sides of it. If he had landed where he was told he had, he had meant to follow the track south to the road and pick his way across the culvert, though he might have shunned it by taking a side-path. In approaching the road from the south he determined to cross the other culvert in the same way, and it is not clear that on that side of the road he could have done any better. But when he neared the cattle-guard his eyes deceived him and his foot slipped, and in trying to regain his balance he fell into the culvert, which he supposed was farther off, and was seriously hurt. Held, that the company's negligence in carrying him past the station and in misinforming him was not the proximate cause of the injury, which was purely accidental, and he could not recover for it. *Lewis v. Flint & P. M. R. Co.*, 18 Am. & Eng. R. Cas. 263, 54 Mich. 55, 52 Am. Rep. 790, 19 N. W. Rep. 744. — **DISTINGUISHING** *Kellogg v. Chicago & N. W. R. Co.*, 26 Wis. 223; *Fent v. Toledo, P. & W. R. Co.*, 59 Ill. 349; *Wiley v. West Jersey R. Co.*, 44 N. J. L. 248; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469; *Hoyt v. Jeffers*, 30 Mich. 181; *Pennsylvania Co. v. Hoagland*, 78 Ind. 203; *Smith v. British & N. A. R. M. S. Packet Co.*, 86 N. Y. 408. **REVIEWING** *Brown v. Chicago, M. & St. P. R. Co.*, 3 Am. & Eng. R. Cas. 444, 54 Wis. 342. — **FOLLOWED IN** *Selleck v. Lake Shore & M. S. R. Co.*, 58

Mich. 195. **REVIEWED IN** *Selleck v. Langdon*, 55 Hun (N. Y.) 19, 28 N. Y. S. R. 326, 8 N. Y. Supp. 573.

129. Liability for negligence of servants.—(1) *Rule stated.*—The duty that the carrier owes to the passenger is to protect him from all danger, so far as possible, through the efforts of the carrier or its employés. In the performance of its duty the employés of the company stand in its place, and all their acts, so far as they have a direct connection with the performance or non-performance of the contract, must be held to be the acts of the company itself. *Chicago & E. I. R. Co. v. Flexman*, 9 Ill. App. 250. *Kansas City, M. & B. R. Co. v. Sanders*, 58 Am. & Eng. R. Cas. 140, 98 Ala. 293, 13 So. Rep. 57.

The officers of a railroad train, as to passengers *intransitu*, should be regarded as the corporation itself, and it is, therefore, as responsible for their acts in the conduct of the train and the treatment of the passengers as the officers of the train would be for themselves if they were the owners of it. *Louisville & N. R. Co. v. Ballard*, 28 Am. & Eng. R. Cas. 135, 85 Ky. 307, 7 Am. St. Rep. 600, 3 S. W. Rep. 530.

Railroad companies are bound for a due application on the part of their servants and agents of necessary attention, art, and skill, to secure the safety of passengers; and they are liable for all injuries which may occur from the negligence or want of skill of their agents, if such injury might have been avoided by the utmost degree of care and skill on the part of their agents and servants. *Nashville & C. R. Co. v. Messino*, 1 Sneed (Tenn.) 220.

And are held to the greatest care and diligence in regard to the conduct and acts of their officers, agents, and employés. *Hanson v. Mansfield R. & T. Co.*, 38 La. Ann. 111, 58 Am. Rep. 162.

And are responsible for injuries inflicted upon passengers in consequence of the negligence, imprudence, and want of skill of persons in the service of those companies. *Carmanty v. Mexican Gulf R. Co.*, 5 La. Ann. 703.

(2) *Its extent and limits.*—A company will not be exempted from liability for injuries incurred by a passenger while on the cars, produced by the carelessness of its servants, upon proof that the servants were carefully selected by the company with reference to their competency, and that the neg-

ligent act was done without the sanction of the company. *Gillenwater v. Madison & I. R. Co.*, 5 Ind. 339.—DISTINGUISHED IN *Whaalan v. Mad River & L. E. R. Co.*, 8 Ohio St. 249.

In an action by a passenger to recover damages for injuries sustained by him while traveling over defendants' road, it is not competent for the latter to exonerate themselves in whole or in part by proving mistakes committed by their own agents. *Baltimore & O. R. Co. v. Blocher*, 27 Md. 277.

A carrier of passengers is liable for their injury or improper treatment due to the negligence or wilful misconduct of its servants while engaged in executing the contract. *Gillingham v. Ohio River R. Co.*, 51 Am. & Eng. R. Cas. 222, 35 W. Va. 588, 14 L. R. A. 798, 14 S. E. Rep. 243.

A carrier is liable for the negligence of its employés resulting in an injury to a passenger, although such employés at the time are not acting within the line of their specified duties. A distinction must be made between the specified duties of an employé and the scope of his employment in relation to passengers. *Lakin v. Oregon Pac. R. Co.*, 34 Am. & Eng. R. Cas. 500, 15 Oreg. 220, 15 Pac. Rep. 641.—REVIEWING *Isaac v. Denver & R. G. R. Co.*, 12 Daly (N.Y.) 340; *Little Miami R. Co. v. Wetmore*, 19 Ohio St. 110.

A carrier is responsible for the conduct of all persons whom he may employ in the business of transportation, whether he hires the motive-power, be it steam or horses, with the servants who are to direct it, or whether it is his own motive-power controlled by his own servants. *Ryland v. Peters*, 1 Phila. (Pa.) 264.—DISTINGUISHING *Laugher v. Forister*, 5 B. & C. 547.

(3) *Illustrations*.—Where an accident happens and a passenger is injured owing to the neglect of the fireman to be at his post, the company is liable. *Grand Rapids & I. R. Co. v. Ellison*, 39 Am. & Eng. R. Cas. 480, 117 Ind. 234, 20 N. E. Rep. 135.

The contract of a company with its passenger is to carry safely; and if, through the negligence or wilful act of the conductor or of a brakeman, or of both, a jet of water is dashed upon the passenger while being carried, it is a breach of the contract. *Terre Haute & I. R. Co. v. Jackson*, 6 Am. & Eng. R. Cas. 178, 81 Ind. 19.

A military company bought round-trip tickets from their home to another station and back, plaintiff being a member thereof.

When they arrived at their place of destination their car was pushed onto a side-track overlapping the trestle of a bridge, and a little off the depot grounds. About the time that the train was due to take them on the return trip, and at night, plaintiff and others entered the car, finding it lighted but unattended, and remained some time until the train came in. The conductor came into the car and asked the occupants to alight and assist him in pushing the car onto the main track, so it could be hitched onto the train. Plaintiff, to avoid the danger of getting off between the car and the train, stepped off on the other side, fell through the trestle, and was injured. *Held*, that he might maintain an action against the company. *Bellman v. New York C. & H. R. R. Co.*, 42 Hun (N.Y.) 130, 5 N.Y. S. R. 153; *affirmed in 122 N.Y. 671, mem.*, 34 N.Y. S. R. 1015.

Plaintiff's contract with defendant road was to carry him to the city of St. Louis. Defendant had an arrangement with a transit company to furnish the motive-power and haul its cars from East St. Louis to the depot in the city proper. *Held*, that defendant was liable to plaintiff for an injury received through the negligence of the employés of such transit company. On the principle that where there are several tortfeasors each may be liable, such transit company is also liable if the injury to plaintiff resulted directly through the negligence or unskillfulness of its own servants. *Keep v. Indianapolis & St. L. R. Co.*, 3 McCrary (U.S.) 302, 10 Fed. Rep. 454.

A carrier owes to its passengers the duty of carrying them to their journey's end and protecting them from injury from any source that human judgment and foresight are capable of providing against; and a company is responsible to a passenger for injuries caused through the negligence of an engineer placed upon the engine "to learn the road," by the managing agent of the company, although the latter had no authority to employ any person, such engineer being aboard the engine serving the company in the transportation of passengers at the request and at the acquiescence of its servants and agents. *Lakin v. Oregon Pac. R. Co.*, 34 Am. & Eng. R. Cas. 500, 15 Oreg. 220, 15 Pac. Rep. 641.

(4) *Acts of postal clerks—Strangers*.—A

* See also CARRIAGE OF MAILS, 7; and *post*, 133.

company is not responsible for the negligent acts of postal clerks or agents upon its trains. *Muster v. Chicago, M. & St. P. R. Co.*, 18 Am. & Eng. R. Cas. 113, 61 Wis. 325, 21 N. W. Rep. 223, 49 Am. Rep. 41. *Poling v. Ohio River R. Co.*, 38 W. Va. 645, 18 S. E. Rep. 782.

A company is not liable for an injury caused by the negligence or wrongful act of a stranger in pushing a passenger off the steps of a car unless they were acting in concert. *Chicago & N. W. R. Co. v. Scates*, 90 Ill. 586. See also *Thomas v. Philadelphia & R. R. Co.*, 148 Pa. St. 180, 23 Atl. Rep. 989. *Reibel v. Cincinnati, I., St. L. & C. R. Co.*, 114 Ind. 476, 15 West. Rep. 331, 17 N. E. Rep. 107. *Ellinger v. Philadelphia, W. & B. R. Co.*, 58 Am. & Eng. R. Cas. 429, 153 Pa. St. 213, 25 Atl. Rep. 1132. *Graeff v. Philadelphia & R. R. Co.*, (Pa.) 58 Am. & Eng. R. Cas. 431, 28 Atl. Rep. 1107.

130. — servants of independent contractor.*—A company is not liable for injuries to a passenger owing to the fall of a girder through the negligence of workmen employed by a contractor unconnected with the railway company. *Daniel v. Metropolitan R. Co.*, L. R. 3 C. P. 591, 37 L. J. C. P. 280.

Where a construction company uses a road before completion for the purpose of general traffic, the corporation owning the road is liable for an injury to a passenger resulting from the negligence of the employés of the construction company. *Lakin v. Willamette V. & C. R. Co.*, 26 Am. & Eng. R. Cas. 611, 13 Oreg. 436, 11 Pac. Rep. 68, 57 Am. Rep. 25.—**DISTINGUISHING** *Cunningham v. International R. Co.*, 51 Tex. 503.

131. Duty to employ competent and skillful servants.—The negligence for which a carrier of passengers is liable includes the skill of its servants. *Grand Rapids & I. R. Co. v. Boyd*, 65 Ind. 526. See also *Nashville & C. R. Co. v. Messino*, 1 Sneed (Tenn.) 220. *Carmanty v. Mexican Gulf R. Co.*, 5 La. Ann. 703.

A company is responsible to a passenger for the unskillfulness and incompetency of one employed as a conductor. *Alexander v. Louisville & N. R. Co.*, 25 Am. & Eng. R. Cas. 458, 83 Ky. 589.

Carriers of passengers not only engage for the competent skill of their employés, but for its faithful and continued application. *Gillenwater v. Madison & I. R. Co.*, 5 Ind. 339.

The law requires of persons engaged in the carriage of passengers by railroad the highest degree of care, diligence, and skill known to careful, diligent, and skillful persons engaged in that business. *Montgomery & E. R. Co. v. Mallette*, 92 Ala. 209, 9 So. Rep. 363. And see also *Sullivan v. Philadelphia & R. R. Co.*, 30 Pa. St. 234. *International & G. N. R. Co. v. Halloren*, 3 Am. & Eng. R. Cas. 343, 53 Tex. 46, 37 Am. Rep. 744.

Where a passenger is injured in a collision caused by the negligence of a watchman at the crossing of two roads, such watchman being in the employ of the company on whose road the passenger was riding at the time he was injured, it is no defense that the defendant had no knowledge of the watchman's incompetency until after the accident. *Grand Rapids & I. R. Co. v. Ellison*, 39 Am. & Eng. R. Cas. 480, 117 Ind. 234, 20 N. E. Rep. 135.

132. Employes need not be men of extraordinary skill.—While the highest degree of care, diligence, and skill is exacted of those engaged in the carriage of passengers by railroads, a charge which asserts that it must be exercised by men of extraordinary care, skill, and diligence is erroneous. *Gadsden & A. U. R. Co. v. Causter*, 58 Am. & Eng. R. Cas. 258, 97 Ala. 235, 12 So. Rep. 439.—**APPROVING** *Louisville & N. R. Co. v. Jones*, 83 Ala. 376; *Georgia Pac. R. Co. v. Love*, 91 Ala. 432; *Leach v. Bush*, 57 Ala. 145; *South & N. Ala. R. Co. v. Bees*, 82 Ala. 340; *Alabama G. S. R. Co. v. Hill*, 93 Ala. 514. **QUOTING** *Montgomery & E. R. Co. v. Mallette*, 92 Ala. 209.

133. Liability for negligence or acts of third persons.*—The rule that a carrier of passengers is bound to exercise the highest degree of care that is possible to human foresight and prudence does not require a construction that will make the carrier liable for the wrongful acts of strangers, unless the carrier was remiss in not discovering them in time to avert the

* See also **INDEPENDENT CONTRACTOR**, § 25.

2 D. R. D.—23.

* Liability of company for personal injuries caused by wrongful act of stranger, see note, 22 L. R. A. 306. See also *ante*, 129 (4).

injury; nor for an impracticable character or extent of precaution which could not be observed without so ruinous a cost as to destroy the business; and in all cases the liability is only such as results from negligence. *Fredericks v. Northern C. R. Co.*, 58 Am. & Eng. R. Cas. 91, 157 Pa. St. 103, 27 Atl. Rep. 689.—APPLYING *Meier v. Pennsylvania R. Co.*, 64 Pa. St. 225. QUOTING *Philadelphia & R. R. Co. v. Hummell*, 44 Pa. St. 375; *Bowen v. New York C. R. Co.*, 18 N. Y. 408.

Where a passenger on a train, while sitting at the window of a car, was injured by a missile, the nature and origin of which was unknown, and there was nothing to connect the accident with a defect in any of the appliances of transportation, or any negligence on the part of the company or its employes, there can be no recovery against the company. *Thomas v. Philadelphia & R. R. Co.*, 148 Pa. St. 180, 23 Atl. Rep. 989.—DISTINGUISHING *Pennsylvania R. Co. v. MacKinney*, 124 Pa. St. 462.—See also *Chicago & N. W. R. Co. v. Scates*, 90 Ill. 586.

Where a passenger, at the command of the persons in charge of a moving train, jumps therefrom upon the platform of a station and alights safely, but is run against by another passenger alighting at the same time, and is thrown under the train by the force of the collision and injured, the company, in the absence of a further showing, is not liable. *Reibel v. Cincinnati, I., St. L. & C. R. Co.*, 114 Ind. 476, 15 West. Rep. 331, 17 N. E. Rep. 107.

Where a company has provided proper appliances and means to assist passengers in leaving its cars at a station it is not liable for injuries sustained by a passenger who, in alighting from a car and while in the act of leaving the steps, is rudely jostled by an impatient person seeking to get aboard. *Ellinger v. Philadelphia, W. & B. R. Co.*, 58 Am. & Eng. R. Cas. 429, 153 Pa. St. 215, 25 Atl. Rep. 1132.—DISTINGUISHING *Pennsylvania R. Co. v. Peters*, 30 Am. & Eng. R. Cas. 607, 116 Pa. St. 206.

A carrier is not liable to a passenger for injuries sustained by the rude and hasty act of a person entering a station in pushing a door open just as the passenger is leaving thereby. *Graeff v. Philadelphia & R. R. Co.*, (Pa.) 58 Am. & Eng. R. Cas. 431, 28 Atl. Rep. 1107.

134. Duty to inform or warn pas-

senger.*—When a passenger carrier cannot maintain an absolute barrier against danger, it is his next duty to warn his passengers; and if he omits such warning he will be liable for any injury caused by that danger. *Brockway v. Lascala*, 1 Edm. Sel. Cas. (N. Y.) 135.

Cars were so constructed that when at rest the platform of each touched, but when in motion were so far apart that a person might fall between them. Plaintiff entered the train while at rest, and while attempting to pass from one to the other the train started and she fell between two cars and was injured. The conductor, who was familiar with the facts, was on the platform at the time, but was imperatively engaged in other duties and gave no warning. *Held*, that ordinarily it was the duty of the conductor to give warning of such danger, but being prevented from doing so in this case, his conduct did not constitute actionable negligence. *Clune v. Brooklyn El. R. Co.*, 15 N. Y. S. R. 825, 48 Hun 618, 1 N. Y. Supp. 239.

135. Right to rely upon servant's declarations and directions.†—A passenger upon a train has a right to act upon the conduct and directions of the agents of the corporation. *Lake Erie & W. R. Co. v. Fix*, 11 Am. & Eng. R. Cas. 109, 88 Ind. 381, 45 Am. Rep. 464.

No duty of care is imposed upon a company by reason of a conductor of a train, in response to a question asked by a passenger, answering and giving the length of time the train managed by the conductor would stop over at a station ahead upon the road. *Missouri Pac. R. Co. v. Foreman*, 73 Tex. 311, 11 S. W. Rep. 326.

136. Transferring from one train to another beyond a wreck.—A passenger train encountered a wrecked freight train, about midnight of a dark and rainy night. The passengers were transferred to a train beyond the wreck. To reach this train a ditch about three feet deep had to be crossed. Across it was placed a plank; but no light was stationed by it by the employes, nor any warning of it given to the passengers. A passenger, in attempting to

* See also *post*, 190, 223, 304, 473.

Duty to give passenger information which would prevent exposure to danger or injury, see note, 7 Am. St. Rep. 830.

† See also *post*, 242, 355, 370, 407, 429-431, 470, 496.

cross, fell and broke his leg, causing him to suffer much pain, lose time, etc. In an action by him against the company for damages—held, that the failure to place a light at the crossing of the ditch, or to give any warning thereof, or to take some means to guard passengers against injury from the extra hazard to which they were exposed in crossing, was such negligence as would render the company liable for any injury sustained by passengers in crossing. *Vicksburg & M. R. Co. v. Howe*, 52 Miss. 202.

*b. Degree of Care.**

137. Rule of extraordinary diligence, generally.†—(1) *Statement of rule.*—A carrier owes a peculiar duty to its passengers for hire. *Denver & R. G. R. Co. v. Hodgson*, 18 Colo. 117, 31 Pac. Rep. 954. *Atchison, T. & S. F. R. Co. v. Shean*, 58 Am. & Eng. R. Cas. 360, 18 Colo. 368, 33 Pac. Rep. 108.

Public policy requires that a carrier should be held to the greatest possible care and diligence, and that the personal safety of passengers should not be left to the sport of chance or the negligence of a careless agent. *Bryan v. Missouri Pac. R. Co.*, 32 Mo. App. 228.

A carrier is bound to exercise the strictest vigilance in conveying a passenger to his destination and in setting him down safely. *Waller v. Hannibal & St. J. R. Co.*, 83 Mo. 608.—QUOTING *Higgins v. Hannibal & St. J. R. Co.*, 36 Mo. 418; *Kelly v. Hannibal & St. J. R. Co.*, 70 Mo. 609.

The degree of care required of carriers depends somewhat upon the value and importance of what is to be carried. The greater the value to be transported the greater need of care and caution on the part of the carrier. If the business is of the highest moment—e. g., the transportation of passengers—then the skill, care, and diligence should be in proportion thereto. *Knight v. Portland, S. & P. R. Co.*, 56 Me. 234.

* See also *post*, 162-164, 180, 266, 288, 289, 348, 360, 417.

† Care and diligence required of carriers of passengers, see note, 6 L. R. A. 241, 8 L. R. A. 673.

Degree of diligence required of carriers of passengers, see notes, 8 AM. & ENG. R. CAS. 401; 43 AM. DEC. 355.

Amount of care that carriers of passengers are bound to exercise, see note, 73 AM. DEC. 538.

Carriers of passengers are held to the strictest responsibility for care, vigilance, and skill on the part of themselves and those employed by them. *Sherley v. Billings*, 8 Bush (Ky.) 147.

The policy of the law requires carriers to use a high degree of care in transporting passengers to guard against probable injury. *Lambeth v. North Carolina R. Co.*, 66 N. Car. 494.

(2) — *extraordinary care.*—In duties towards a passenger directly involving his safety the carrier is bound to extraordinary diligence. *Central R. & B. Co. v. Perry*, 58 Ga. 461, 16 Am. Ry. Rep. 122. *Central R. Co. v. Freeman*, 75 Ga. 331. *Raymond v. Burlington, C. R. & N. R. Co.*, 18 Am. & Eng. R. Cas. 217, 13 Am. & Eng. R. Cas. 6, 65 Iowa 152, 17 N. W. Rep. 923, 21 N. W. Rep. 495. *Huelsenkamp v. Citizens' R. Co.*, 37 Mo. 537. *Spellman v. Lincoln Rapid Transit Co.*, 58 Am. & Eng. R. Cas. 297, 36 Neb. 890, 55 N. W. Rep. 270.

Carriers of passengers are bound to use extraordinary care and diligence, and are excused only by reason of force or pure accident. *The Oriflamme*, 3 Sawy. (U. S.) 397.

Extraordinary diligence is the measure of care which conductors must exercise towards passengers. *Georgia R. Co. v. Homer*, 27 Am. & Eng. R. Cas. 186, 73 Ga. 251.

(3) — *highest degree of care.*—Passengers are entitled to the highest degree of care on the part of the carrier that it can render under the circumstances. *Baltimore & O. R. Co. v. State*, 12 Am. & Eng. R. Cas. 149, 60 Md. 449.

A company is bound to use the highest degree of care and diligence for the safety of its passengers. *New York, L. E. & W. R. Co. v. Daugherty*, 6 Am. & Eng. R. Cas. 139, 11 W. N. C. (Pa.) 437. *Little Rock & Ft. S. R. Co. v. Miles*, 13 Am. & Eng. R. Cas. 10, 40 Ark. 298, 48 Am. Rep. 10. *Jeffersonville R. Co. v. Hendricks*, 26 Ind. 228. *Louisville, N. A. & C. R. Co. v. Snyder*, 37 Am. & Eng. R. Cas. 137, 117 Ind. 435, 3 L. R. A. 434, 20 N. E. Rep. 284. *Kentucky & I. Bridge Co. v. Quinkert*, 2 Ind. App. 244, 28 N. E. Rep. 338. *Carroll v. Staten Island R. Co.*, 58 N. Y. 126, 7 Am. Ry. Rep. 25, 9 Am. Ry. Rep. 486; *affirming* 65 Barb. 32. *Galveston C. R. Co. v. Hewitt*, 67 Tex. 473, 3 S. W. Rep. 705. *Cleveland, C., C. & I. R. Co. v. Manson*, 30 Ohio St. 451. *St.*

Louis, A. & T. R. Co. v. Finley, 79 Tex. 85, 15 S. W. Rep. 266. *Florida Southern R. Co. v. Hirst*, 52 Am. & Eng. R. Cas. 409, 30 Fla. 1, 11 So. Rep. 506. *Smith v. St. Louis, K. C. & N. R. Co.*, 69 Mo. 32. *Moore v. Des Moines & Ft. D. R. Co.*, 27 Am. & Eng. R. Cas. 315, 69 Iowa 491, 30 N. W. Rep. 51. *Texas C. R. Co. v. Stuart*, 1 Tex. Civ. App. 642, 20 S. W. Rep. 962.

And is liable to a passenger who is himself without fault for an omission or failure to exercise this care. *Terre Haute & I. R. Co. v. Buck*, 18 Am. & Eng. R. Cas. 234, 96 Ind. 346, 49 Am. Rep. 168.—QUOTED IN *Hoggatt v. Evansville & T. H. R. Co.*, 3 Ind. App. 437.

A passenger is entitled to a safe transit. *Grand Rapids & I. R. Co. v. Ellison*, 39 Am. & Eng. R. Cas. 480, 117 Ind. 234, 20 N. E. Rep. 135. And it is the duty of a company to exercise the highest practical care to safely carry him through his trip. *Willmott v. Corrigan Con. St. R. Co.*, 106 Mo. 535, 17 S. W. Rep. 490.

138. More than ordinary care.—Carriers owe more than an ordinary duty to their passengers. *Franklin v. Southern C. M. R. Co.*, 85 Cal. 63, 24 Pac. Rep. 723.

They are bound to use more than ordinary care and diligence. *Libby v. Maine C. R. Co.*, 58 Am. & Eng. R. Cas. 81, 85 Me. 34, 26 Atl. Rep. 943. *Spellman v. Lincoln Rapid Transit Co.*, 58 Am. & Eng. R. Cas. 297, 36 Neb. 890, 55 N. W. Rep. 270. *Carrico v. West Virginia C. & P. R. Co.*, 52 Am. & Eng. R. Cas. 393, 35 W. Va. 389, 14 S. E. Rep. 12.

They are liable for injuries resulting from want of all ordinary and reasonable care in all cases, in general, and for the want of extraordinary care, in the case of passengers and others under their care. What is ordinary and reasonable care depends on the facts of each case. *Savannah, F. & W. R. Co. v. Stewart*, 71 Ga. 427.

A conductor of a train of cars is engaged in an important business and is bound to use reasonable care for the safety of passengers. And at cross-roads, or where the tracks lie very near each other, a more than ordinary degree of care is requisite. *Curtis v. Central R. Co.*, 6 McLean (U. S.) 401.

The degree of care exacted is greater than that to be exercised in respect to a stranger or trespasser.* *Carrico v. West*

Virginia C. & P. R. Co., 52 Am. & Eng. R. Cas. 393, 35 W. Va. 389, 14 S. E. Rep. 12.

139. Utmost care and human foresight.*—Carriers of passengers are bound to use the utmost care and diligence in providing for their safety by the use of sufficient and suitable modes of conveyance, so as to prevent injuries which human care and foresight can guard against. *Chicago, B. & Q. R. Co. v. George*, 19 Ill. 510.—MODIFIED IN *Chicago & A. R. Co. v. Gretzner*, 46 Ill. 74.—*George v. St. Louis, I. M. & S. R. Co.*, 1 Am. & Eng. R. Cas. 294, 34 Ark. 613. *Denver & R. G. R. Co. v. Hodgson*, 18 Colo. 117, 31 Pac. Rep. 954. *Louisville C. R. Co. v. Weams*, 80 Ky. 420. *Wheaton v. North Beach & M. R. Co.*, 36 Cal. 590. *Atchison, T. & S. F. R. Co. v. Shean*, 58 Am. & Eng. R. Cas. 360, 18 Colo. 368, 33 Pac. Rep. 108. *Philadelphia, W. & B. R. Co. v. Anderson*, 44 Am. & Eng. R. Cas. 345, 72 Md. 519, 20 Atl. Rep. 2. *Taylor v. Grand Trunk R. Co.*, 48 N. H. 304. *Baltimore & Y. Turnpike Road v. Leonhardt*, 27 Am. & Eng. R. Cas. 194, 66 Md. 70, 5 Atl. Rep. 346. *Nagle v. California Southern R. Co.*, 88 Cal. 86, 25 Pac. Rep. 1106. *Fisher v. West Virginia & P. R. Co.*, (W. Va.) 58 Am. & Eng. R. Cas. 337, 19 S. E. Rep. 578. *Louisville, N. A. & C. R. Co. v. Pedigo*, 27 Am. & Eng. R. Cas. 310, 108 Ind. 481, 8 N. E. Rep. 627. *Kellow v. Central Iowa R. Co.*, 21 Am. & Eng. R. Cas. 485, 68 Iowa 470, 23 N. W. Rep. 740, 27 N. W. Rep. 466. *Baltimore & O. R. Co. v. State*, 21 Am. & Eng. R. Cas. 202, 63 Md. 135. *Gainard v. Rochester City & B. R. Co.*, 18 N. Y. S. R. 692, 2 N. Y. Supp. 470. *Laing v. Colder*, 8 Pa. St. 479. *Oliver v. New York & E. R. Co.*, 1 Edm. Sel. Cas. (N. Y.) 589. *Baltimore & O. R. Co. v. Breinig*, 25 Md. 378. *Caldwell v. Murphy*, 1 Duer (N. Y.) 233. *East Tenn., V. & G. R. Co. v. Mitchell*, 11 Heisk. (Tenn.) 400. *Spellman v. Lincoln Rapid Transit Co.*, 58 Am. & Eng. R. Cas. 297, 36 Neb. 890, 55 N. W. Rep. 270.—QUOTING *Smith v. St. Paul City R. Co.*, 32 Minn. 1; *Sales v. Western Stage Co.*, 4 Iowa 546; *Wheaton v. North Beach & M. R. Co.*, 36 Cal. 590; *Maverick v. Eighth Ave. R. Co.*, 36 N. Y. 378; *Philadelphia & R. R. Co. v. Derby*, 14 How. (U. S.) 485; *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 291.—*Schultz v. Pacific R.*

* Carriers of passengers bound to highest degree of care, skill, and diligence, see note, 2 L. R. A. 84.

* See also ante, 95.

Co., 36 Mo. 13. *Chicago & N. W. R. Co. v. Reilly*, 40 Ill. App. 416. *Eureka Springs R. Co. v. Timmons*, 40 Am. & Eng. R. Cas. 698, 51 Ark. 459, 11 S. W. Rep. 690. *Pershing v. Chicago, B. & Q. R. Co.*, 34 Am. & Eng. R. Cas. 405, 71 Iowa 561, 32 N. W. Rep. 488. *Yerkes v. Keokuk N. L. Packet Co.*, 7 Mo. App. 265. *McLean v. Burbank*, 11 Minn. 277 (Gil. 189). *Ladd v. Foster*, 12 Sawy. (U. S.) 547, 31 Fed. Rep. 827.

In the absence of a special contract carriers are required to carry passengers as safely as human foresight and reasonable care will permit. *Ryan v. Gilmer*, 2 Mont. 517.

A carrier of passengers is bound to exercise the very highest and utmost degree of care possible, and in an action for personal injuries it is correct to so charge. *Dlabola v. Manhattan R. Co.*, 8 N. Y. Supp. 334, 29 N. Y. S. R. 149.—APPLYING *Brown v. New York C. R. Co.*, 34 N. Y. 404; *Johnson v. Hudson River R. Co.*, 20 N. Y. 65; *Fero v. Buffalo & S. L. R. Co.*, 22 N. Y. 213; *Webber v. Herkimer & M. St. R. Co.*, 109 N. Y. 314, 16 N. E. Rep. 358.

Those intrusted with the management of a train are bound to exercise the utmost care, skill, and prudence in their relation to other passengers. *Conroy v. Pennsylvania R. Co.*, 1 Pittsb. (Pa.) 440.

A carrier of passengers is bound, in the management of its cars and trains and in making connections of cars, to exercise the highest degree of care which it reasonably can to prevent such injuries to its passengers as human care and forethought can avert. *White v. Fitchburg R. Co.*, 18 Am. & Eng. R. Cas. 140, 136 Mass. 321.

The duty of a carrier of passengers is to exercise the utmost care and caution. He has no right to experiment at the risk of those whom he carries. *Barrett v. Third Ave. R. Co.*, 45 N. Y. 628; affirming 8 Abb. Pr. N. S. 205, 1 Sweeney 568.—FOLLOWED IN *Macer v. Third Ave. R. Co.*, 15 J. & S. (N. Y.) 461.

The care and circumspection required of a company with respect to passengers in its charge is the utmost which can be exercised under the circumstances, short of a warranty of their safety. *International & G. N. R. Co. v. Welch*, 58 Am. & Eng. R. Cas. 70, 86 Tex. 204, 24 S. W. Rep. 390.—FOLLOWING *International and G. N. R. Co. v. Halloren*, 3 Am. & Eng. R. Cas. 343, 53 Tex. 53. NOT FOLLOWING *Indianapolis &*

St. L. R. Co. v. Horst, 93 U. S. 295; *Philadelphia & R. R. Co. v. Derby*, 14 How. (U. S.) 486. QUOTING *Missouri Pac. R. Co. v. Brown*, 75 Tex. 269.

While carriers of passengers are not insurers of absolute safety, they are bound to exercise reasonable care according to the nature of their contract; and as their employment involves the safety of the lives and limbs of their passengers, the law requires the highest degree of care which is consistent with the nature of their undertaking. *Baltimore & O. R. Co. v. State*, 12 Am. & Eng. R. Cas. 149, 60 Md. 449.—REVIEWED IN *Philadelphia, W. & B. R. Co. v. Anderson*, 72 Md. 519.

A company in the transportation of passengers, though not the insurer of their lives, is required to use the utmost skill and diligence in carrying them safely, and to employ those means peculiar to this mode of transit known to skillful and competent persons. *Hazard v. Chicago, B. & Q. R. Co.*, 1 Biss. (U. S.) 503.

140. Liability for slight negligence.

—(1) Generally.—The degree of responsibility to which carriers of passengers are subjected is not ordinary care, but extraordinary care, which renders them liable for slight negligence. *Huelsenkamp v. Citizens' R. Co.*, 37 Mo. 537.—REVIEWING *Galena & C. U. R. Co. v. Yarwood*, 15 Ill. 468; *Carroll v. New York & N. H. R. Co.*, 1 Duer (N. Y.) 571; *Chamberlain v. Milwaukee & M. R. Co.*, 7 Wis. 425; *Trow v. Vermont C. R. Co.*, 24 Vt. 487.—DISTINGUISHED IN *Ashbrook v. Frederick Ave. R. Co.*, 18 Mo. App. 290. QUOTED IN *Bryan v. Missouri Pac. R. Co.*, 32 Mo. App. 228. REVIEWED IN *Fitch v. Pacific R. Co.*, 45 Mo. 322.—*Furnish v. Missouri Pac. R. Co.*, 102 N. Y. 438, 13 S. W. Rep. 1044. *Barrett v. Third Ave. R. Co.*, 45 N. Y. 628; affirming 8 Abb. Pr. N. S. 205, 1 Sweeney 568. *Boss v. Providence & W. R. Co.*, 21 Am. & Eng. R. Cas. 364, 15 R. I. 149, 1 Atl. Rep. 9.

When a company contracts to give the passenger a safe transportation to the station of his destination, until it has carried him to that regular and safe landing it is responsible for slight neglect, extraordinary diligence being the measure of its care for him to that place. *Central R. Co. v. Thompson*, 76 Ga. 770.

The degree of responsibility to which carriers of passengers are subjected—they being bound to the utmost care and skill in the

performance of their duty to them—is not ordinary care, which will make them liable only for ordinary neglect, but extraordinary care, which renders them liable for slight neglect. The same degree of care is required for a gratuitous passenger as would be required in the case of a passenger paying his fare, and the same liability incurred, and conditions of exemption will not absolve the carrier from liability. *Bryan v. Missouri Pac. R. Co.*, 32 *Mo. App.* 228.—*APPROVING Jacobus v. St. Paul & C. R. Co.*, 20 *Minn.* 125. *QUOTING Huelsenkamp v. Citizens' R. Co.*, 37 *Mo.* 538.

Railway companies who are carriers of passengers are required to use all the means reasonably in their power to prevent accidents. It is not necessary to charge them with liability that they be guilty of great negligence. It is enough if the accident was caused solely by any negligence on their part, however slight, if by the exercise of the strictest care or precaution, reasonably within their power, the injury would not have been sustained. *Seymour v. Chicago, B. & Q. R. Co.*, 3 *Biss. (U. S.)* 43.—*DISTINGUISHED IN Ohio & M. R. Co. v. Dickerson*, 59 *Ind.* 317.

(2) *Slightest or smallest negligence.*—Common carriers are not insurers of their passengers, but are bound to the utmost care and diligence of very cautious persons, as far as human care and foresight can go, and are liable for an injury resulting from the slightest negligence, if human prudence and foresight might have guarded against it. *Treadwell v. Whittier*, 80 *Cal.* 574, 22 *Pac. Rep.* 266.

Carriers of passengers by steam are responsible for the smallest or slightest negligence. *Little Rock & Ft. S. R. Co. v. Miles*, 13 *Am. & Eng. R. Cas.* 10, 40 *Ark.* 298, 48 *Am. Rep.* 10. *Jeffersonville R. Co. v. Hendricks*, 26 *Ind.* 228. *Kentucky & I. Bridge Co. v. Quinkert*, 2 *Ind. App.* 244, 28 *N. E. Rep.* 338.—*QUOTING Jeffersonville R. Co. v. Hendricks*, 26 *Ind.* 228.—*Spellman v. Lincoln Rapid Transit Co.*, 58 *Am. & Eng. R. Cas.* 297, 36 *Neb.* 890, 55 *N. W. Rep.* 270. *Carrico v. West Virginia C. & P. R. Co.*, 52 *Am. & Eng. R. Cas.* 393, 35 *W. Va.* 389, 14 *S. E. Rep.* 12. *Taylor v. Grand Trunk R. Co.*, 48 *N. H.* 304.—*FOLLOWING Cornwall v. Sullivan R. Co.*, 28 *N. H.* 169; *Clark v. Barrington*, 41 *N. H.* 51. *QUOTING Philadelphia & R. R. Co. v. Derby*, 14 *How. (U. S.)* 486.—*Schultz v. Pacific R. Co.*, 36

Mo. 13. *Eureka Springs R. Co. v. Timmons*, 40 *Am. & Eng. R. Cas.* 698, 51 *Ark.* 439, 11 *S. W. Rep.* 690. *Pershing v. Chicago, B. & Q. R. Co.*, 34 *Am. & Eng. R. Cas.* 405, 71 *Iowa* 561, 32 *N. W. Rep.* 488. *McLean v. Burbank*, 11 *Minn.* 277 (*Gil.* 189). *Jamison v. San José & S. C. R. Co.*, 3 *Am. & Eng. R. Cas.* 350, 55 *Cal.* 593.

And the law compels them to repel, by satisfactory proofs, every imputation of such negligence. When carriers undertake to convey passengers by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. Any negligence or default in such case will make such carriers liable in damages under the statute. *Baltimore & O. R. Co. v. Wightman*, 29 *Gratt. (Va.)* 431, 17 *Am. Ry. Rep.* 351.

The slightest omission of any measure or means to avoid danger against which human foresight or prudence could guard will make him liable for every accident which may be the consequence of it. *Tennery v. Pippinger*, 1 *Phila. (Pa.)* 543.

If an injury occurs to a passenger by reason of the slightest omission in regard to the highest perfection of all the appliances of transportation, or the mode of management at the time the injury occurs, the carrier is responsible. *George v. St. Louis, I. M. & S. R. Co.*, 1 *Am. & Eng. R. Cas.* 294, 34 *Ark.* 613.

141. Extent of the rule of extraordinary care, generally.—The extent of the care and diligence which both carrier and passenger must exercise is measured by the known perils to which passengers are exposed by the particular kind of conveyance. The more hazardous the mode the greater the care and diligence required by both parties. *Chicago, B. & Q. R. Co. v. Hazzard*, 26 *Ill.* 373.—*DISTINGUISHING Stokes v. Saltonstall*, 13 *Pet. (U. S.)* 190.—*FOLLOWED IN Chicago & A. R. Co. v. Gretzner*, 46 *Ill.* 74.

The use of every possible precaution is not the rule. The carrier must adopt such precautions of known value as are sanctioned by experience, and secure such skilled labor as it can reasonably procure. *International & G. N. R. Co. v. Halloren*, 3 *Am. & Eng. R. Cas.* 343, 53 *Tex.* 46, 37 *Am. Rep.* 744.

The carrier must omit no care to discover and prevent danger and injury to a passen-

ger or passengers that is reasonable and practicable. The public exigency and security demand this much of the carrier at all times and under all circumstances. *Chicago & A. R. Co. v. Pillsbury*, 31 *Am. & Eng. R. Cas.* 24, 123 *Ill.* 9, 14 *N. E. Rep.* 22, 11 *West. Rep.* 757.

The duty of the carrier to exercise the highest degree of care for the safety of his passenger is founded on contract, and where the contract is broken, and the passenger suffers consequential injury, the carrier cannot escape liability because the proximate cause of the injury was the negligent act of another. *Kellow v. Central Iowa R. Co.*, 21 *Am. & Eng. R. Cas.* 485, 68 *Iowa* 470, 23 *N. W. Rep.* 740, 27 *N. W. Rep.* 466.

When a company has created extra danger, it is bound to use extra precautions, and the precautions to be adopted must be adequate to insure the safety of every passenger who exercises ordinary care. *Klein v. Jewett*, 26 *N. J. Eq.* 474; *affirmed in* 27 *N. J. Eq.* 550.

It is the duty of a company engaged in the transportation of passengers, whether by freight or passenger trains, to so run and manage its trains and to so handle its passengers that no one shall be injured by its own negligence. *New York, C. & St. L. R. Co. v. Doane*, 37 *Am. & Eng. R. Cas.* 87, 115 *Ind.* 435, 15 *West. Rep.* 465, 17 *N. E. Rep.* 913, 1 *L. R. A.* 157, 7 *Am. St. Rep.* 451.

Any reasonable possibility or probability of danger demands action on the part of the carrier. *Meyer v. St. Louis, I. M. & S. R. Co.*, 58 *Am. & Eng. R. Cas.* 111, 54 *Fed. Rep.* 116.

142. Care such as used by prudent persons.—(1) *Cautious persons.*—The rule is that a carrier of passengers for hire must use the utmost care and skill which prudent, cautious men are accustomed to use under like circumstances. *Louisville City R. Co. v. Weams*, 80 *Ky.* 420. *Fuller v. Naugatuck R. Co.*, 21 *Conn.* 557. *Gilson v. Jackson County Horse R. Co.*, 12 *Am. & Eng. R. Cas.* 132, 76 *Mo.* 282. *Brockway v. Lascaia*, 1 *Edm. Sel. Cas. (N. Y.)* 135. *Boss v. Providence & W. R. Co.*, 21 *Am. & Eng. R. Cas.* 364, 15 *R. I.* 149, 1 *Atl. Rep.* 9. *Bowen v. New York C. R. Co.*, 18 *N. Y.* 408.

Provided that the carrier's liability is not restricted by special contract. *Thayer v. St. Louis, A. & T. H. R. Co.*, 22 *Ind.* 26.

If the carrier fails to exercise such degree

of care and skill, and an injury results therefrom without the party who is injured contributing materially or substantially thereto, the road is liable in damages. *Mackoy v. Missouri Pac. R. Co.*, 5 *McCrory (U. S.)* 538.

Negligence cannot be imputed to a passenger for not anticipating culpable negligence on the part of the carrier, but he has a right to act on the presumption that the employes of the carrier will use that degree of care which persons of ordinary prudence are accustomed to employ under the same or similar circumstances. *Franklin v. Southern Cal. Motor Road Co.*, 85 *Cal.* 63, 24 *Pac. Rep.* 723.

Railroad companies, as to their passengers, should be held to the exercise of the utmost care and skill which prudent persons would be likely to exercise as to themselves under the like circumstances, and in the conduct of a business so hazardous as railroading. *Louisville Southern R. Co. v. Minogue*, 90 *Ky.* 369, 14 *S. W. Rep.* 357.

Care and negligence are relative terms, and the degree of caution required of carrier and passenger is to be estimated, in a measure, by the hazard to life and limb; it is always such care and vigilance as a prudent rational person would exercise under like circumstances. *Dougherty v. Missouri R. Co.*, 21 *Am. & Eng. R. Cas.* 497, 81 *Mo.* 325, 51 *Am. Rep.* 239; *affirming* 9 *Mo. App.* 478.

(2) *Very cautious persons.*—Carriers, to secure the safety of passengers, must use more care than prudent men would ordinarily do under the same circumstances. *Louisville, N. A. & C. R. Co. v. Snyder*, 37 *Am. & Eng. R. Cas.* 137, 117 *Ind.* 435, 20 *N. E. Rep.* 284, 3 *L. R. A.* 434.

They are bound to exercise toward their passengers the highest degree of care of a very prudent and cautious person. *O'Connell v. St. Louis, C. & W. R. Co.*, 106 *Mo.* 482, 17 *S. W. Rep.* 494. *Nagle v. California Southern R. Co.*, 88 *Cal.* 86, 25 *Pac. Rep.* 1106. *Libby v. Maine C. R. Co.*, 58 *Am. & Eng. R. Cas.* 81, 85 *Me.* 34, 26 *Atl. Rep.* 943. *Taylor v. Grand Trunk R. Co.*, 48 *N. H.* 304. *Gainard v. Rochester City & B. R. Co.*, 18 *N. Y. S. R.* 692, 2 *N. Y. Supp.* 470. *Oliver v. New York & E. R. Co.*, 1 *Edm. Sel. Cas. (N. Y.)* 589.

The care required of a carrier of persons is that care, prudence, and caution which a very careful person would use and exercise

in a like business and under like circumstances, or the utmost care and skill which prudent men are accustomed to use under similar circumstances, or such skill, diligence, and foresight as is exercised by a very cautious person under like circumstances. *Smith v. Chicago & A. R. Co.*, 52 *Am. & Eng. R. Cas.* 483, 108 *Mo.* 243, 18 *S. W. Rep.* 971.

Passenger carriers bind themselves to carry safely those whom they take into their coaches or cars, as far as human care and foresight will go; that is, for the utmost care and diligence of very cautious persons. *Wheaton v. North Beach & M. R. Co.*, 36 *Cal.* 590. *Richmond City R. Co. v. Scott*, 44 *Am. & Eng. R. Cas.* 418, 86 *Va.* 902, 11 *S. E. Rep.* 404.

They are not insurers of the safety of their passengers further than could be required by the exercise of such a high degree of foresight as to possible dangers, and such a high degree of prudence in guarding against them as would be used by very cautious, prudent, and competent persons under like circumstances. *International & G. N. R. Co. v. Halloren*, 3 *Am. & Eng. R. Cas.* 343, 53 *Tex.* 46, 37 *Am. Rep.* 744.—QUOTED IN *Fordyce v. Withers*, 1 *Tex. Civ. App.* 540.

In an action by a passenger to recover for a personal injury, the law as to the care the company should exercise toward the passenger is correctly stated in an instruction to the effect that "the railroad company was required to use the utmost practicable care in providing for the safety of passengers on its road, and to use that high degree of prudence, diligence, and care in building its road and maintaining its track and in running its trains as would be used by very cautious, prudent, and competent persons under similar circumstances; and if it failed to use such degree of care, such failure was negligence." *Levy v. Campbell*, (*Tex.*) 19 *S. W. Rep.* 438.

143. Care such as used by good railroad men.—The care required of a carrier towards its passengers may also be defined as the highest practicable care, caution, and diligence which capable and faithful railroad men would exercise in similar circumstances. *Furnish v. Missouri Pac. R. Co.*, 102 *Mo.* 438, 13 *S. W. Rep.* 1044.

Carriers fulfil their duty if they furnish and conduct their road in the manner gen-

erally found and believed to be safe by prudent railway companies. *Grand Rapids & I. R. Co. v. Huntley*, 38 *Mich.* 537.

A charge to the jury that carriers are "legally bound to exert the utmost care and skill in conveying their passengers and are responsible for the slightest negligence or want of skillfulness either in themselves or their servants;" that they are "bound to the utmost care and skill in the performance of their duty;" that the degree of responsibility to which they are subjected is "not ordinary care, which will make them liable for ordinary neglect, but extraordinary care, which renders them liable for slight neglect," etc., is too exacting in its requirements. Railroads are only held to the duty of being prudent and to the diligence embraced by the common rules of good railroad management. *Michigan C. R. Co. v. Coleman*, 28 *Mich.* 440, 12 *Am. Ry. Rep.* 59.

A company in coupling a freight train to a passenger car having passengers already in it to be carried by the train is bound to exercise extraordinary diligence—that is, such diligence as very prudent persons would use with a like train under like circumstances. *Chattanooga, R. & C. R. Co. v. Huggins*, 52 *Am. & Eng. R. Cas.* 473, 89 *Ga.* 494, 15 *S. E. Rep.* 848. See also *Fisher v. Southern Pac. R. Co.*, 89 *Cal.* 399, 26 *Pac. Rep.* 894.

144. Towards women and children.*—It must not be understood to be a rule of law that a carrier owes to every passenger precisely the same care, without respect to age, sex, or bodily infirmity. The degree of care is the same—that is to say the greatest care—but what would be sufficient to insure the safety of one person may not be sufficient for others, physically less able to take care of themselves. So held where a female passenger was injured. *St. Louis, A. & T. R. Co. v. Finley*, 79 *Tex.* 85, 15 *S. W. Rep.* 266.

It is the duty of a company to exercise the highest degree of care in the carriage of passengers; and it is the duty of conductors, when women and children are upon their trains, not to direct them to go into places of danger without furnishing such assistance as will prevent accident. *Cleveland, C., C. & I. R. Co. v. Manson*, 30 *Ohio St.* 451.

*Duty of carrier towards females, see note, 47 *AM. & ENG. R. CAS.* 572. See also CHILDREN, INJURIES TO, 13-19, 42-49.

145. Towards sick and feeble passengers.*—Persons laboring under physical infirmities or otherwise unable to take care of themselves, who travel on railroad trains, must provide proper assistance for themselves, and it is not the duty of the conductor, in the absence of instructions from the company, to render such assistance. *Louisville & N. R. Co. v. Fleming*, 18 Am. & Eng. R. Cas. 347, 14 Lea (Tenn.) 128.—*APPROVING* New Orleans, J. & G. N. R. Co. v. Statham, 42 Miss. 607; *Willets v. Buffalo & R. R. Co.*, 14 Barb. (N. Y.) 585. *QUOTING* *Sheridan v. Brooklyn & N. R. Co.*, 36 N. Y. 39.

Knowledge communicated to the conductor of a train that a passenger is feeble and will need assistance in getting off is notice to the carrier, and it is not necessary to notify every other conductor and train-hand that may be in charge of the train. *Foss v. Boston & M. R. Co.*, (N. H.) 47 Am. & Eng. R. Cas. 566.

In putting off a passenger who has gotten upon the wrong train by mistake, when informed of his dimness of vision or feeble condition, the carrier must use such care as his condition requires to prevent injury. *Columbus, C. & I. C. R. Co. v. Powell*, 40 Ind. 37.

146. Towards passengers mentally incapacitated.†—Where an unattended passenger, after entering upon a journey, becomes sick and unconscious, or insane, it is the duty of the company to remove him from the train and leave him until he is in a fit condition to resume his journey, or until he has obtained the necessary assistance to take care of him to the end of the journey. *Atchison, T. & S. F. R. Co. v. Weber*, 21 Am. & Eng. R. Cas. 418, 33 Kan. 543, 6 Pac. Rep. 877.

The duty of the company to such a passenger does not end with his removal from the train, but it is bound to the exercise of reasonable and ordinary care in temporarily providing for his protection and comfort; and—*held*, that the company may have ex-

ercised due care towards such a passenger, who is without friends or money, when it carefully and prudently removes him from its train and promptly places him in charge of the overseer of the poor. The statute makes it the duty of an overseer of the poor in any township or city to grant temporary relief to any non-resident who may be found lying sick therein, or in distress, and without friends or money, and the expense of providing such relief is to be paid out of the county treasury. *Atchison, T. & S. F. R. Co. v. Weber*, 21 Am. & Eng. R. Cas. 418, 33 Kan. 543, 6 Pac. Rep. 877.—*QUOTED IN* *Indianapolis, P. & C. R. Co. v. Pitzer*, 25 Am. & Eng. R. Cas. 313, 109 Ind. 179, 58 Am. Rep. 387.

The degree of care to be exercised where company accepts as a passenger one who, because of mental and physical disabilities, is unable to take care of himself and who has no assistant, is that which is reasonably necessary for the safety of the passenger in view of his mental and physical condition; and whether the railway company exercises such degree of care is a question for a jury. *Croom v. Chicago, M. & St. P. R. Co.*, 52 Minn. 296, 53 N. W. Rep. 1128.

Where a carrier admits an insane person on the train with other passengers the degree of care imposed is the highest, and an instruction that the company "was bound to use the utmost care and diligence that prudent and careful men should have exercised" is erroneous, as the carrier's legal obligation is higher than any degree of care required of prudent men. *Meyer v. St. Louis, I. M. & S. R. Co.*, 54 Fed. Rep. 116, 10 U. S. App. 677, 4 C. C. A. 221.

Where a passenger, by reason of the failure of the train employes to call the stations, attempts to alight at a station called by a fellow-passenger, not his destination, and is thrown from the platform to the track by the sudden starting of the train, and afterwards, while upon the track, between the station and his destination, in a partially unconscious condition from his fall, is negligently run down and killed by a passenger train in charge of employes having knowledge of his fall and condition of mind, the company is liable because of its duty, having knowledge of his fall and mental condition, to use care to protect him from its trains. *Cincinnati, I., St. L. & C. R. Co. v. Cooper*, 120 Ind. 469, 22 N. E. Rep. 340, 6 L. R. A. 241.

* See also *ante*, 113.

Duty towards passengers in feeble health, see note, 47 AM. & ENG. R. CAS. 572.

Duty that companies owe sick, aged, and feeble passengers, see note, 97 AM. DEC. 499.

Degree of care required towards passengers, both well and disabled or sick, see 58 AM. & ENG. R. CAS. 73, *abstr.*

† See also *ante*, 114.

147. Towards intoxicated passengers.*—Carrier must use same care to a drunken as to a sober passenger. *Milliman v. New York C. & H. R. R. Co.*, 66 N. Y. 642; *affirming 4 Hun 409*, 6 T. & C. 585.

If none of the defendant's employes knew that the plaintiff had been drinking, they were bound only to use toward him the care and prudence that a sober man would require for his safety. *Strand v. Chicago & W. M. R. Co.*, 31 Am. & Eng. R. Cas. 54, 67 Mich. 380, 11 West. Rep. 538, 34 N. W. Rep. 712.

Where a passenger is riding on the platform of the car in such a state of intoxication as to be careless and heedless of the danger to which he is exposed, it is the duty of the company, after the conductor has notice of his condition and exposure to danger, to use the ordinary precautions for his safety, such as calling his attention to the danger and the rules of the company forbidding such exposure, and inviting him to go inside of the car. *Fisher v. West Virginia & P. R. Co.*, (W. Va.) 58 Am. & Eng. R. Cas. 337, 19 S. E. Rep. 578.—QUOTING *Carrico v. West Virginia C. & P. R. Co.*, 52 Am. & Eng. R. Cas. 393, 35 W. Va. 390.—And see also *McClelland v. Louisville, N. A. & C. R. Co.*, 18 Am. & Eng. R. Cas. 260, 94 Ind. 276.

148. Greater care than used towards cattle.†—The paramount duty of a railroad company, through its agents intrusted with the conduct of the train, is to look to the safety of the persons and property thereon, subordinate to which is the duty to avoid unnecessary injury to animals straying upon the road. *Louisville & F. R. Co. v. Ballard*, 2 Metc. (Ky.) 177.

149. Limits and exceptions to the rule of extraordinary care, generally.‡—The law requires carriers of passengers to do all that human care, vigilance, and foresight can, under the circumstances, considering the character and mode of con-

veyance, to prevent accident. While they are held to the utmost care which is consistent with the business in which they are engaged, they are not to be held as against every possible danger, nor are they to be held accountable for not taking every possible precaution against danger and accident. *Libby v. Maine C. R. Co.*, 58 Am. & Eng. R. Cas. 81, 85 Me. 34, 26 Atl. Rep. 91.—QUOTING *Warren v. Fitchburg R. Co.*, 8 Allen (Mass.) 227; *Tuller v. Talbot*, 23 Ill. 357.

A company is bound to use the best precautions known in practical use to secure the safety of passengers, but not every possible precaution which the highest scientific skill (according to speculative evidence) might have suggested. And if there are several grounds of negligence suggested, the jury must be satisfied that some one or other of them caused damage to the party injured, though they need not be able to ascribe the whole injury to either. *Ford v. London & S. W. R. Co.*, 2 F. & F. 730.

The high degree of care which carriers must exercise to prevent injuries to their passengers must be determined by reference to the care that a cautious man would take without knowledge that an accident might occur, and not as viewed from the standpoint of a jury in looking back at the accident and seeing what might have prevented the injury. *Bowen v. New York C. R. Co.*, 18 N. Y. 408.—APPLIED IN *Maverick v. Eighth Ave. R. Co.*, 36 N. Y. 378. QUOTED IN *Griffith v. Utica & M. R. Co.*, 43 N. Y. S. R. 835. *Fredericks v. Northern C. R. Co.*, 157 Pa. St. 103.

Less care on the part of a company for the safety of its passengers is necessary in handling a train which stops at a wood station for wood and water than where it stops to take on or put off passengers. *Mitchell v. Western & A. R. Co.*, 30 Ga. 22.

The rule that the carrier is bound to exercise the highest degree of care that is possible to human foresight and prudence does not require a construction that will make the carrier an insurer against accidents; nor the prevention of accidents by the employment of means which, if the accident could have been foretold, might have been used to prevent it; nor for the wrongful acts of strangers, unless the carrier was remiss in not discovering them in time to avert the injury; nor is it required to exercise an impracticable character or ex-

* See also *ante*, 37, 101, 115; *post*, 312, 353, 400, 434.

Care of intoxicated passengers, see note, 31 AM. & ENG. R. CAS. 59.

Exposure of drunken passenger to danger by ejecting him from train, see note, 19 L. R. A. 327.

† See also ANIMALS, INJURIES TO, 38, 66 (4), 60 (4).

‡ Knowledge or means of knowledge of company as to causes likely to produce injuries, as bearing on liability for injuries to passengers, see note, 21 AM. & ENG. R. CAS. 335.

tent of precaution which could not be observed without so ruinous a cost as to destroy its business; and in all cases the liability is only such as results from negligence. *Fredericks v. Northern C. R. Co.*, 58 Am. & Eng. R. Cas. 91, 157 Pa. St. 103, 27 Atl. Rep. 689.—APPROVING *Thomas v. Philadelphia & R. R. Co.*, 148 Pa. St. 180.

150. Ordinary care, when sufficient.—In duties touching the convenience or accommodation of a passenger, who has purchased a ticket and is waiting at the ordinary place of departure to take the train, the carrier need only use ordinary diligence. *Central R. & B. Co. v. Perry*, 58 Ga. 461, 16 Am. Ry. Rep. 122.

Carriers are only held to reasonable care in preventing injuries by one passenger upon another, and not to the utmost care which is required in the construction of the road and the management of its trains. So held, where a passenger sued for an injury by being jostled and thrown down when he was about to leave the car, by other passengers entering it. *Buck v. Manhattan R. Co.*, 32 N. Y. S. R. 51, 10 N. Y. Supp. 107.—APPLYING *Palmer v. Pennsylvania Co.*, 111 N. Y. 488, 19 N. Y. S. R. 493; *Kelly v. Manhattan R. Co.*, 112 N. Y. 443, 21 N. Y. S. R. 507; *Lafflin v. Buffalo & S. W. R. Co.*, 106 N. Y. 139, 8 N. Y. S. R. 595; *Morris v. New York C. & H. R. R. Co.*, 106 N. Y. 678, 11 N. Y. S. R. 204.

Where a company is not chartered for the purpose of carrying passengers, but only furnishes motive-power to a regular railroad company, it is only bound to use ordinary skill and diligence, and is only liable for direct unskillfulness or negligence. *Keep v. Indianapolis & St. L. R. Co.*, 3 McCrary (U. S.) 208, 9 Fed. Rep. 625.

A carrier is only held to reasonable care to prevent such injuries as are likely to result to passengers by accidental falling of baggage from the car-rack, and not to that higher degree of care required in providing safe transportation, etc. *Morris v. New York C. & H. R. R. Co.*, 1 Sivo. App. 513, 106 N. Y. 678, mem., 13 N. E. Rep. 455, 11 N. Y. S. R. 204; reversing 36 Hun 647, mem.

Carriers of passengers, by the English rule, are bound to carry their passengers safely, using such care and caution as may be reasonably expected to be used by reasonable men. *Richardson v. Great East-*

ern R. Co., L. R. 10 C. P. 490. *Metropolitan R. Co. v. Jackson*, 3 App. Cas. 193.

151. Carrier not deemed an insurer.*—A company as a carrier of passengers cannot be held to the responsibility of warranting the safety of its passengers against all accidents and at all events. *Nagle v. California Southern R. Co.*, 88 Cal. 86, 25 Pac. Rep. 1106. *Baltimore & Y. Turnpike Road v. Leonhardt*, 27 Am. & Eng. R. Cas. 194, 66 Md. 70, 5 Atl. Rep. 346.

A company engaged in the carriage of passengers as a common carrier cannot be considered an insurer of the absolute safety of the persons and lives of its passengers during transportation. *Hazard v. Chicago, B. & Q. R. Co.*, 1 Biss. (U. S.) 503. *Chicago, K. & W. R. Co. v. Fisher*, 49 Kan. 460, 30 Pac. Rep. 462. *Jeffersonville R. Co. v. Hendricks*, 26 Ind. 228. *Chicago, P. & St. L. R. Co. v. Lewis*, 58 Am. & Eng. R. Cas. 126, 145 Ill. 67, 33 N. E. Rep. 960. *Chicago & A. R. Co. v. Arnold*, 58 Am. & Eng. R. Cas. 411, 144 Ill. 261, 33 N. E. Rep. 204. *Baltimore & O. R. Co. v. State*, 12 Am. & Eng. R. Cas. 149, 60 Md. 449. *O'Connell v. St. Louis, C. & W. R. Co.*, 106 Mo. 482, 17 S. W. Rep. 494. *Leslie v. Wabash, St. L. & P. R. Co.*, 26 Am. & Eng. R. Cas. 229, 88 Mo. 50. *Gilson v. Jackson County Horse R. Co.*, 12 Am. & Eng. R. Cas. 132, 76 Mo. 282. *Sawyer v. Hannibal & St. J. R. Co.*, 37 Mo. 241. *Fredericks v. Northern C. R. Co.*, 58 Am. & Eng. R. Cas. 91, 157 Pa. St. 103, 27 Atl. Rep. 689. *International & G. N. R. Co. v. Halloren*, 3 Am. & Eng. R. Cas. 343, 53 Tex. 46, 37 Am. Rep. 744. *Texas Pac. R. Co. v. Buckelew*, 3 Tex. Civ. App. 272, 22 S. W. Rep. 994. *Fisher v. West Virginia & P. R. Co.*, (W. Va.) 58 Am. & Eng. R. Cas. 337, 19 S. E. Rep. 578. *Gillingham v. Ohio River R. Co.*, 51 Am. & Eng. R. Cas. 222, 35 W. Va. 588, 14 L. R. A. 798, 14 S. E. Rep. 243. *Louisville, N. A. & C. R. Co. v. Pedigo*, 27 Am. & Eng. R. Cas. 310, 108 Ind. 481, 8 N. E. Rep. 627. *Ladd v. Foster*, 12 Sawy. (U. S.) 547, 31 Fed. Rep. 827. *Chicago & N. W. R. Co. v. Carroll*, 5 Ill. App. 201. *Grand Rapids & I. R. Co. v. Huntley*, 38 Mich. 537.

A passenger carrier is not an insurer of the safety of the traveler, nor required to use means to prevent injuries which shall

*Carriers not insurers of life or safety of passengers, see note, 2 L. R. A. 252.

necessarily and in all cases be sufficient, efficient, and effective. *Chicago, K. & W. R. Co. v. Fisher*, 49 Kan. 460, 30 Pac. Rep. 462.

The company is an insurer of the passenger's safety only against the risks caused or increased solely by its own negligence. *Grand Rapids & I. R. Co. v. Boyd*, 65 Ind. 526.

152. Care consistent with practical operation of the road, generally.

—The true rule in regard to the degree of care required of railroad companies to guard against injury to passengers is, that the carrier shall do all that human care, vigilance, and foresight can reasonably do, consistent with the mode of conveyance and the practical operation of the road. *Pittsburg, C. & St. L. R. Co. v. Thompson*, 56 Ill. 138, 3 Am. Ry. Rep. 454.—FOLLOWING *Tuller v. Talbot*, 23 Ill. 357.—*Carv v. Eel River & E. R. Co.*, 98 Cal. 366, 33 Pac. Rep. 213.

Carriers are required to do all that human care, vigilance, and foresight can reasonably do, consistent with the character and mode of conveyance adopted and practicable prosecution of the business, to prevent accidents to passengers riding upon their trains or alighting therefrom. *Chicago & A. R. Co. v. Byrum*, 48 Ill. App. 41.

While ordinarily carriers of passengers for hire are not insurers of absolutely safe carriage, in the absence of any limitation of their liability they are required to exercise the highest degree of care, skill, and diligence practically consistent with the efficient use and operation of the mode of transportation adopted. *Chicago & A. R. Co. v. Arnol*, 58 Am. & Eng. R. Cas. 411, 144 Ill. 261, 33 N. E. Rep. 204.

153. — considering the mode of conveyance adopted.—(1) *Generally.*—Carriers of passengers are only held to the utmost degree of care, vigilance, and precaution which is consistent with the mode of transportation used. *Mobile & O. R. Co. v. Klein*, 43 Ill. App. 63.—QUOTING *Tuller v. Talbot*, 23 Ill. 357; *Heazle v. Indianapolis, B. & W. R. Co.*, 76 Ill. 501.—*North Chicago St. R. Co. v. Cook*, 145 Ill. 551, 33 N. E. Rep. 958.

The law requires common carriers of passengers to do all that human care, vigilance, and foresight can under the circumstances, considering the character and mode of conveyance, to prevent accident. *Libby*

v. Maine C. R. Co., 85 Me. 34, 26 Atl. Rep. 943.—QUOTING *Warren v. Fitchburg R. Co.*, 8 Allen (Mass.) 227.—*Jamison v. San José & S. C. R. Co.*, 3 Am. & Eng. R. Cas. 350, 55 Cal. 593. *Chicago, P. & St. L. R. Co. v. Lewis*, 48 Ill. App. 274. *Atchison, T. & S. F. R. Co. v. Frier*, (Tex. Civ. App.) 22 S. W. Rep. 6.

Carriers, while not absolutely insurers of the passengers' safety, are required to use all means that care, vigilance, and foresight reasonably require in view of the character and mode of conveyance adopted, and are held to the highest degree of care and prudence which is consistent with the practical operation of their road and the transaction of their business. *Chicago, P. & St. L. R. Co. v. Lewis*, 58 Am. & Eng. R. Cas. 126, 145 Ill. 67, 33 N. E. Rep. 960.

(2) *Freight and mixed trains.**—A company, in operating a freight train carrying passengers, is not bound to the utmost diligence which human skill and foresight can effect, but is required to use the highest degree of practical care, diligence, and skill that is consistent with the operation of its road and that will not render the business of carrying passengers impracticable. *St. Louis, I. M. & S. R. Co. v. Sweet*, 57 Ark. 287, 21 S. W. Rep. 587.—QUOTING *Arkansas Midland R. Co. v. Canman*, 52 Ark. 524.

Carriers must use the best precautions in known practical use to secure the safety of their passengers; and this is the measure of their duty whether they carry them on freight or mixed trains or on exclusively passenger trains; but this does not require that they should adopt, on freight or mixed trains, all the appliances which they use on passenger trains, but merely the highest degree of care consistent with the practical operation of such trains. *Oviatt v. Dakota C. R. Co.*, 43 Minn. 300, 45 N. W. Rep. 436.

Section 2100 of the California Civil Code, which provides that a railroad company carrying passengers paying fare must use the utmost care and diligence, and must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill, applies to all trains carrying passengers for hire; and in operating a train regularly carrying freight and passengers the company is liable for the full degree of negligence enjoined by the statute; but the concluding provision requires, in addition

* See also *post*, 288, 289.

to diligence, skill only in providing what is necessary to the safe carriage of passengers, and does not prohibit the use of a freight train for that purpose. *Fisher v. Southern Pac. R. Co.*, 89 Cal. 399, 26 Pac. Rep. 894. See also *Chattanooga R. & C. R. Co. v. Huggins*, 52 Am. & Eng. R. Cas. 473, 89 Ga. 494 15 S. E. Rep. 848.

It is the duty of the company to see that the train is properly made up and equipped, and that the cars, machinery, and appliances, of their kind, are not so materially defective as to increase the ordinary hazards of transportation by a freight train. *Chicago & A. R. Co. v. Arnold*, 58 Am. & Eng. R. Cas. 411, 144 Ill. 261, 33 N. E. Rep. 204.

It is not the duty of a company to run separate passenger trains where its business is not sufficient to warrant it in doing so. But if the business of the company is sufficiently large and profitable to warrant such trains, and the safety of passengers is endangered by having the passenger coaches mixed in the same train with freight cars, then it is the duty of the company to run separate trains. *Arkansas Midland R. Co. v. Canman*, 52 Ark. 517, 13 S. W. Rep. 280.

The liability of a company for negligence will, to a degree, be limited by its capacity and fitness to transport passengers, known to a passenger when he elects to be transported on it. Hence a short-line road doing a small business and running only mixed trains is not required to apply all the delicate checks and guards that are in use. *International & G. N. R. Co. v. Copeland*, 60 Tex. 325.

154. Care proportionate to the nature and risks of the business.—The degree of care which is exacted of carriers of passengers is subject to a reasonable limitation. It is not the utmost and highest absolutely, but the highest which is consistent with the nature of their business, and there must be a due regard to its necessary requirements. *Philadelphia, W. & B. R. Co. v. Anderson*, 44 Am. & Eng. R. Cas. 345, 72 Md. 519, 20 Atl. Rep. 2.—REVIEWING *Baltimore & O. R. Co. v. State*, 60 Md. 449.

They are held by law to exercise the highest degree of care regarding the safety of their passengers—a degree of care proportionate to the nature and risks of the business, and such as would ordinarily be exercised by persons of great care and prudence under similar circumstances. *Texas & P.*

R. Co. v. Davidson, 3 Tex. Civ. App. 542, 21 S. W. Rep. 68.—FOLLOWING *Texas C. R. Co. v. Burnett*, 80 Tex. 536; *Texas C. R. Co. v. Stuart*, 1 Tex. Civ. App. 642.

155. — considering the circumstances of each case.—A company is bound to carry passengers in safety, so far as the utmost care and skill of the most prudent men practicably obtainable can secure it under the particular circumstances of the case. *Delaware, L. & W. R. Co. v. Dailey*, 37 N. J. L. 526. *Chicago City R. Co. v. Engel*, 35 Ill. App. 490.

Where one is on a train as a passenger to be carried as such, the company must use all fair means in its power under the circumstances to transport him safely. *Secord v. St. Paul, M. & M. R. Co.*, 5 McCrary (U. S.) 515, 18 Fed. Rep. 221.

A carrier of passengers is bound to provide for their safety, so far as human foresight and care can. What a carrier is to do in this regard depends upon the circumstances surrounding the carriage: and it is difficult to say what the limitations of care are, beyond which a carrier need not go, at grade crossings, over which locomotives pass at frequent intervals. *West Chicago St. R. Co. v. Martin*, 47 Ill. App. 610.

Whilst a passenger on board a steamboat is attempting to land at a place where he may properly do so, the degree of care to be used by the company for his protection is the highest which can be exercised by it in that particular instance. *Dodge v. Boston & B. Steamship Co.*, 37 Am. & Eng. R. Cas. 67, 148 Mass. 207, 19 N. E. Rep. 373, 2 L. R. A. 83.—DISTINGUISHING *Moreland v. Boston & P. R. Co.*, 141 Mass. 31. QUOTING *Gaynor v. Old Colony & N. R. Co.*, 100 Mass. 208.

156. — injury from package falling from car-rack.—In an action against a company to recover damages for an injury to a passenger caused by the falling upon him of an article placed in a rack over his seat by another passenger—held, that in looking for and protecting passengers from such dangers a carrier was not required to exercise the highest care which human vigilance can give, but only reasonable care, to be measured by the circumstances surrounding each case. *Morris v. New York C. & H. R. R. Co.*, 30 Am. & Eng. R. Cas. 538, 106 N. Y. 678, 13 N. E. Rep. 455, 11 N. Y. S. R. 204, 1 Silv. App. 513; reversing 36 Hun 647, mem.—APPLIED IN *Kelly v. Man-*

hattan R. Co., 112 N. Y. 443, 20 N. E. Rep. 383, 21 N. Y. S. R. 507; *Buck v. Manhattan R. Co.*, 32 N. Y. S. R. 51, 10 N. Y. Supp. 107.

Where a passenger sues for an injury received by a parcel falling from the car-rack, the failure of the train-hands to notice the parcel and remove it is not negligence, where there is nothing extraordinary about the appearance of the parcel—nothing to attract special notice to it. *Morris v. New York C. & H. R. R. Co.*, 30 Am. & Eng. R. Cas. 538, 106 N. Y. 678, 1 *Silv. App.* 513, *mem.*, 13 N. E. Rep. 455, 11 N. Y. S. R. 204; *reversing* 36 Hun 647, *mem.*

157. Need not protect from passenger's own negligence.—The law does not, as a rule, impose the duty on companies to protect their passengers, while on their trains, from the passenger's own negligence. Their duty is to furnish a safe and convenient mode of transportation, of which the passenger is to avail himself, and then safely, in that mode, to transport him. They do not have to watch the doors or windows to prevent passengers from jumping or falling off their trains. *St. Louis, A. & T. H. R. Co. v. Carr*, 47 Ill. App. 353.

The duty of a carrier does not extend to the imprisonment of the passenger, so as to prevent him from voluntarily exposing himself to needless peril. *Indianapolis & C. R. Co. v. Rutherford*, 29 Ind. 82.—DISTINGUISHING *Holbrook v. Utica & S. R. Co.*, 12 N. Y. 236. NOT FOLLOWING *New Jersey R. Co. v. Kennard*, 21 Pa. St. 203.

158. Vis major—Inevitable accident*—Act of God.†—When, carrying by the agency of steam, an injury is occasioned to passengers thereby, one cannot escape liability unless it appears that the accident happened from causes beyond his control, and to which neither his own negligence nor that of his employes, nor the negligence of the manufacturer of the machinery in any way contributed. *Carroll v. Staten Island R. Co.*, 58 N. Y. 126, 7 Am. Ry. Rep. 25, 9 Am. Ry. Rep. 486; *affirming* 61 Barb. 32.—FOLLOWED IN *Connolly v. Knickerbocker*

Ice Co., 39 Am. & Eng. R. Cas. 441, 114 N. Y. 104, 21 N. E. Rep. 101, 22 N. Y. S. R. 675.

A carrier is not bound to the highest degree of foresight and circumspection as against an act of God, but only to such care as an ordinarily prudent person would use under all circumstances of the case. *Gillespie v. St. Louis, K. C. & N. R. Co.*, 6 Mo. App. 554.—QUOTED IN *Black v. Chicago, B. & Q. R. Co.*, 30 Neb. 197.

Carriers of passengers are not liable for mere accident or misadventure, any more than for the act of God or the public enemy, for any sudden convulsion of nature, or an unknown or unforeseen destruction, or an unknowable insufficiency of some part of the road. In addition to this there must be some actual negligence or want of strict care, diligence, and foresight. *Sawyer v. Hannibal & St. J. R. Co.*, 37 Mo. 240.

The carrier is not liable for injuries resulting from an accident against which the highest degree of skill, foresight, and diligence would have been unavailing. *Kansas Pac. R. Co. v. Miller*, 2 Colo. 442, 20 Am. Ry. Rep. 245. *Topeka City R. Co. v. Higgs*, 34 Am. & Eng. R. Cas. 529, 38 Kan. 375, 16 Pac. Rep. 667.

A carrier of passengers is not obliged to foresee and provide against casualties which have not been known to occur before, and which may not be reasonably expected. If it has availed itself of the best known and most extensively used safeguards against danger it has done all the law requires, and its liability is not to be ascertained by what appears for the first time after the disaster to be a proper precaution against its recurrence. *Higgins v. Cherokee R. Co.*, 27 Am. & Eng. R. Cas. 218, 73 Ga. 149.

While it is the duty of the company to provide a safe roadbed, it is not liable for an injury to a passenger caused by a sound rail which is broken by the extreme cold, and which human foresight could not have anticipated and prevented. *McPadden v. New York C. R. Co.*, 44 N. Y. 478; *reversing* 47 Barb. 247.—LIMITING AND DISTINGUISHING *Alden v. New York C. R. Co.*, 26 N. Y. 102.

A company is not bound to anticipate or provide against storms of extraordinary and unusual violence, and such as have not within practical experience been known in the locality in which the railroad is operated. *Connolly v. Manhattan R. Co.*, 68 Hun (N. Y.) 456.

* Liability for injuries arising from inevitable accident, see note, 2 L. R. A. 252.

† Act of God as defense for loss of baggage, see BAGGAGE, 12.

Act of God or act of public enemy as defense to actions against carriers of merchandise, see *post*, 177; CARRIAGE OF MERCHANDISE, 12-20, 104, 280.

The company is not responsible for injuries to a passenger on a car sustained by reason of the happening of a mere accident, such as the sudden opening of a closet-door by one of the train-hands, who was shown not to have been guilty of any negligence in opening the same. *Murphy v. Atlanta & W. P. R. Co.*, 89 Ga. 832, 15 S. E. Rep. 774.

159. Extraordinary care limited to time of bailment of person.—The rule of extraordinary diligence applies to the receiving, keeping, carrying, and discharging of passengers. It does not apply to precautions adopted to prevent them from being left, if they are unnecessarily late in taking their places after full and fair opportunity for doing so safely has been afforded. *Central R. & B. Co. v. Perry*, 58 Ga. 461, 16 Am. Ry. Rep. 122.

The rule imposing upon the carrier of passengers the highest degree of care applies only to the means and measures for safety which the passenger of necessity must trust wholly to the carrier. It is in general applicable only to the period during which the carrier is in a certain sense the bailee of the person of the passenger. *Texas & P. R. Co. v. Miller*, 79 Tex. 78, 15 S. W. Rep. 264.

160. — and to the duties incident to the transportation.—In regard to the selection of suitable machinery and cars, the fitness of the road, both as to manner of construction and materials used, and in the use of all appliances adopted for the government or moving of trains, and in regard to the selection and retention of competent and faithful servants, the carrier of passengers by rail is obligated to the highest reasonable and practicable skill, care, and diligence. But as to dangers and perils not incident to any mode of travel, the rule of liability imposed on the carrier by law is less stringent. *Chicago & A. R. Co. v. Pillsbury*, 31 Am. & Eng. R. Cas. 24, 123 Ill. 9, 14 N. E. Rep. 22, 11 West. Rep. 757.

c. Construction and Repair of Roadbed and Track.*

161. Generally.—The standard of care and diligence required in carrying pas-

sengers does not depend upon its pecuniary condition or the amount of its revenues, but it is bound to provide a track, rolling stock, and all other agencies suited to the nature and extent of the business it assumes to do. *Taylor v. Grand Trunk R. Co.*, 48 N. H. 304.

A company in engaging in business as a common carrier undertakes that their road is in good traveling order and fit for use, and that the engines and carriages employed are road-worthy and properly constructed, and furnished according to the present state of the art; and if an injury results from the imperfection of the road, the carriages, or the engines, the company are liable unless the imperfection was of a character in no degree attributable to their negligence. *Nashville & C. R. Co. v. Messino*, 1 Sneed (Tenn.) 220. *Sullivan v. Philadelphia & R. R. Co.*, 30 Pa. St. 234.—EXPLAINING *New York & E. R. Co. v. Skinner*, 19 Pa. St. 298.—DISTINGUISHED IN *Pennsylvania R. Co. v. MacKinney*, 37 Am. & Eng. R. Cas. 153, 124 Pa. St. 462.

A company is bound to exercise that high degree of care and skill which cautious persons would use in the construction, by competent engineers and workmen, of the roadbed, track, engines, cars, and all appliances, to carry on the business of the road and operate its trains; to make frequent careful examinations of the same, in order to avoid accidents, as far as human skill could reasonably secure such a result, and also to procure a sufficient number of good, steady, and competent agents and employes to so conduct and control its trains as to insure careful and skillful management. *International & G. N. R. Co. v. Halloren*, 3 Am. & Eng. R. Cas. 343, 53 Tex. 46, 37 Am. Rep. 744.

A company owes the duty to its passengers of making and maintaining a suitable and safe track, of furnishing comfortable and safe cars, of running its trains regularly and safely, of so adjusting its time-tables and the passage of its trains that no injury will be liable to be caused thereby; and it is its duty to furnish a safe and ready passage-way to and from its cars, on either side and between them and its stations, when no notice to the contrary is given, and in all this exercise the highest degree of skill and care; and passengers have a right to presume that this will be done. *Gonzales v. New York & H. R. Co.*, 39 Haw. Pr. (N.

* See also DERAILMENT, 1-7.

† Duty to furnish safe roadbed and equipment, see 38 AM. & ENG. R. CAS. 90, *abstr.*

Liability for injuries to passengers caused by derailment of trains, see 44 AM. & ENG. R. CAS. 323, *abstr.*

Y.) 407.—**DISTINGUISHING** *Ernst v. Hudson River R. Co.*, 36 How. Pr. 84; *Wilcox v. Rome, W. & O. R. Co.*, 39 N. Y. 358; *Beisiegel v. New York C. R. Co.*, 40 N. Y. 9; *Honegsberger v. Second Ave. R. Co.*, 33 How. Pr. 193; *Munger v. Tonawanda R. Co.*, 4 N. Y. 349; *Spencer v. Utica & S. R. Co.*, 5 Barb. 337; *Hartfield v. Roper*, 21 Wend. 615; *Willetts v. Buffalo & R. R. Co.*, 14 Barb. 585.

162. Care to be exercised.*—Carriers are required to use the utmost human sagacity and foresight, in the construction of roads, tracks, bridges, and other arrangements, to prevent accidents to passengers. *Union Pac. R. Co. v. Hand*, 7 Kan. 380, 1 Am. Ry. Rep. 548. *Kansas Pac. R. Co. v. Miller*, 2 Colo. 442, 20 Am. Ry. Rep. 245. *Searle v. Kanawha & O. R. Co.*, 37 Am. & Eng. R. Cas. 179, 32 W. Va. 370, 9 S. E. Rep. 248.

They are held by law to the utmost and most exact care in the structure, repair, and care of the track and bridges, and all other arrangements necessary to the safety of passengers. *Baltimore & O. R. Co. v. Noell*, 32 Gratt. (Va.) 394. *Baltimore & O. R. Co. v. Wightman*, 29 Gratt. (Va.) 431, 17 Am. Ry. Rep. 351. *Virginia C. R. Co. v. Sanger*, 15 Gratt. (Va.) 230. *McElroy v. Nashua & L. R. Corp.*, 4 Cush. (Mass.) 400.

A carrier of passengers is held to the utmost care in the removal of obstructions, repair of bridges and switches, and all other matters properly pertaining to the condition and safety of its track. *Carrico v. West Virginia C. & P. R. Co.*, 52 Am. & Eng. R. Cas. 393, 35 W. Va. 389, 14 S. E. Rep. 12.

A company is bound to furnish for its passengers a reasonably safe and sufficient track and equipments, and to maintain them in a reasonably safe condition, so far as can be provided by the utmost human skill, diligence, and foresight, and is liable to a passenger for slight negligence in this respect causing injury. *St. Louis & S. F. R. Co. v. Mitchell*, 57 Ark. 418, 21 S. W. Rep. 883.

While a company is not an insurer of the safety of its passengers, it is bound to use a high degree of skill and vigilance to guard against accidents. This vigilance is to be exercised in seeing that its road and the appliances used in operating it are and re-

main in good condition and free from defects. A latent defect which will relieve it from liability is such only as no reasonable degree of skill and foresight could guard against or discover. *Palmerv. Delaware & H. Canal Co.*, 44 Am. & Eng. R. Cas. 298, 120 N. Y. 170, 24 N. E. Rep. 302, 30 N. Y. S. R. 817; *affirming 46 Hun 486*, 11 N. Y. S. R. 872.

The company owes a higher duty to its passengers than mere ordinary care and foresight in the construction and maintenance of its tracks; it is bound to exercise the highest degree of practicable care, not the utmost possible precaution that might be imagined, but the highest care and best precautions known to practical use, and which are consistent with the mode of transportation adopted. *Southern Kan. R. Co. v. Walsh*, 47 Am. & Eng. R. Cas. 493, 45 Kan. 653, 26 Pac. Rep. 45.

163. Care used by competent engineers and workmen.—In the construction of their roadbed, track, and culverts companies are held to that degree of care and foresight which will avoid such dangers as can be reasonably foreseen, or ascertained by competent and skilful engineers, as liable to result from rainfalls and freshets incident to the particular section of country through which they are constructed. *Libby v. Maine C. R. Co.*, 58 Am. & Eng. R. Cas. 81, 85 Me. 34, 26 Atl. Rep. 943.

164. Care such as used by cautious persons under like circumstances.*

—A company is bound to furnish for its passengers a reasonably safe and sufficient track and equipments, so far as can be provided by the utmost human skill, diligence, and foresight, which is such skill, diligence, and foresight as is exercised by a very cautious person under like circumstances. *Furnish v. Missouri Pac. R. Co.*, 102 Mo. 438, 13 S. W. Rep. 1044.—**RECONCILING** *Dougherty v. Missouri R. Co.*, 97 Mo. 647.

165. Duty to keep in repair, generally.—Where a track is out of repair, pieces of old rails being used to supply the place of a broken rail, and laid upon rotten ties, and a train is run over such track at a speed of from twenty-five to thirty miles an hour, and an accident occurs resulting in personal injury, the company will be liable.

* See also *ante*, 142.

† Imposed duty on company to keep its right of way in safe condition, see note, 10 L. R. A. 770.

* See also *ante*, 137-160; *post*, 180, 206, 288, 289, 348, 417.

Peoria, P. & J. R. Co. v. Reynolds, 88 Ill. 418, 21 Am. Ry. Rep. 324.

Companies are not liable for injuries resulting to their passengers from unexpected and unforeseen contingencies, which could not reasonably have been provided against; but a spell of wet weather with a fall of snow does not come within the rule, and will not relieve the company from liability for failure to keep track in repair. *Missouri Pac. R. Co. v. Johnson*, 37 Am. & Eng. R. Cas. 128, 72 Tex. 95, 10 S. W. Rep. 325.—*REVIEWING GULF, C. & S. F. R. Co. v. Pomeroy*, 67 Tex. 498.

166. Examination and inspection.*

—(1) *Generally*.—The duty of a carrier to exercise proper care to discover by inspection a defect in its track is an essential part of its obligation to its passengers. *Furnish v. Missouri Pac. R. Co.*, 102 Mo. 438, 13 S. W. Rep. 1044. And see also *International & G. N. R. Co. v. Halloren*, 3 Am. & Eng. R. Cas. 343, 53 Tex. 46, 37 Am. Rep. 744.

And they are bound to keep themselves informed as to the condition of their tracks, and to know whether they are in a fit condition for the safe passage of their trains or not. *Toledo, W. & W. R. Co. v. Apperson*, 49 Ill. 480.

It is their duty to furnish a safe road, and for this purpose to keep all portions of their track in repair and so watched and tended as to insure the safety of all persons who may be upon their trains, whether passengers or servants or others, and this is a continuing duty. *East Tenn., V. & G. R. Co. v. Gurley*, 17 Am. & Eng. R. Cas. 568, 12 Lea (Tenn.) 46.—*APPROVING Nashville & C. R. Co. v. Elliott*, 1 Coldw. (Tenn.) 612.

In order to be assured that its line is in a reasonably safe condition company must make as frequent inspection of its roadbed and track as can be done consistently with the conduct of its business. *Libby v. Maine C. R. Co.*, 58 Am. & Eng. R. Cas. 81, 85 Me. 34, 26 Atl. Rep. 943.

Under circumstances of more than ordinary peril the company should inspect its line with more than ordinary promptitude, particularly those portions which are the most liable to injury by storm or flood. *Libby v. Maine C. R. Co.*, 58 Am. & Eng. R. Cas. 81, 85 Me. 34, 26 Atl. Rep. 943.

The track, and especially every exposed place, ought to be examined after every

storm before a train is allowed to pass; and if that is not done, and injury results, whether to passengers or servants on the train, the corporation is liable. *Hardy v. North Carolina C. R. Co.*, 74 N. Car. 734.

To relieve a company from liability to a passenger for injuries sustained by reason of defects in its roadbed, it is not enough that the track was "apparently" in good and safe condition, for the company is required to exercise care and skill to discover defects which it is its duty to discover. *Chicago, P. & St. L. R. Co. v. Lewis*, 58 Am. & Eng. R. Cas. 126, 145 Ill. 67, 33 N. E. Rep. 960.

(2) *Illustrations*.—On the trial of an action brought by a passenger for a personal injury resulting from negligence in running its train at a high speed over a defective road, the court refused an instruction for the defendant, which told the jury that if the track was in "apparently good and safe condition," etc., "and the train was in charge of an experienced engine-driver and conductor, and was well and carefully managed, etc., that the defendant was not liable," etc. *Held*, properly refused, as it was not enough that the track was apparently in a good and safe condition. If there were defects, rendering it unsafe, which might have been discovered by proper care and skill, it was the duty of defendant to have discovered them and thus avoid injury to the plaintiff. *Chicago, P. & St. L. R. Co. v. Lewis*, 58 Am. & Eng. R. Cas. 126, 145 Ill. 67, 33 N. E. Rep. 960.

When personal injury to a passenger is caused by a break or sudden fracture of a rail brought about by cold weather, which the company did not have time to discover, and which break was not caused by defects in the track, then the company is not liable, provided the rail before the accident was such as a person of competent skill might reasonably presume upon inspection to be free from liability to such fracture. *Missouri Pac. R. Co. v. Johnson*, 37 Am. & Eng. R. Cas. 128, 72 Tex. 95, 10 S. W. Rep. 325.

167. — of leased track.—A company is bound to exercise due care in carrying the passengers and property intrusted to it. It is therefore its duty to see that the road which it uses for such transportation is safe and in good repair, whether such road is owned by it or not. If it uses the track of another company for such purpose it will be liable for damages to its

* See also *post*, 194.

passengers or freight by reason of defects in the road so used. This rule applies as between the company and its employes. *Wisconsin C. R. Co. v. Ross*, 53 Am. & Eng. R. Cas. 73, 142 Ill. 9, 31 N. E. Rep. 412; affirming 43 Ill. App. 454. And see also *Philadelphia & R. R. Co. v. Anderson*, 6 Am. & Eng. R. Cas. 407, 94 Pa. St. 351, 39 Am. Rep. 787.

108. Defective track, generally.*

—The carrier is responsible for accidents caused by a defective track. *Wisconsin C. R. Co. v. Ross*, 53 Am. & Eng. R. Cas. 73, 142 Ill. 9, 31 N. E. Rep. 412; affirming 43 Ill. App. 454.

It is the duty of the company to have a good, substantial, and safe road-track for the use of its trains, and default in that duty, in consequence of which a passenger is injured, is negligence for which the company will be responsible in damages. *Florida R. & N. Co. v. Webster*, 25 Fla. 394, 5 So. Rep. 714.

It is only required, as toward its passengers, to furnish a reasonably good track, and not one that is "perfectly safe." *Pattee v. Chicago, M. & St. P. R. Co.*, 34 Am. & Eng. R. Cas. 399, 5 Dak. 267, 38 N. W. Rep. 435.

Plaintiff was riding upon the steps of a car carrying an excursion party by reason of its crowded condition, and was struck by another car passing on a parallel track. The tracks were nearer to each other at that place than on other parts of the road, and the inside rail of one of them was sunken so as to throw the upper portion of the cars nearer together. *Held*, that it was the duty of the company to properly construct and maintain its track, and it was liable for any injury resulting from a failure to do so. *Gray v. Rochester City & B. R. Co.*, 40 N. Y. S. R. 715, 61 Hun 212, 15 N. Y. Supp. 927.

While a passenger on a freight train takes on himself the additional risks necessarily incident to such travel, and though derailment is more liable to happen to such a train than to a regular passenger train, yet as to the condition of the ties and roadway for moving trains safely he assumes no greater risk than does a passenger on an ordinary passenger train. *Ohio Valley R.*

* Injuries to passengers from defective or obstructed track, see notes, 41 AM. & ENG. R. CAS. 131; 52 *Id.* 259.

Obligation of company in regard to tracks and switches, see note, 6 AM. & ENG. R. CAS. 145.

Co. v. Watson, (Ky.) 58 Am. & Eng. R. Cas. 418, 21 S. W. Rep. 244.

109. Rails and cross-ties.*—(1)

Generally.—Carriers should provide safe roadbeds, the cross-ties should be sound, and the rails strong and securely laid. An accident caused by negligence in not thus providing for the safety of their passengers and employes will subject them to damages. *McFee v. Vicksburg, S. & P. R. Co.*, 42 La. Ann. 790, 7 So. Rep. 720.

It is negligence for a company to so lay a track that the rails become pressed out of place by the expansion and contraction caused by heat or cold, and it is liable to a passenger for personal injuries caused thereby. *Reed v. New York C. R. Co.*, 56 Barb. (N. Y.) 493.

In a case in which it is shown that after an accident on the road, causing injury, it was found that a rail only ten feet long was out of place, and the track was very bad, the rails much worn, and were of all lengths, while usually they are thirty feet long, the verdict of the jury finding negligence should not be disturbed. *Florida R. & N. Co. v. Webster*, 25 Fla. 394, 5 So. Rep. 714.

It is the first duty of a company to provide for the safety of its passengers, and if rails of twenty-one feet in length will not pass the trains smoothly over the joints, unless so laid as to be liable in hot weather to displacement, then they should be shortened, or at all events so secured as not to be subject to such derangement. *Reed v. New York C. R. Co.*, 56 Barb. (N. Y.) 493.

Where it appeared that ties were unsound and the rails insecurely fastened thereto, the company was not excused from liability because its servants had examined the rails the night of the casualty. *Chicago, P. & St. L. R. Co. v. Lewis*, 58 Am. & Eng. R. Cas. 126, 145 Ill. 67, 33 N. E. Rep. 960.

(2) *Double track.*—Where a company constructs a double track so that it knows that the rails must be pushed out of position by expansion, caused by heat, or by running the trains only one way over each track, it is its duty to guard against it, either by so fastening them that they will not be pushed out of place or by running the trains both ways on the same track. *Reed v. New York C. R. Co.*, 56 Barb. (N. Y.) 493.

* Derailment occasioned by rails broken by frost, see note, 27 AM. & ENG. R. CAS. 290.

A company was sued for a personal injury to a passenger occurring on a double-track road, caused by the rails getting out of place. Some of the evidence tended to show that the displacement of the rails was caused by the expansion and contraction, caused by heat and cold, while other evidence tended to show that the rails were shoved forward out of position, caused by running trains only one way over them. *Held*, that it mattered not which caused the injury. The company was liable if the injury occurred through a defect in its track. *Reed v. New York C. R. Co.*, 56 *Barb. (N. Y.)* 493.

170. Embankments* and cuts.—Where a company builds its road on an embankment or side hill it must take the necessary precaution to prevent its cars being precipitated down the declivity by either widening the crown of the road or erecting walls or other safeguards to prevent it. So a company was held liable for an injury to a passenger where his car was thrown off the track on a narrow embankment and precipitated down the declivity, as the company had taken no precautions to prevent the car being thrown down the side of the embankment. *Hanley v. Harlem R. Co.*, 1 *Edm. Sel. Cas. (N. Y.)* 359.

Where an accident occurs by reason of the washing away of an embankment because of insufficient drainage, the company will not be relieved of liability by the fact that the road was constructed under the supervision of a competent engineer, and that the drainage at the point of the accident was provided for in a manner directed and approved by him. And this rule applies to a leased road. *Philadelphia & R. R. Co. v. Anderson*, 6 *Am. & Eng. R. Cas.* 407, 94 *Pa. St.* 351, 39 *Am. Rep.* 787.—**DISTINGUISHING** *Mansfield C. & C. Co. v. McEnery*, 91 *Pa. St.* 185. **FOLLOWING** *Sullivan v. Philadelphia & R. R. Co.*, 30 *Pa. St.* 234; *Laing v. Colder*, 8 *Pa. St.* 479; *Meier v. Pennsylvania R. Co.*, 64 *Pa. St.* 225; *DelaWare, L. & W. R. Co. v. Napheys*, 90 *Pa. St.* 135.—**DISTINGUISHING** *IN* *Hayman v. Pennsylvania R. Co.*, 34 *Am. & Eng. R. Cas.* 478, 118 *Pa. St.* 508, 10 *Cent. Rep.* 835, 11 *Atl. Rep.* 815, 20 *W. N. C.* 466; *Pennsylvania R. Co. v. MacKinney*, 37 *Am. & Eng. R. Cas.* 153, 124 *Pa. St.* 462.

Proof that a passenger is injured where a

road is carried over an embankment and bridge across a ravine, caused by part of the embankment being washed away, which was so constructed as not to resist the action of water, is sufficient to render the company liable for negligence in the construction of its road, but not for wilful negligence. *Kansas Pac. R. Co. v. Lundin*, 3 *Colo.* 94.—**DISTINGUISHING** *Withers v. North Kent R. Co.*, 3 *H. & N.* 969.

A landslide, in a cut through which a railroad passes, caused by an ordinary fall of rain is not an "act of God" which will exempt the company from liability for injury to passengers caused thereby. The failure to so construct the banks of its cuts that they will not slide by reason of the action of ordinary causes and to carefully inspect them is negligence which entails liability for injuries to passengers caused by the banks giving way. *Gleson v. Virginia Midland R. Co.*, 47 *Am. & Eng. R. Cas.* 513, 140 *U. S.* 435, 11 *Sup. Ct. Rep.* 859.

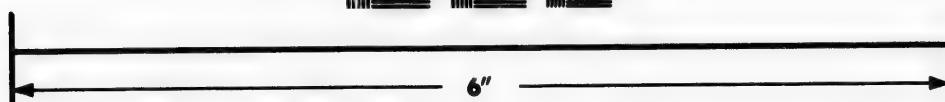
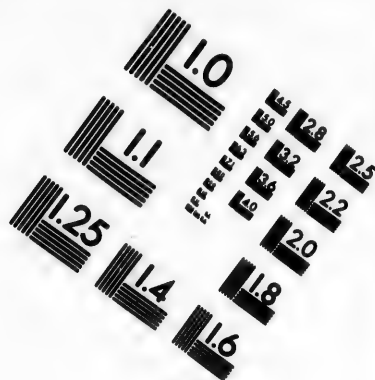
171. Bridges.*—The duty of a carrier of passengers is not discharged by the purchase from reputable manufacturers of the material used in the construction of its bridges, it being incumbent on the company to carefully and skillfully test and inspect the materials used before relying on their sufficiency and to continue the inspection from time to time whilst the bridges are in use. *Louisville, N. A. & C. R. Co. v. Snyder*, 37 *Am. & Eng. R. Cas.* 137, 117 *Ind.* 435, 20 *N. E. Rep.* 284, 3 *L. R. A.* 434. And see also *Kansas Pac. R. Co. v. Miller*, 2 *Colo.* 442, 20 *Am. Ry. Rep.* 245.

Defendant constructed its road over a lift-bridge owned by the state, and plaintiff, while a passenger, was injured by a quantity of iron falling which was used in balancing the bridge. *Held*, that by using the bridge the company made itself liable for the injury the same as if it had owned the bridge. *Birmingham v. Rochester City & B. R. Co.*, 37 *N. Y. S. R.* 317, 59 *Hun* 583, 14 *N. Y. Supp.* 13.

A state bridge, the plans of which were approved and its construction thereunder supervised by state officers, which forms part of a highway and is used by a street-railway company with the consent or license of the state, but over which it has no control, is not such an appliance of the company by adoption as will render it liable

* See also EMBANKMENTS, 6.

* See also BRIDGES—VIADUCTS, 51.



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for an injury to one of its passengers caused by a defect in a device for raising and lowering the bridge, which, although discoverable in the manufacture, was not apparent on ordinary observation. *Birmingham v. Rochester City & B. R. Co.*, 58 Am. & Eng. R. Cas. 134, 137 N. Y. 13, 32 N. E. Rep. 995.

172. Trestles.—A passenger cannot recover for an injury received by a trestle giving way under a train, where the evidence shows that there had been an unusual rain just before, but fails to show any negligence on the part of the company in the construction of the trestle, its inspection, or in the operation of the train. *Wabash, St. L. & P. R. Co. v. Koenigsam*, 13 Ill. App. 50.

Plaintiff was a passenger on defendant's train that broke through in crossing a trestle. The sleeper whereon plaintiff was, dipped over the break at an angle of forty-five degrees, but so gently as not even to break or put out the lamps in the cars. Plaintiff was sleeping when the break occurred, and on leaving the car said he was uninjured and declined medical services. Weeks later he became sick. The physicians disagreed as to the nature of his ailment, his own testifying that it was spinal meningitis, the defendant's that it was malaria. At the trial he was well. *Held*, that no injury to plaintiff or negligence of defendant was established for which a recovery could be had. *Richmond & D. R. Co. v. Moffett*, 88 Va. 785, 14 S. E. Rep. 370.

173. Switches.—A railway switch which is either defective in construction or out of repair is intrinsically dangerous to the lives of passengers transported over that portion of the track upon which the switch is situated, and where it must be used in order to regulate the movement of passenger trains. *Stodder v. New York, L. E. & W. R. Co.*, 50 Hun (N. Y.) 221, 19 N. Y. S. R. 772; *affirmed in* 121 N. Y. 655, *mem.*

A company that maintains a switch and employs the persons who tend it is liable for the injuries received by passengers of another road who have the privilege of running over it for a certain compensation paid, caused by its defective condition. *Stodder v. New York, L. E. & W. R. Co.*, 50 Hun (N. Y.) 221, 19 N. Y. S. R. 772; *affirmed in* 121 N. Y. 655, *mem.*—**FOLLOWING** *Smith v. New York & H. R. Co.*, 19 N. Y. 127.

174. Selection of materials used.

—A company employed in transporting passengers exercises a sufficient degree of care in the selection of the plans and materials for the construction of its road and appliances if it select such plans and materials as are in use and have been found sufficient by the best and most skillfully conducted roads of the country. *Pershing v. Chicago, B. & Q. R. Co.*, 34 Am. & Eng. R. Cas. 405, 71 Iowa 561, 32 N. W. Rep. 488.

A company must do all that human care, vigilance, and foresight reasonably can, consistent with the mode of conveyance and the practical operation of the road, in providing safe coaches, machinery, tracks, and roadbed, and to keep the same in repair; but the carrier does not absolutely insure the passenger against injury, and, while responsible for an injury resulting from negligence, is not responsible for an accident resulting from a hidden defect in materials used for ties, rails, etc., if such defect could not, by the exercise of such care, vigilance, and foresight, be detected. *St. Louis Coal R. Co. v. Moore*, 14 Ill. App. 510.

175. Providing against ordinary rainfall.*

—A company is required to so construct its roadbed and track as to avoid those dangers which it could be reasonably foreseen by competent and skillful engineers might result from the ordinary rainfall and freshets peculiar to the particular section of country in which it is constructed. *International & G. N. R. Co. v. Halloren*, 3 Am. & Eng. R. Cas. 343, 53 Tex. 46, 37 Am. Rep. 744.

176. Providing against extraordinary floods.†—(1) Generally.

—It is not culpable negligence on the part of a company in the construction of its roadbed, track, and culverts if it has failed to provide against such extraordinary and unprecedented storms, floods, or other inevitable casualties caused by the hidden forces of nature, unknown to common experience, and which could not have been reasonably anticipated by that degree of engineering skill and experience required in the prudent construction of such railroad. *Libby v.*

* See also BRIDGES—VIADUCTS, 23; CULVERTS, 13.

Liability for injuries to passengers caused by washouts, see note, 37 AM. REP. 749.

† See also CULVERTS, 14; FLOODING LANDS, I, 3.

Maine C. R. Co., 58 *Am. & Eng. R. Cas.* 81, 85 *Me.* 34, 26 *Atl. Rep.* 943. *International & G. N. R. Co. v. Halloren*, 3 *Am. & Eng. R. Cas.* 343, 53 *Tex.* 46, 37 *Am. Rep.* 744.

A company is not liable for an injury to a passenger caused by a train turning over, due to a defect in the track caused by a violent storm, in the absence of proof that the engineer had reason to suspect that the track was out of order and failed to test it. *Ellet v. St. Louis, K. C. & N. R. Co.*, 12 *Am. & Eng. R. Cas.* 183, 76 *Mo.* 518.

If the real cause of the personal injury sued for by a passenger be a sudden and extraordinary rain-storm, which washed away the ties of the railroad, negligence of the carrier, which only remotely and indirectly contributed to the injury, will not make the carrier liable. *Gillespie v. St. Louis, K. C. & N. R. Co.*, 6 *Mo. App.* 554.

(2) *Illustrations*.—In an action against a company for injuries sustained by a passenger in an accident caused by an embankment on the company's road being undermined by a rain-storm of unprecedented violence, it appearing that since the accident the embankment had been so altered as to provide against a recurrence of such storms, the company asked, but the trial court refused, an instruction that the jury were not to take this fact into consideration. *Held*, that this was error. *Ely v. St. Louis, K. C. & N. R. Co.*, 16 *Am. & Eng. R. Cas.* 342, 77 *Mo.* 34.

A roadbed which was safe before a rain-fall was undermined by a sudden and unusual rainfall about dark, which was but local in its extent. Plaintiff was injured while passing over it on a train run at half speed. Another train had safely passed over the track two hours before, and the track seemed to be safe, and no defect was visible at the time of the accident. The track had been inspected after the passage of the former train and before the accident, and was apparently in safe condition. *Held*, that the company was not liable for the injury. *International & G. N. R. Co. v. Halloren*, 3 *Am. & Eng. R. Cas.* 343, 53 *Tex.* 46, 37 *Am. Rep.* 744.

Where it was claimed that the dangerous condition of the track was attributable to unprecedented rain, snow, and cold, and the testimony showed that the wreck was on December 26, and that there was much continuous rain and some snow for a considerable time before the accident, while the

case did not call for a charge upon the subject, yet it was not improper to charge upon the subject "that the railway company would not be liable if the defect (a broken rail) that caused the accident was brought about by weather unusual and unprecedented, against which the company could not have guarded by the use of proper care and skill." *Missouri Pac. R. Co. v. Mitchell*, 72 *Tex.* 171, 10 *S. W. Rep.* 411.

177. Acts of public enemy.*—Proof that a railroad bridge was down, causing a train to be precipitated, which injured a passenger, is sufficient to *prima facie* show negligence on the part of the company; but proof on the part of the company that the bridge was down by reason of a sudden inroad and hostile act of the public enemy, and not by any deficiency of construction or repair, is sufficient to rebut the *prima facie* case; and the company will be held not liable, unless there be further proof that those in charge of the train knew that the bridge was down, and failed to use such care and diligence as a very careful and prudent man would have exercised. *Sawyer v. Hannibal & St. J. R. Co.*, 37 *Mo.* 240.

178. Obstructions on or near track.†—(1) *Generally*.—The duty of a company to employ the utmost care and diligence in guarding their road against obstructions on the track is clearly embraced within its warranty to carry their passengers safely, so far as human care and foresight can go. *Virginia C. R. Co. v. Sanger*, 15 *Gratt. (Va.)* 230. *Carrico v. West Virginia C. & P. R. Co.*, 52 *Am. & Eng. R. Cas.* 393, 35 *W. Va.* 389, 14 *S. E. Rep.* 12.

When a passenger is injured by reason of any such obstruction along the line of its road, the burden devolves upon it to prove that the accident was the result of the plaintiff's own negligence, or that the most thorough and perfect diligence could not have foreseen and prevented the injury. Neither can the company relieve itself from liability in regard to the condition and construction of its road by undertaking to confide these duties which it owes to passengers to other hands, no matter what precaution it may have taken in selecting such agencies. *Carrico v. West Virginia C. & P. R. Co.*, 52 *Am. & Eng. R. Cas.* 393, 35 *W. Va.* 389, 14 *S. E. Rep.* 12.

* See also *ante*, 158.

† See also *post*, 485-490.

(2) *Coal-bins—Gates—Timber and bushes.*—It is negligence to allow coal-bins so close to its track that persons upon an excursion car cannot safely stand, while passing them, upon the running board that stretches along the side of such a car. *Dickinson v. Port Huron & N. R. Co.*, 21 *Am. & Eng. R. Cas.* 456, 53 *Mich.* 43, 18 *N. W. Rep.* 553.

Where a railroad maintains a gate across a highway where its road crosses, in such a manner as to be dangerous to passengers in any event which may reasonably be expected to occur, the company is liable for the injury. So held, where a heavy team became frightened and ran against such gate, and so threw it out of position that one end of it ran through a car-window in a train which was passing and injured a passenger. *Tyrell v. Eastern R. Co.*, 111 *Mass.* 546.

Railway passenger carriers bind themselves to exercise the utmost degree of human care, diligence, and skill in order to carry their passengers safely; and this obligation makes it the duty of the company to remove timber and bushes along the track on the land of the company, so as to keep the engineer's view unobstructed. *Louisville & N. R. Co. v. Ritter*, 28 *Am. & Eng. R. Cas.* 167, 85 *Ky.* 368, 3 *S. W. Rep.* 591.

179. Duty to fence track.*—One of the objects of a statute requiring railroad companies to fence their tracks is for the safety of passengers. So proof that a passenger was injured by reason of a failure to fence, as the statute required, is sufficient proof of negligence to render the company liable. *Blair v. Milwaukee & P. du C. R. Co.*, 20 *Wis.* 254. *Donagan v. Erhardt*, 42 *Am. & Eng. R. Cas.* 580, 119 *N. Y.* 468.

A company must take measures to so fence its track as to prevent animals from running upon it. If the duty to fence is negligently violated, and the violation of duty is the proximate cause of injury to a passenger, his right of action is clear and complete. *Louisville, N. A. & C. R. Co. v. Hendricks*, 128 *Ind.* 462, 28 *N. E. Rep.* 58.

A company is not obliged to fence its line as to passengers and persons already on the line. The duty to fence is towards persons off the line, to prevent them from getting or straying upon it. Accordingly, if a passenger in getting out of a carriage,

which has overshot the station platform, falls from an embankment to the roadway beneath, owing to the absence of a fence on top of the embankment, the company is not liable. *Harrold v. Great Western R. Co.*, 14 *L. T.* 440.

d. Safe Cars, Engines, Appliances, etc.*

180. Degree of care required.†—The obligation imposed on railroads with respect to passengers is that their machinery is suitable, sufficient, and as safe as care and skill can make it. *Nashville & D. R. Co. v. Jones*, 9 *Heisk. (Tenn.)* 27, 19 *Am. Ry. Rep.* 261. *Taylor v. Pennsylvania Co.*, 50 *Fed. Rep.* 755.

They are required to provide for the safety of passengers all such things as are reasonably consistent with their business and appropriate to the means of conveyance they employ, but they are not required, in order to make their roads perfectly safe, to incur such expenses as would render the business of carrying passengers wholly impracticable. *Arkansas Midland R. Co. v. Canman*, 52 *Ark.* 517, 13 *S. W. Rep.* 28c.—QUOTING *Indianapolis & St. L. R. Co. v. Horst*, 93 *U. S.* 291.

Greatest care must be used in regard to machinery and equipments of the road. *Hanson v. Mansfield R. & T. Co.*, 38 *La. Ann.* 111, 58 *Am. Rep.* 162.

A carrier in the conduct and management of his business, and as to all the appliances made use of in the business, is bound to exercise the highest degree of care and diligence, for the convenience and safety of his passengers, that is reasonably consistent with the practical conduct of the business, and is held liable for the slightest neglect. *Pershing v. Chicago, B. & Q. R. Co.*, 34 *Am. & Eng. R. Cas.* 405, 71 *Iowa* 561, 32 *N. W. Rep.* 488. *Chicago & N. W. R. Co. v. Reilly*, 40 *Ill. App.* 416. *Eureka Springs R. Co. v. Timmons*, 40 *Am. & Eng. R. Cas.* 698, 51 *Ark.* 459, 11 *S. W. Rep.* 690.

This duty and responsibility exist not only in respect to the vehicle, but to every means and instrument used or embraced by the carrier in the transportation, and extends throughout the entire journey. *Mc-*

* See also *FENCES, II.*; and *post*, 211.

Injury to passengers owing to failure to fence, whereby collisions with cattle occur, see note, 42 *AM. & ENG. R. CAS.* 582.

* Railroads not bound to provide against possibility of accident with respect to its appliances, see note, 30 *AM. & ENG. R. CAS.* 590.

† See also *ante*, 137-160, 162-164; *post*, 266, 288, 348, 417.

Lean v. Burbank, 11 Minn. 277 (Gil. 189).—QUOTED IN *Jacobus v. St. Paul & C. R. Co.*, 20 Minn. 125 (Gil. 110).

It is bound to exercise the utmost care and diligence and is responsible for the slightest neglect; and when an accident and injury are proved, resulting from the breaking of carriages or machinery, a want of road-worthiness, or insufficiency of construction or equipment, or other like accidents occurring on the road, the law will imply some degree of negligence from these facts; for from their very nature they may be taken as affirmatively importing at least that slightest degree of negligence or unskillfulness which will be sufficient to render a carrier liable for an injury done to a passenger. *Schultz v. Pacific R. Co.*, 36 Mo. 13.—DISTINGUISHED IN *Rohback v. Pacific R. Co.*, 43 Mo. 187.

Carriers are bound to exercise the highest degree of care which a prudent man would use, and to adopt all precautions which have been practically tested and are known to be of value; but are not bound to have machinery constructed of the "most perfect material," and in the "most perfect manner which care and diligence can suggest," consistent with the construction and operation of their boats. *Yerkes v. Keokuk N. L. Packet Co.*, 7 Mo. App. 265.—DISTINGUISHING *Harvey v. Terre Haute & I. R. Co.*, 6 Mo. App. 585. QUOTING *Holbrook v. Utica & S. R. Co.*, 12 N. Y. 236.

181. Providing safe place in which to ride.—The stoppage of a train at a regular station is an invitation to the public to take passage thereon, and the sale of tickets for that train binds the company running the road to furnish its passengers a safe and secure place to ride. Proof of their omission to do so, whereby a passenger is obliged to ride in an unsafe place, is evidence tending to show negligence. *Werle v. Long Island R. Co.*, 21 Am. & Eng. R. Cas. 429, 98 N. Y. 650.

When a carrier of passengers, by himself or his manager or conductor, accepts a person as a passenger and receives from him the full and established fare, without any restriction in the contract itself as to place or mode of carriage, he is bound to furnish such passenger with a safe and comfortable vehicle and a safe and comfortable place or position, and so to transport the passenger that he shall not sustain injury from any fault or neglect of the carrier, any

rule, notice, or regulation of the carrier to the contrary notwithstanding; and he is responsible for any injury the passenger may sustain by the fault or neglect of the carrier, provided the passenger occupies as safe a place as he can and conducts himself with proper care in the place where he is. *Hadencamp v. Second Ave. R. Co.*, 1 *Sweeney (N. Y.)* 490.

182. Defective cars, carriages, and coaches, generally.*—Where a defective car was put in a train, the carrier must be held liable. *East Line & R. R. Co. v. Smith*, 65 Tex. 167.

A carrier is bound to use the utmost care and diligence in providing for the safe carriage of his passengers. *Ryland v. Peters*, 1 Phila. (Pa.) 264. *Taylor v. Grand Trunk R. Co.*, 48 N. H. 304. *Gonzales v. New York & H. R. Co.*, 39 How. Pr. (N. Y.) 407. *Sullivan v. Philadelphia & R. R. Co.*, 30 Pa. St. 234. *Nashville & C. R. Co. v. Missino*, 1 Sneed (Tenn.) 220. *International & G. N. R. Co. v. Halloren*, 3 Am. & Eng. R. Cas. 343, 53 Tex. 46, 37 Am. Rep. 744.

While a carrier of passengers is not an insurer of their safety, and does not undertake that the vessel or vehicle, or the machinery he employs, is absolutely free from defects, he is held to the exercise of the utmost skill and care in the construction and management of both. *Carroll v. Staten Island R. Co.*, 58 N. Y. 126, 7 Am. Ry. Rep. 25, 9 Am. Ry. Rep. 486; affirming 65 Barb. 32.—FOLLOWING *Christie v. Gregg*, 2 Camp. 79. **LIMITING** *Alden v. New York C. R. Co.*, 26 N. Y. 102.

The law requires carriers to furnish sufficient cars to secure the safety of their passengers by the exercise of the utmost care and skill in their preparation, whether they construct them themselves or employ others to do so. It is not enough to show that persons of good reputation were employed to construct the cars. The carrier must see that the manufacturers not only possessed the requisite capacity and skill, but exer-

* Liability for injuries resulting from defects in vehicles and appliances, see notes, 64 AM. DEC. 521; 75 Id. 268.

Implied contract on part of carrier that cars and apparatus are suitable, see note, 2 L. R. A. 85.

Duty to passenger not discharged by employment of proper persons to construct vehicles and track, see note, 6 AM. & ENG. R. CAS. 418.

Duty to furnish safe carriages, see note, 31 AM. REP. 324.

cised it. *Hegeman v. Western R. Corp.*, 13 N. Y. 9; affirming 16 Barb. 353.—DISTINGUISHED IN *Carlson v. Phoenix Bridge Co.*, 132 N. Y. 273. REVIEWED IN *Brown v. New York C. R. Co.*, 34 N. Y. 404; *Steinweg v. Erie R. Co.*, 43 N. Y. 123; *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 282.

A company is bound to furnish safe cars for the transportation of all persons, whether they be passengers or employes, who have the right to travel on them; and if a car be so improperly constructed as to make its use gross negligence, such negligence is the proximate cause of an injury, and an action for damages will lie. *Gulf, W. T. & P. R. Co. v. Ryan*, 33 Am. & Eng. R. Cas. 289, 69 Tex. 665, 7 S. W. Rep. 83.

The use of defective cars with knowledge of their condition is inconsistent with the degree of care required of a carrier of passengers, and an instruction to that effect is correct, it being left with the jury whether that state of facts existed, and if it did, whether the company had knowledge of it. *East Line & R. R. Co. v. Smith*, 65 Tex. 167.

A company which manufactures its own passenger coaches must use due care and skill. *Holton v. London & S. W. R. Co.*, 1 C. & E. 542.

The breaking of a bolt, whereby the rear wheels of a car were separated from the car and the car thrown off the track, is sufficient evidence of negligence and insufficiency of the car conveying passengers, the train having at the time just left a station, and proceeding at the rate of from 4 to 5 miles an hour, there being no obstruction on the track and nothing out of the usual course of things, notwithstanding evidence by the defendants' servants that the car had been recently examined, and that no indication presented itself to the eye of any defect either in the bolt or car. *Germain v. Montreal & N. Y. R. Co.*, 6 Low. Can. 172.

183. Brakes.—Where it is not the duty of a company to run separate passenger trains, the statute (Mansf. Ark. Dig. § 5477) requires it, in forming mixed trains, to place the baggage and freight cars in front of the passenger coaches, and if the use of bell-pulls and air-brakes on trains thus formed is impracticable, the law will not require it. But if the use of such appliances on mixed trains is practicable, and is necessary to the safety of passengers, then the law will demand it. *Arkansas Midland R. Co. v. Can-*

man, 52 Ark. 517, 13 S. W. Rep. 280.—QUOTED IN *St. Louis, I. M. & S. R. Co. v. Sweet*, 57 Ark. 287.

In an action to recover damages for injuries received by reason of one of the cars having a defective brake, the accident occurring at night during a heavy snowstorm, it is not error to charge the jury that the defendant is liable if the brake was "out of order, not in reasonable repair, not reasonable for the occasion;" the brake should be suitable as well for stormy as for fair weather, otherwise the passengers and employes would be left without efficient safeguards at the very time they are most needed. *Mackey v. Baltimore & P. R. Co.*, 8 Mackey (D. C.) 282.

Where it appears that the brake-wheel might have been fastened so as to prevent accidents, with reasonable expense and trouble, a general verdict for the person injured will not be disturbed because the jury find, specially, facts tending to show a lack of negligence, but failed to find that there was no defect in the brake or machinery. *Cleveland, C. C. & St. L. R. Co. v. McHenry*, 47 Ill. App. 301.

184. Car-axles.—(1) *Rule stated.*—A carrier of passengers is liable for an injury caused by a defective car-axle giving way, though the defect could not have been discovered by any practicable test or examination. *Alden v. New York C. R. Co.*, 26 N. Y. 102.—FOLLOWING *Hegeman v. Western R. Corp.*, 13 N. Y. 9; *Sharp v. Grey*, 9 Bing. 457, 2 M. & S. 621.—CRITICISED IN *Nashville & D. R. Co. v. Jones*, 9 Heisk. (Tenn.) 27. DISAPPROVED IN *Meier v. Pennsylvania R. Co.*, 64 Pa. St. 225. LIMITED IN *McPadden v. New York C. R. Co.*, 44 N. Y. 478; *Carroll v. Staten Island R. Co.*, 58 N. Y. 126. REVIEWED IN *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 282.

But it is not liable to passengers for injuries resulting from latent defects in parts of the car, which human knowledge, skill, and foresight cannot provide against. So held, where a passenger was injured by the breaking of an axle, made at the best shops, of the best material, and apparently in good condition, the roadbed being good and the train running at a proper rate of speed. *Meier v. Pennsylvania R. Co.*, 64 Pa. St. 225.—DISAPPROVING *Alden v. New York C. R. Co.*, 26 N. Y. 102. OVERRULING *New Jersey R. Co. v. Kennard*, 21 Pa. St. 204.—APPLIED IN *Fredericks v. Northern C. R.*

Co., 157 Pa. St. 103. FOLLOWED IN Philadelphia & R. R. Co. v. Anderson, 6 Am. & Eng. R. Cas. 407, 94 Pa. St. 351, 39 Am. Rep. 787.

(2) *Illustrations*.—Where a passenger in a car was injured by the breaking of one of the axles in consequence of a latent defect, which could not be discovered by the most vigilant external examination—*held*, that the company was responsible to him for damages, although it purchased the car from extensive and skilful car-makers, and the axle was procured from a manufacturer of skill and reputation, if the defect could have been discovered in the process of manufacturing the axle or car by the application of any test known to men skilled in such business. *Hegeman v. Western R. Corp.*, 13 N. Y. 9; *affirming* 16 Barb. 353.—DISTINGUISHING *Ingalls v. Bills*, 9 Metc. (Mass.) 1.—FOLLOWED IN *Alden v. New York C. R. Co.*, 26 N. Y. 102; *Brehm v. Great Western R. Co.*, 34 Barb. (N. Y.) 256.

Plaintiff being a passenger in one of defendants' cars, the axle of the tender broke and the tender and car in which plaintiff was were thrown off the track, whereby plaintiff's arm was broken. At the trial defendants called the engineer of the train, who proved that he examined the axle shortly before the accident, when it appeared in good order. The jury having found a verdict for plaintiff upon this evidence, and with a charge favorable to defendants, the court refused to set it aside, on the ground that it was for the jury, on the evidence, to determine whether there was negligence on the part of defendants or not. *Thatcher v. Great Western R. Co.*, 4 U. C. C. P. 543.

185. Car-wheels.—A company is not liable for an injury to a passenger arising from a latent defect in a car-wheel such as no care or skill could discover. *Redhead v. Midland R. Co.*, 8 B. & S. 371, 36 L. J. Q. B. 181, L. R. 2 Q. B. 412, 15 W. R. 831, 16 L. T. 485; *affirmed on appeal* in 9 B. & S. 519, L. R. 4 Q. B. 379, 38 L. J. Q. B. 169, 20 L. T. 682, 17 W. R. 737.—FOLLOWED IN *Searle v. Laverick*, L. R. 9 Q. B. 122, 43 L. J. Q. B. 43, 30 L. T. 89, 22 W. R. 367.

An accident caused by a latent defect in the wheel of a passenger coach, which no care could detect, does not render the company responsible for injury to passengers, since it does not warrant the road-worthiness of its vehicles, but is only bound to use the

utmost vigilance. *Redhead v. Midland R. Co.*, 9 B. & S. 519, 38 L. J. Q. B. 169, L. R. 4 Q. B. 379, 17 W. R. 737, 20 L. T. 628. And see also *Blamires v. Lancashire & Y. R. Co.*, 42 L. J. Ex. 182, L. R. 8 Ex. 283.

The evidence tending to show the negligence of the company in running the train at a high rate of speed over poor track, roadbed, etc., using a cracked wheel, and failing to have the proper officers make due and careful inspection of the same—*held*, to warrant a finding that the injury to the passenger happened through the negligence of the company. *Texas & P. R. Co. v. Hamilton*, 26 Am. & Eng. R. Cas. 182, 66 Tex. 92.

186. Couplings.—In going from one car to another while the train is in motion, a passenger only assumes the visible risks, and the company is liable for an injury received by a passenger while passing from the smoking-car to his coach, caused by the breaking of a coupling between the cars, due to the negligence of the company. *Costikyan v. Rome, W. & O. R. Co.*, 12 N. Y. Supp. 683.—REVIEWING *Goodrich v. New York C. & H. R. R. Co.*, 116 N. Y. 398, 22 N. E. Rep. 397.

187. Doors, windows, etc.—Where a carriage-door flies open upon being merely "touched" by a passenger, causing her to fall out and receive injuries, there is evidence of negligence on the part of the company to go to the jury. *Richards v. Great Eastern R. Co.*, 28 L. T. 711.

The mere fall of a carriage-window from the ledge upon which it rests while closed is not evidence of negligence which will support an action for injury to a passenger caused by the sudden descent of the window. *Murray v. Metropolitan District R. Co.*, 27 L. T. 762.

It is not the duty of a company to place screens at the windows of its cars, either to prevent the passengers from putting their heads or arms out or to protect them against missiles thrown by persons outside over whom the company has no control. *Missimer v. Philadelphia & R. R. Co.*, 17 Phila. (Pa.) 172.

Plaintiff, in alighting from one of defendant's cars, was thrown to the ground and injured, her clothing having caught on a curtain-hook. The car was an open one, with side-curtains, which, when let down, were fastened together by a ring on one side and a hook with a spring upon the

other. When the spring was in place it formed, with the hook, a loop. On the day of the accident the spring in one of these hooks was broken, and it was upon this broken hook that plaintiff's clothing caught. There was no proof showing how or when the spring was broken, or how long it had been broken. Defendant proved that all the cars on that line were furnished with the same kind of curtains and hooks; that there was no better way known of fastening the curtains; that its road had been operated for several years and had carried more than a million of passengers yearly, and such an accident had never before occurred; that the springs in the hooks would sometimes break by use; that at the end of each trip the cars were inspected by persons assigned to that duty and the curtains examined, and if a broken hook was discovered it was replaced by a perfect one. *Held*, that the evidence failed to establish a case entitling plaintiff to a recovery, and a refusal to dismiss the complaint was error. *Kelly v. New York & S. B. R. Co.*, 109 N. Y. 44, 15 N. E. Rep. 879, 14 N. Y. S. R. 36, 11 Cent. Rep. 874; reversing 39 Hun 486.—APPLIED IN *Powers v. New York C. & H. R. R. Co.*, 60 Hun (N. Y.) 19.

188. Lamp-shades.—The plaintiff, a passenger on defendant's road, was injured by the falling of a porcelain lamp-shade fixed in the upper part of the car. In an action to recover damages for the injuries received—*held*, that the fact that the shade fell was alone sufficient to authorize the jury to find that it was in an unsafe condition owing to defendant's negligence. *White v. Boston & A. R. Co.*, 30 Am. & Eng. R. Cas. 615, 144 Mass. 404, 4 N. Eng. Rep. 267, 11 N. E. Rep. 552.

189. Platforms.—Where a company permits passengers to ride on a caboose attached to a freight train, and which is not designed primarily for the carriage of passengers, it is not negligence in it to fail to put a chain across the rear end of the platform for the better safety of passengers. *Chicago, B. & Q. R. Co. v. Hazzard*, 26 Ill. 373.—QUOTED IN *Lusby v. Atchison, T. & S. F. R. Co.*, 41 Am. & Eng. R. Cas. 93, 41 Fed. Rep. 181.

190. Stoves and furnaces.—*New York statute.*—New York act of 1887, ch. 616, as amended in 1888, ch. 189, prohibiting the heating of passenger cars by stoves or furnaces, except on roads less than

fifty miles long, applies to all roads in the state having fifty miles or more of road, though part of the road may be in another state. *People v. New York, N. H. & H. R. Co.*, 8 N. Y. Supp. 672; affirming 5 N. Y. Supp. 945.

Said statutes are but police regulations and are not an infringement of interstate commerce or of the federal constitution when applied to a road only part of which is in the state. *People v. New York, N. H. & H. R. Co.*, 8 N. Y. Supp. 672; affirming 5 N. Y. Supp. 945.—QUOTING *Thorpe v. Rutland & B. R. Co.*, 27 Vt. 149.

191. Defective engines.—The regulation of the Board of Trade requiring a space of 2 feet 4 inches to be left between the sides of passenger carriages and structures on a line has no bearing upon the question of the fitness of an engine to run upon the line. *East & W. J. R. Co. v. Northampton & B. J. R. Co.*, 2 Ry. & C. T. Cas. 293. Compare *Hegeman v. Western R. Corp.*, 13 N. Y. 9. *Nashville & C. R. Co. v. Messino*, 1 Sneed (Tenn.) 220. *International & G. N. R. Co. v. Halloren*, 3 Am. & Eng. R. Cas. 343, 53 Tex. 46, 37 Am. Rep. 744.

192. — driving-wheel.—It is a question for the jury, in an action for injuries to a passenger caused by a defective driving-wheel, whether the company should have tested the wheel in a certain manner, it being shown that the defect would in all probability have been discovered thereby. *Manser v. Eastern Counties R. Co.*, 3 L. T. 585.

193. Adoption of new improvements.—Railroads are not required to adopt every new invention; it is sufficient if they conform to such machinery and appliances as are in ordinary use by well-regulated railroad companies. *Louisville & N. R. Co. v. Jones*, 34 Am. & Eng. R. Cas. 417, 83 Ala. 376, 3 So. Rep. 902.

The law requires of the carrier that he shall adopt the usual kind and quality of means employed by other railroad carriers, to enable them, similarly situated, the better to perform their duties. *Wallace v. Wilmington & N. R. Co.*, (Del.) 18 Atl. Rep. 818.

Carriers of passenger are bound to keep pace with science, art, and modern improvement in supplying safe vehicles, and must adopt the most improved modes of construction and machinery and appliances of safety in known use. They cannot be ex-

cused from the vigilant use of all known tests of safety reasonably practicable, by the fact that the vehicle was originally constructed by a competent and skilled manufacturer. *Treadwell v. Whittier*, 80 Cal 574, 22 Pac. Rep. 266.

Carriers who propel their passengers by steam are bound to use every precaution, skill, and care that foresight can provide, and to exercise some care and foresight in ascertaining and adopting new improvements, to secure additional protection. If a defect exists, which could have been avoided or remedied by any means which science had furnished or disclosed, it is the duty of the carrier to employ such means, although not generally used by manufacturers. *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 282.—REVIEWING *Hegeman v. Western R. Corp.*, 13 N. Y. 9; *Alden v. New York C. R. Co.*, 26 N. Y. 102; *Steinweg v. Erie R. Co.*, 43 N. Y. 123.

Whether the adoption by a company of an improvement enhancing the safety of passengers is, under the evidence, a necessary and proper precaution, is a question of fact for the jury. *Hegeman v. Western R. Corp.*, 13 N. Y. 9; *affirming* 16 Barb. 353.

194. Examination and inspection.*

—The duty of a company to its passengers does not require it to make such a minute examination of the car-trucks as will defeat the purposes of through traffic. Nor is it its duty to make a minute examination of the whole of a truck merely because a defect has been discovered in it. *Richardson v. Great Eastern R. Co.*, 24 W. R. 907, L. R. 1 C. P. D. 342, 35 L. T. 351; *reversing* L. R. 10 C. P. 480, 32 L. T. 248. And see also *International & G. N. R. Co. v. Halloren*, 3 Am. & Eng. R. Cas. 343, 53 Tex. 46, 37 Am. Rep. 744.

The question as to what is the requirement of duty in regard to frequency of examination is dependent upon the liability to impairment and the consequences which may be apprehended as the result of defective condition. *Palmer v. Delaware & H. Canal Co.*, 44 Am. & Eng. R. Cas. 298, 120 N. Y. 170, 24 N. E. Rep. 302, 30 N. Y. S. R. 817; *affirming* 46 Hun 486, 11 N. Y. S. R. 872.

Whether the system and manner of executing its duty in examining its machinery and appliances are all that may be required

of a carrier cannot be measured by any rule of law to be applied by the court, but that question is one of fact for the jury to determine upon proper instruction. *Palmer v. Delaware & H. Canal Co.*, 44 Am. & Eng. R. Cas. 298, 120 N. Y. 170, 24 N. E. Rep. 302, 30 N. Y. S. R. 817; *affirming* 46 Hun 486, 11 N. Y. S. R. 872.—REVIEWED IN *Schneider v. Second Ave. R. Co.*, 39 N. Y. S. R. 370.

In a suit by a passenger to recover damages for personal injuries, a charge which declares that it is the duty of those operating trains to inspect the same is not erroneous when the damage sustained is alleged to have been caused by negligence of the company in failing to furnish safe cars for traveling purposes. *Texas & St. L. R. Co. v. Suggs*, 21 Am. & Eng. R. Cas. 475, 62 Tex. 323.

195. Latent defects.*—Companies buying rolling stock from reputable manufacturers are not chargeable with negligence in accepting material on such inspection as is usual and practicable, without discovering concealed defects; they cannot be held to warrant their cars. *Grand Rapids & I. R. Co. v. Huntley*, 38 Mich. 537.—FOLLOWING *Richardson v. Great Eastern R. Co.*, L. R. 1 C. P. D. 342.—And see also *Alden v. New York C. R. Co.*, 26 N. Y. 102. *Meier v. Pennsylvania R. Co.*, 64 Pa. St. 225. *Hegeman v. Western R. Corp.*, 13 N. Y. 9. *Redhead v. Midland R. Co.*, 8 B. & S. 371, 36 L. J. Q. B. 181, L. R. 2 Q. B. 412, 15 W. R. 831, 16 L. T. 485; *affirmed in* 9 B. & S. 519, L. R. 4 Q. B. 379, 38 L. J. Q. B. 169, 20 L. T. 628, 17 W. R. 737.

Where an injury to a passenger is the result of the breaking of a wheel to the coach, and it appears that such wheel was made by one of the most skilful manufacturers, and had been thoroughly tested by skilful and experienced men and no defects perceived, and such a wheel is in extensive use, the company will not be liable for negligence; nor will the company be liable in such case for defects in a rail, which do not contribute to the injury. *Toledo, W. & W. R. Co. v. Beggs*, 85 Ill. 80.

Where in an action for an injury to a passenger, owing to a latent defect in a car, the facts are as consistent with the exercise of proper care as with negligence, a nonsuit

* See also *ante*, 166.

* Latent defects, see note, 31 AM. REP. 324.

will be granted. *Gilbert v. North London R. Co.*, 1 C. & E. 31.

The immediate cause of the accident was the breaking of an axle which was defective. It was shown, however, that great care had been used in its selection and that the defect was latent and not capable of detection by any ordinary means of examination open to the railway officials. The train had immediately before the accident passed a curve which, at its greatest degree of curvature, was one of 6° 52'. It was alleged that the persons in charge of the train were guilty of negligence in passing this curve and a switch near it at too great a rate of speed. On that point the evidence was contradictory, and, having regard to the rule as to the burden of proof stated above—held, that a case of negligence was not made out. *Dube v. The Queen*, 3 Can. Exch. 147.

196. Manufacturer's negligence imputed to carrier.*—A carrier of passengers contracts not only for his own skill and care in the conduct of the business, but for the skill and care of all those who have made or furnished any of the instrumentalities or appliances by means of which the business is conducted. *Birmingham v. Rochester City & B. R. Co.*, 37 N. Y. S. R. 317, 59 Hun 583, 14 N. Y. Supp. 13.

e. Equipment and Management of Trains.

197. Generally.—(1) *Statement of rule.*—Carrier is held by law to the utmost care in the management of its trains. *Baltimore & O. R. Co. v. Noell*, 32 Gratt. (Va.) 394. *Baltimore & O. R. Co. v. Wightman*, 29 Gratt. (Va.) 431, 17 Am. Ry. Rep. 351. *McElroy v. Nashua & L. R. Co.*, 4 Cush. (Mass.) 400. *Virginia C. R. Co. v. Sanger*, 15 Gratt. (Va.) 230. *Searle v. Kanawha & O. R. Co.*, 37 Am. & Eng. R. Cas. 179, 32 W. Va. 370, 9 S. E. Rep. 248. *International & G. N. R. Co. v. Halloren*, 3 Am. & Eng. R. Cas. 343, 53 Tex. 46, 37 Am. Rep. 744.

Where employes perform their duties in handling cars in a manner so unusual and reckless as to endanger the lives or safety of persons who may be rightfully in the caboose attached to the train, they are guilty of gross negligence, though they have no intent to injure any one, and do not know that any one is in fact in the

caboose. *Way v. Chicago, R. I. & P. R. Co.*, 34 Am. & Eng. R. Cas. 286, 73 Iowa 463, 35 N. W. Rep. 525. And see also *Louisville & N. R. Co. v. Ballard*, 28 Am. & Eng. R. Cas. 135, 85 Ky. 307, 7 Am. St. Rep. 600, 3 S. W. Rep. 530.

(2) *Illustrations.*—The company was guilty of negligence in supplying its conductor and station master with the same kind of uniform, the same kind of lantern for signaling purposes, and in failing to provide some means whereby the signals could be distinguished. *Kansas City, M. & B. R. Co. v. Sanders*, 58 Am. & Eng. R. Cas. 140, 98 Ala. 293, 13 So. Rep. 57.

The failure to have a night operator at the station from which the engineer backed down his train may be considered by the jury as a negligent omission conducing to the injury. *Kansas City, M. & B. R. Co. v. Sanders*, 58 Am. & Eng. R. Cas. 140, 98 Ala. 293, 13 So. Rep. 57.

Where the evidence, in a suit for injuring a passenger, shows that a watchman at a depot and a conductor wore the same uniform, were supplied with the same kind of lanterns for signaling purposes, and that they had the same signal for moving out trains, whether to move out of the way of another train or go on their way to a distant point, and that by reason of this similarity the engineer mistook the signal of the watchman for that of his conductor, and moved his train out and started on his journey over the road—this evidence tends to show negligence on the part of the defendant. *Kansas City, M. & B. R. Co. v. Sanders*, 58 Am. & Eng. R. Cas. 140, 98 Ala. 293, 13 So. Rep. 57.

Where the statute does not specify the number of brakemen there shall be upon a train, it is a regulation left to the company, which must be reasonable and in conformity with general usage and the course of business of railroads. To require one brakeman to each car is unreasonable. *Dinwiddie v. Louisville & N. R. Co.*, 15 Am. & Eng. R. Cas. 483, 9 Lea (Tenn.) 309.

198. Unlawful or excessive rate of speed.*—(1) *Rule stated.*—Where the speed of trains is not regulated by statute, unless in exceptional cases, the existence of a high rate of speed does not argue a fault on the part of the company. The reasonable rule

* Liability for defects in cars attributable to fault of manufacturer, see note, 2 L. R. A. 86.

* See also ANIMALS, INJURIES TO, 69, 70, 72.

is that the highest rate of speed is proper and legitimate which is consistent with the safety of the passengers. *Houston v. Vicksburg, S. & P. R. Co.*, 34 *Am. & Eng. R. Cas.* 76, 39 *La. Ann.* 796, 2 *So. Rep.* 562. And see also *Terry v. Jewett*, 78 *N. Y.* 338; *affirming* 17 *Hun* 395. *Gonzales v. New York & H. R. Co.*, 39 *Hov. Pr. (N. Y.)* 407.

It is the duty which a company owes to the public to make velocity of locomotion compatible with safety, so far as that can be effected by prudence and skill. It is, moreover, an implied condition of their contract with each passenger that he shall not be put in jeopardy of life or limb by any fault, even the slightest, of the servants of the company. The sentiment of responsibility will be found the greatest safeguard against abuses, and though the responsibility will be strictly enforced, it will not be extended so as to allow the recovery of vindictive damages to others than those who are personally the victims of the misconduct of the servants of the company. *Black v. Carrollton R. Co.*, 10 *La. Ann.* 33.

A high rate of speed of a train is not negligence if the conditions of the railway and machinery will permit it without increasing the peril of the passenger; and in determining as to whether or not a certain rate of speed maintained is in effect a negligent operation of the road, the character of the road, its grades and curves, and various other conditions necessarily affecting the question of safety, must be taken into consideration. *Chicago, P. & St. L. R. Co. v. Lewis*, 58 *Am. & Eng. R. Cas.* 126, 145 *Ill.* 67, 33 *N. E. Rep.* 960.

(2) — *in case of special train.*—A company has the right to run special trains at such times, on such terms, and at such increased rates of speed, within the limits of prudence and safety to its passengers, as the necessities or convenience of its business may require; and hence a charge of the court is erroneous which assumes or implies that the running of trains off schedule time, or at increased rates of speed, is *per se* negligence. *East Tenn. & W. N. C. R. Co. v. Winters*, 85 *Tenn.* 240, 1 *S. W. Rep.* 790.

(3) *Illustrations.*—It is gross negligence for the servants of the defendant to run a train carrying passengers over any part of their road known to be frequented by cattle, at full speed, unless that part of the track is properly guarded from that invasion. *Brown v. New York C. R. Co.*, 34 *N. Y.* 404.—AP-

PLIED IN *Dlabola v. Manhattan R. Co.*, 29 *N. Y. S. R.* 149, 8 *N. Y. Supp.* 334.

Where by a preponderance of evidence it was shown that at the place of derailment the ties were rotten and the spikes loose, so as to endanger a train running upon the track at any considerable rate of speed, it was not reversible error to instruct the jury that to entitle plaintiff to recovery he must prove that the train was run at a high and reckless rate of speed, or that they should find that the train was run at a speed so high and dangerous as to become a negligent management thereof, since the jury would necessarily take in connection with such instructions the proof as to the defective condition of the road. *Chicago, P. & St. L. R. Co. v. Lewis*, 58 *Am. & Eng. R. Cas.* 126, 145 *Ill.* 67, 33 *N. E. Rep.* 960.—APPROVING *Indianapolis, B. & W. R. Co. v. Hall*, 106 *Ill.* 371.

100. Duty to give signals.*—The duty to give signals when a train is approaching a station is for the guidance of employes and as a warning to persons who may be about the stations, but does not apply to passengers who are already on the train; and especially is this so where a train only stops at a wood station for the purpose of taking on fuel. *Malcom v. Richmond & D. R. Co.*, 44 *Am. & Eng. R. Cas.* 379, 106 *N. Car.* 63, 11 *S. E. Rep.* 187.

In giving signals to tardy passengers who have needlessly neglected to board the train, the purpose is to prevent them from being left in consequence of their own want of promptitude. Ordinary diligence as to such signals, according to what is usual on like occasions in like circumstances, is required on both sides—on the side of the company in giving them, and on the side of passengers in looking, listening, or observing. What kind of signals will come up to such ordinary diligence, by what means to be made, and with what degree of loudness or distinctness, are questions for the jury and not for the court. *Central R. & B. Co. v. Perry*, 58 *Ga.* 461, 16 *Am. Ky. Rep.* 122.

The statutory provisions requiring the engineer, or other person in charge of a moving train of cars, to blow the whistle or ring the bell on approaching a depot or stopping-place are intended for the protec-

* See also *ante*, 134; *post*, 223, 304, 473.

Statutory provisions to prevent accidents on railroads, see note, 13 *L. R. A.* 185.

tion of the traveling public or persons not on the train; and passengers on the train are not ordinarily included in the letter or spirit of the statute, and cannot complain of its violation when suing for damages on account of personal injuries, to which the failure to ring the bell could have had no tendency to contribute, though cases may occur, possibly, in which passengers or other persons permissively on the train are entitled to have such signals given as a warning to hasten their departure. *Alabama G. S. R. Co. v. Hawk*, 18 *Am. & Eng. R. Cas.* 194, 72 *Ala.* 112, 47 *Am. Rep.* 403.—APPROVING Thirteenth & F. St. Pass. R. Co. v. Boudrou, 92 Pa. St. 475, 37 *Am. Rep.* 707. FOLLOWING South & N. Ala. R. Co. v. Thompson, 62 *Ala.* 494.

While the negligence of the employes in failing to sound the whistle or to ring the bell, as required by the statute, immediately before and at the time of leaving a depot is of itself and in itself negligence, involving the company in liability for all injuries to person or property resulting from the failure, still the statute does not relieve one, in peril of injury from such failure and consequent negligence, from the duty and necessity of taking ordinary care to avoid injury in boarding the train, nor does it modify or abrogate the principle that a plaintiff shall not recover for injuries, not wanton in their character, to which his own negligence directly and immediately contributes. *Central R. & B. Co. v. Letcher*, 12 *Am. & Eng. R. Cas.* 115, 69 *Ala.* 106.—APPLYING *Memphis & C. R. Co. v. Copeland*, 61 *Ala.* 376.

200. Improper arrangement of time-table.*—It is gross negligence in a company to so arrange its time-table that within one minute from the time that an accommodation train is to leave a station an express train, running at the rate of thirty miles an hour, or more, is due at the same place. *Gonzales v. New York & H. R. Co.*, 39 *How. Pr. (N. Y.)* 407.

201. Duty when train is out of time.—Conductors, engineers, and other train employes, and those directly connected with the management of trains, are bound to know the times when trains are liable to meet or to pass each other, or to pass stations; and it is their duty, if trains are out of time, to be on the lookout and give sea-

sonable notice to each other of any meeting of trains out of time or place; and in this they are bound to exercise the utmost care and diligence. *Gonzales v. New York & H. R. Co.*, 39 *How. Pr. (N. Y.)* 407.

It is not necessarily negligence to run a hand-car over a railway when a train is past due, even though more than ordinary danger is incurred thereby. The measure of care required must be estimated with a view to the safety of the employes operating the hand-car and of the passengers upon the train, and determined by the facts of each particular case. *Campbell v. Chicago, R. I. & P. R. Co.*, 45 *Iowa* 76.

202. Duty to stop train.*—An engineer is also required, "on perceiving any obstruction on the track of the road," to "use all means within his power, known to skillful engineers, in order to stop the train;" but this duty is not absolute, and does not require that the peril of passengers shall be increased when the obstruction is not perceived until too late to stop the train with safety, though there may have been antecedent negligence and consequent liability incurred by the failure to keep a proper lookout, whereby the obstruction might have been sooner discovered. *East Tenn., V. & G. R. Co. v. Deaver*, 79 *Ala.* 216.—REVIEWING *East Tenn., V. & G. R. Co. v. Bayliss*, 75 *Ala.* 466, 77 *Ala.* 429.

203. — to reverse engine.†—If a train is about to run upon an animal that is seen on the track, the engineer is not required to reverse his engine to prevent a collision if the rate of speed is such that to do so would endanger the lives of the passengers. *Nashville & C. R. Co. v. Troxlee*, 1 *Lea (Tenn.)* 520.

204. Running train onto side-track.—It is not negligence to run a passenger train on the side track where it is necessary to permit a freight train, too long to run into the side-track, to pass, when the evidence shows such a course was not unusual. *Ohio & M. R. Co. v. Schiebe*, 44 *Ill.* 460.

205. Liability for sudden jerks, jolts, or jars.‡—(1) *Generally.*—The sud-

* See also ANIMALS, INJURIES TO, 66 (4), 69 (4).

† See also ANIMALS, INJURIES TO, 68.

‡ See also *post*, 221, 248, 293, 385. Liability for injury to passenger by sudden jerk when train is nearing station, see note, 1 *L. R. A.* 542.

* See also *ante*, 122; and also TIME-TABLES.

den or violent motion or jerking of a train may be negligence. *Kentucky & I. Bridge Co. v. Quinkert*, 2 Ind. App. 244, 28 N. E. Rep. 338.

The sudden stoppage of a train with such violence as to throw a passenger through an open door is *prima-facie* negligence. *Condy v. St. Louis, I. M. & S. R. Co.*, 13 Mo. App. 587. See 85 Mo. 79.

In the operation of its trains a company is not bound to exercise only a degree of care sufficient to avoid injury to a person of ordinary physical ability, but must exercise such care as will avoid injuring persons in feeble health who may be upon its trains; and it will be responsible for an injury to a person who had just recovered from bodily injuries which he had received, and who is thrown across the seats of the cars and again injured, through the running of a switch-engine against the car while the passengers were attempting to alight. *East Line & R. R. Co. v. Rushing*, 34 Am. & Eng. R. Cas. 367, 69 Tex. 306, 6 S. W. Rep. 834.

If a company receives a passenger in one of its cars for passage before making up the train of which such car is to be a part, the law requires the company to make up its train, couple, manage, and control its cars and engines in such a careful, skilful, and prudent manner as to carry the passenger with reasonable safety; and it will be liable for an injury to the passenger resulting from its neglect of this duty, when such passenger is not wanting in ordinary care. *Hannibal & St. J. R. Co. v. Martin*, 111 Ill. 219; affirming 11 Ill. App. 386.

(2) *Illustrations*.—Plaintiff was riding on a freight train, and when nearing a station and while standing up was injured by a sudden jerk of the train, caused by letting on more steam, necessary to overcome the friction in running onto a switch and to move up to the station. *Held*, that it is a matter of common observation that it is impossible to move such trains under such circumstances without more or less of a jerking motion, and the company will not be liable, where the engineer acts with reasonable discretion, though he may let on more steam than the exact quantity necessary. *Chicago, B. & Q. R. Co. v. Hazzard*, 26 Ill. 373.

Evidence that, in switching, a number of heavily loaded cars were backed with unnecessary force against standing cars, caus-

ing the latter to come suddenly and with such force against the car in which plaintiff was a passenger that he was thrown from his seat and injured, is sufficient to support a verdict finding the company guilty of negligence. *Quackenbush v. Chicago & N. W. R. Co.*, 34 Am. & Eng. R. Cas. 545, 73 Iowa 458, 35 N. W. Rep. 523.

Where, in an action by a passenger for personal injuries, it appears that the plaintiff was told by the porter of the train to go forward two cars in order to get off at the next station, and that after plaintiff started to go forward the train started, jerking her off the platform, such starting of the train constitutes negligence on the part of the company. *Smith v. Chicago & A. R. Co.*, 52 Am. & Eng. R. Cas. 483, 108 Mo. 243, 18 S. W. Rep. 971.

It is negligence for which a passenger may recover damages, for the employes of a railroad company to bring a switch-engine in such violent contact with its passenger car at a depot as to injure him, if he had not been allowed a reasonable time to leave the car after the train stopped, notice having been previously given that the passengers change cars. *East Line & R. R. Co. v. Rushing*, 34 Am. & Eng. R. Cas. 367, 69 Tex. 306, 6 S. W. Rep. 834.

In such action evidence that the conductor had left the train before all the passengers had alighted, and that the brakeman making the coupling gave no warning, is sufficient to justify the submission of the question of gross negligence to the jury. *East Line & R. R. Co. v. Rushing*, 34 Am. & Eng. R. Cas. 367, 69 Tex. 306, 6 S. W. Rep. 834.

A train proceeding from one station to another three hundred yards distant, at which permanent buffers were erected, jolted and so injured a passenger. The train stopped after the jolt and near the buffers. *Held*, that there was evidence of negligence. *Burke v. Manchester, S. & L. R. Co.*, 18 W. R. 694, 22 L. T. 442.

206. Crushing hand by suddenly shutting door.—Where a porter slams a carriage-door and thereby catches and injures the hand of a passenger who had been thrown forward by the motion of the train, there is no evidence of negligence on the part of the company. *Jackson v. Metropolitan R. Co.*, 26 W. R. 175; reversing L. R. 2 C. P. D. 125, 46 L. J. C. P. D. 376, 25 W. R. 661, 36 L. T. 485, L. R. 10 C. P. 49.

44 *L. J. C. P.* 83, 31 *L. T.* 475, 23 *W. R.* 78.

If a guard, without warning, closes a carriage-door, thereby crushing the hand of a passenger between the back of the door and the door-post, the passenger having placed his hand there to aid him in mounting the steps, there is evidence of negligence, and the company is not entitled to a nonsuit. *Fordham v. London, B. & S. C. R. Co.*, *L. R.* 4 *C. P.* 619, 38 *L. J. C. P.* 324, 17 *W. R.* 896; *affirming L. R.* 3 *C. P.* 368, 37 *L. J. C. P.* 176.

Where a passenger has completely entered a carriage, although he has not yet taken his seat, the company is not liable for injury to his thumb, which was in the hinge of the carriage-door, which was shut by the company's servant without warning. *Maddox v. London, C. & D. R. Co.*, 38 *L. T.* 458. And see also *Murphy v. Atlanta & W. P. R. Co.*, 89 *Ga.* 832. *Coleman v. South E. R. Co.*, 4 *H. & C.* 699. *St. Louis, I. M. & S. R. Co. v. Rexroad*, 58 *Am. & Eng. R. Cas.* 615.

207. Putting passenger in perilous position *—Fright.—If the negligence of a carrier place a passenger in a position of such apparent imminent peril as to cause fright, and the fright causes nervous convulsions and illness, the negligence is the proximate cause of the injury, and the injury is one for which an action may be brought. *Purcell v. St. Paul City R. Co.*, 52 *Am. & Eng. R. Cas.* 611, 48 *Minn.* 134, 50 *N. W. Rep.* 1034, 16 *L. R. A.* 203.—**APPROVING Milwaukee & St. P. R. Co. v. Kellogg**, 94 *U. S.* 469.

208. Forceful expulsion from ladies' car.—Plaintiff went to the ladies' car for a seat and found the door locked, but upon its being unlocked by a brakeman attempted to enter the car. He was forcibly driven upon the platform of the car while the train was crossing a river, where a fall would have been fatal. There was a conflict of evidence whether he entered the car peaceably and without being forbidden to enter it, or whether he was forbidden and attempted to enter the car forcibly. *Held*, that he was not obliged to wait the slow pleasure of the officials in giving him a seat elsewhere, if the ladies' car was open to peaceable entrance; and if the officers of

the train neither furnished him with a seat nor forbade his entrance into the ladies' car, it was a license to him to enter it. But if his entrance was forbidden, he had no right to attempt to force an entrance; but if, being neither barred nor forbidden, he entered the car peaceably and was peaceable in it, where there was a seat for him, he was rightfully there, and no officer of the train had a right to remove him by force—certainly not without offering him a seat elsewhere; and no circumstances would justify throwing him on the platform in such a perilous position. *Bass v. Chicago & N. W. R. Co.*, 36 *Wis.* 450, 9 *Am. Ry. Rep.* 101.—**DISTINGUISHED IN** *Brown v. Memphis & C. R. Co.*, 1 *Am. & Eng. R. Cas.* 247, 7 *Fed. Rep.* 51.

209. Passenger struck by projection from passing train.*—Plaintiff was injured while seated in a car by a bar of iron entering the car, which was loaded on a construction train passing in the opposite direction. *Held*, in the absence of any explanation, that the inference was that the injury resulted from the negligence and inattention of those in charge of the construction train, and was sufficient to make the company liable. *Walker v. Erie R. Co.*, 63 *Barb. (N. Y.)* 260.

Any carelessness in loading a freight train of cars, or in not attending to the adjustment of the load of lumber, by which an injury is done to a passenger in another train, will make the owners of the freight train responsible. *Curtis v. Central R. Co.*, 6 *McLean (U. S.)* 401.

210. Removal of ice and snow from the platform.†—Proof that plaintiff was injured in stepping from a car onto an icy platform, and that snow and ice had been forming since the day before, and that no means had been used, by either sanding or putting ashes on the platform to make it safe, is sufficient to make out a *prima-facie* case of negligence against the company, and to justify a verdict for plaintiff. *Timpson v. Manhattan R. Co.*, 5 *N. Y. Supp.* 684.—**REVIEWING** *Weston v. New York El. R. Co.*, 73 *N. Y.* 595; *Hulbert v. New York C. R. Co.*, 40 *N. Y.* 145.

A company is under no obligation to remove the effects of a continuous storm of snow, sleet, and rain from the exposed plat-

* See also *post*, 345, 346, 420 (3), 435-440, 457-498.

* See also *post*, 480.

† See also **STATIONS AND DEPOTS, 88.**

form of the car while making its passage between stations or the *termini* of its route; and a passenger who has reason to know that there is snow and ice upon the platform, and that the company has had no reasonable opportunity to effectually remove it, cannot recover damages for injuries sustained through a fall caused by slipping thereon. *Palmer v. Pennsylvania Co.*, 37 *Am. & Eng. R. Cas.* 150, 111 *N. Y.* 488, 18 *N. E. Rep.* 859, 19 *N. Y. S. R.* 493; *reversing* 42 *Hun* 656, 4 *N. Y. S. R.* 888.—DISTINGUISHING *Weston v. New York El. R. Co.*, 73 *N. Y.* 595.—APPLIED IN *Kelly v. Manhattan R. Co.*, 112 *N. Y.* 443, 20 *N. E. Rep.* 383, 21 *N. Y. S. R.* 507; *Buck v. Manhattan R. Co.*, 32 *N. Y. S. R.* 51, 10 *N. Y. Supp.* 107. QUOTED IN *Bruswitz v. Netherlands A. S. Nav. Co.*, 46 *N. Y. S. R.* 623. REVIEWED IN *Hanrahan v. Manhattan R. Co.*, 53 *Hun* (N. Y.) 420, 24 *N. Y. S. R.* 790, 6 *N. Y. Supp.* 395.

211. Collisions with cattle upon track.*—(1) *Generally.*—The duty of a company to exercise every reasonable precaution to prevent injury to passengers requires of employés in charge of trains faithful watchfulness to prevent accidents by collisions with cattle, and requires the company to keep a clear right of way to afford them the facility of performing that duty; if these or other precautions are insufficient to guard against that danger, and a fence will render the track safe from the intrusion of cattle, the company's obligation demands the more effective precaution. *Fordyce v. Jackson*, 56 *Ark.* 594, 20 *S. W. Rep.* 528, 597.

A company carrying passengers for hire is bound to use the highest degree of reasonable care and vigilance to keep cattle off the track of their road; but there is not a conclusive presumption of negligence or omission of duty on their part in every case of injury to passengers caused by cattle being on the track. *Wright v. Pennsylvania R. Co.*, 3 *Pittsb. (Pa.)* 116.

The fact that a passenger is injured by a train colliding with a cow which has strayed upon the track through the carelessness of the owner does not exempt a railroad company from liability, unless it is free from negligence contributing to the injury. *Card v. New York & H. R. Co.*, 50 *Barb. (N. Y.)* 39.

That a car was thrown off the track by

* See also *ante*, 179; ANIMALS, INJURIES TO, 66 (4), 68, 69 (4).

running over a cow that was unlawfully on the road, and the passenger thereby injured, is not in itself sufficient to repel the presumption of negligence. The company are bound to make provision against accidents. *Sullivan v. Philadelphia & R. R. Co.*, 30 *Pa. St.* 234.—FOLLOWED IN *Philadelphia & R. R. Co. v. Anderson*, 6 *Am. & Eng. R. Cas.* 407, 94 *Pa. St.* 351, 39 *Am. Rep.* 787.

(2) *Illustrations.*—A train in which plaintiff was a passenger was thrown from the track by running on a cow at a station. It appeared that cows were in the habit of resorting there, being attracted by corn scattered on the ground, and that there was no watchman about the station. *Held*, inexcusable negligence, making the company liable for an injury so received. *Chicago, R. I. & P. R. Co. v. McAra*, 52 *Ill.* 296.

Plaintiff was injured by the train carrying him colliding with a cow. She was seen, or might have been seen, for a long distance, very near the track, and so situate that she could only escape by crossing the track; but the train was run on without any effort to slacken the speed or prevent a collision. *Held*, sufficient proof of negligence to justify a submission of the case to the jury, and it was error to grant a nonsuit. *Brown v. New York C. R. Co.*, 34 *N. Y.* 404.—DISTINGUISHED IN *Beisiegel v. New York C. R. Co.*, 40 *N. Y.* 9.

On the question of negligence it was proper to show in such case that other cattle had been killed there by defendant on other occasions, as tending to show a greater duty upon the part of the company's agents to be on their guard; and the fact that such cattle were trespassers could not affect the duty that the company owed to its passengers. *Brown v. New York C. R. Co.*, 34 *N. Y.* 404.

A passenger sustained injuries by the collision of a train with cattle which were trespassing from adjoining lands, and had come on the line at a private level crossing through an open gate. Other private crossings and a public crossing were within 300 yards; and the train, when approaching, could not be seen at a distance of more than twenty perches from the place where the accident occurred. Evidence was given that the gate had been left unlocked on previous occasions, and that the post to which it should be locked was loose at the time of the accident. *Held*, that there was evidence of negligence on the part of the com-

pany. *Patchell v. Irish North Western R. Co.*, 6 Ir. C. L. 117.

212. Collisions at crossings of railroads.*—The Central Iowa R. Co. stopped one of its passenger trains at Mason City junction, and, for convenience in transferring baggage, the baggage-car was stopped in front of the baggage-room of the depot, so that the rear passenger car was left standing over a cross-track of the Chicago, Milwaukee & St. Paul R. Co.; and in moving certain freight cars out of the way of an engine the employes of the latter road pushed the cars on the cross-track, and some of them, being heavily loaded, broke loose and ran down the grade into the passenger car of the Central, threw it from the track, turned it over, and fatally injured a passenger therein. *Held*, that the Central Co. was guilty of negligence, and could not avoid liability for the injury upon the special finding of the jury that the collision could not reasonably have been anticipated. *Kellow v. Central Iowa R. Co.*, 21 Am. & Eng. R. Cas. 485, 68 Iowa 470, 23 N. W. Rep. 740, 27 N. W. Rep. 466.

f. Taking on Passengers.

213. Generally.—A company may be liable in damages to passengers who are injured while attempting to board the trains before they are ready, caused by misleading announcements; but in order to recover for an injury so received it must be declared on specially. *Flint & P. M. R. Co. v. Stark*, 38 Mich. 714.

It must be determined, in view of all the circumstances of the case, whether an employé of a company, after directing a passenger how to enter a car situated at a distance from the platform, had a right to suppose that his instructions were understood. *Alender v. Chicago, R. I. & P. R. Co.*, 43 Iowa 276, 14 Am. Ry. Rep. 443.

Leaving a caboose on a side-track open, and where persons are in the habit of taking passage, together with the habit of carrying passengers on freight trains, is an implied

* See also COLLISIONS, 4-6; CROSSING OF RAILWAYS, 79.

† See also *ante*, 75-78; *post*, 292, 366-391.

Duty to passengers while getting on and alighting from trains, see note, 6 AM. & ENG. R. CAS. 136.

Injuries to passengers in getting on or off moving trains, see note, 37 AM. REP. 384.

Alighting from and boarding stationary trains, see note, 37 AM. & ENG. R. CAS. 86.

invitation to passengers to enter the same. *Illinois C. R. Co. v. Axley*, 47 Ill. App. 307.

Passengers assume the risks of accidental injuries in getting on or off cars; therefore a passenger cannot recover for an injury received by an employé of the company slipping from the platform-rail and falling on him while ascending the steps for the purpose of entering the car, where it seems that the falling was purely accidental. *Skinner v. Atchison, T. & S. F. R. Co.*, 39 Fed. Rep. 188.

Suit was brought to recover for the death of a person who was killed while about to step on a train, caused by its suddenly starting. The declaration charged that the company had drawn the train to the station for the purpose of receiving passengers, and further charged that it was the duty of the company "to allow and permit the deceased and all others who wished to enter upon said train to do so before the same should be started." The evidence showed that it was not the train intended for passage to plaintiff's destination, and not the one that he supposed it was, though it had been standing at the station for some 45 minutes, and had by mistake a placard indicating that it was the right train. *Held*, that the averments of the declaration were disproved by the evidence. *Flint & P. M. R. Co. v. Stark*, 38 Mich. 714.

A freight train had attached to it a caboose for the carriage of passengers. On the invitation of the conductor of the train a person attempted to get on the caboose as a passenger while the train was in motion. Owing to a sudden lurch of the car he was thrown and injured, but there was no evidence as to the cause of the lurch, further than that the circumstances permitted of the inference that the lurch was due to the checking of the speed of the train. *Held*, that the relation of carrier and passenger had been established, and that the facts warranted a finding of negligence on the part of the railway company. *Murphy v. St. Louis, I. M. & S. R. Co.*, 43 Mo. App. 342.—REVIEWING Dougherty v. Missouri R. Co., 81 Mo. 325.

214. Duty to stop train at station, generally.*—(1) *Georgia—Way-station.*—

* Stoppage of trains at stations, see note, 3 AM. & ENG. R. CAS. 140.

Obligation to stop for passenger at time advertised, see note, 66 AM. DEC. 603.

Liability for passenger missing train caused

A company selling a ticket at a way-station for a train soon to pass is bound to stop the train long enough to afford the purchaser reasonable time to board it in safety. *Poole v. Georgia R. & B. Co.*, 89 Ga. 320, 15 S. E. Rep. 321.

(2) *Illinois*—*Flag-station*.—Under Illinois Rev. St. ch. 114, §. 88, providing that passenger trains shall stop at each station advertised for receiving and discharging passengers a sufficient length of time to receive and let off passengers with safety, and at all county seats, a company is not liable for failing to stop at a place not a county seat, unless such place is advertised as a station for receiving and discharging passengers. *Lake Erie & W. R. Co. v. People*, 42 Ill. App. 387.

The penalty provided by § 90 of the above act cannot be recovered for a failure to stop at a place advertised as a flag-station upon being signaled to do so, or by reason of a special contract with the agent for the train to stop, or because it usually stopped there; but the failure to stop at such place may authorize the recovery of ordinary damages. *Lake Erie & W. R. Co. v. People*, 42 Ill. App. 387.

(3) *Indiana*.—A company is not bound to stop a train and allow a passenger to get off except at a regular station or stopping-place. *Pittsburgh, C. & St. L. R. Co. v. Nuzum*, 50 Ind. 141, 9 Am. Ry. Rep. 396.

The duty of a company to the public requires that it should run its trains according to its rules and regulations, without infringing upon them to accommodate a single passenger. *Pittsburgh, C. & St. L. R. Co. v. Nuzum*, 50 Ind. 141, 9 Am. Ry. Rep. 396.

(4) *Michigan*—*During storm*.—If the night was so stormy as to obstruct the road in the cuts, so as to render it unsafe for the defendant to stop its train without danger of having to stop a long time, that would be recognized by the law as an excuse; but the simple failure, on account of the storm, to see the signal which was given by the parties would not be a just and lawful excuse. Under the admissions of counsel the court properly modified the instruction, and told the jury that if the situation was such that the defendant's employes upon the train could not, in the exercise of due dili-

gence and care, have seen the signal, the plaintiff cannot recover. *Freeman v. Detroit, M. & M. R. Co.*, 30 Am. & Eng. R. Cas. 623, 65 Mich. 577, 9 West. Rep. 117, 32 N. W. Rep. 833.

(5) *Mississippi*—*Flag-station*.—W. bought from a company a ticket from E. to B. and return, at a reduced rate. There was a condition in the ticket that it was good only on the trains advertised to stop at stations named therein. A train not advertised to stop at B. was signaled at the point by W., but failed to stop for him. Held, that W.'s rights on this ticket were limited by the conditions thereof, and he could not take advantage of the reduction in the rate and reject the conditions on which the reduction was made. Hence it was no breach of the special contract when the train refused to stop at B. on the signal of W. *Wilson v. New Orleans & N. E. R. Co.*, 63 Miss. 352.

(6) *Texas*—*Flag-station*.—A person desiring to take passage at night at a station where trains only stop when flagged or signaled, waved a handkerchief at that train as a signal to stop, which it failed to do. It appeared that the usual way of stopping trains was to wave a light. Held, in an action against the company for failing to stop the train, that it was not liable. *St. Louis, I. M. & S. R. Co. v. Berryhill*, 3 Tex. App. (Civ. Cas.) 387.

(7) *New Brunswick*.—In an action against the conductor for injury sustained by a passenger who was thrown down by a sudden motion of the train while getting into it, he having parcels in his hands at the time—held: (1) that it was negligence in the conductor not to stop the train at a station where the regulations of the railway directed him to stop; (2) that it was a proper question for the jury, on the point of contributory negligence, whether the plaintiff could have got into the train without injury if he had not had the parcels in his hands. *Parker v. White*, 27 New Brun. 442.

(8) *England*—"Ordinary trains."—Accelerated trains forming part of fast through trains from London are not "ordinary trains" within the meaning of a branch railway act giving a landowner the right to stop by signals all ordinary trains; and this is so although the fares charged on such train are at the ordinary rate. *Turner v. London & S. W. R. Co.*, L. R. 17 Eq. 561, 43 L. J. Ch. 430.

by its not stopping at platform, see 47 AM. & ENG. R. CAS. 461, *abstr.*

The fact that a train on a local line running in connection with trains between London and Scotland stops at junctions connecting the line with other important lines, and even stopping at two junctions within eight miles of one another, does not deprive it of its character as an express train. *Hood v. North Eastern R. Co.*, 19 *W. R.* 523.

Where a company agrees that all passenger trains shall regularly stop at a certain station, it must stop at that station queen's-messenger trains and post-office trains on which passengers are allowed to travel, but is not obliged to stop special excursion trains. *Burnett v. Great North of Scotland R. Co.*, 24 *Am. & Eng. R. Cas.* 647, *L. R.* 10 *App. Cas.* 147, 54 *L. J. Q. B. D.* 531, 53 *L. T.* 507.

By *feu* charter, dated 1863, between A., the proprietor of land through which a railway was authorized to run, and the company, it was provided that the company should be bound to erect on a piece of ground conveyed to them by A. at a nominal *feu* rent, "a station for passengers and goods traveling by the said" railway, "at which all passenger trains shall regularly stop," to be called Crathes station. The station was erected. Subsequently certain trains were run, namely: (1) Excursion trains at low fares to certain places on the line, but not to Crathes station. They were advertised by special handbills, and were not included in the time-tables except in error. (2) Trains called the queen's-messenger trains, run by arrangement with the home office, who paid the railway company a subsidy. (3) Trains called the post-office trains, run by arrangement with the post-office, who also paid a subsidy. The queen's-messenger trains and the post-office trains only ran during her majesty's stay at Balmoral; but they were advertised in the railway company's time-table, and through passengers were allowed to travel by them. They stopped at Crathes by signal, but did not stop regularly for setting down or taking up passengers. There was no contract with the home office or post-office that they should not do so. A. sought *declarator* that all trains, including the above, except only such as might be hired for an individual or individuals for his or their exclusive use, should regularly stop. *Held*, reversing the decision of the court below, that the trains called the queen's-messenger trains and the post-office trains fell within

the terms of the contract; but, agreeing with the decision of the court below, that the excursion trains in the circumstances materially differed from ordinary passenger trains and did not come within the obligation. *Burnett v. Great North of Scotland R. Co.*, 24 *Am. & Eng. R. Cas.* 647, *L. R.* 10 *App. Cas.* 147, 54 *L. J. Q. B. D.* 531, 53 *L. T.* 507.

215. Duty to stop at county seats under Illinois statute.—A through passenger train, equipped and operated in the same manner as other passenger trains on the same road, carrying passengers and baggage as other trains, and running upon the official time-table of the company the same as its other passenger trains do, the only difference being that the other trains stopped at all the stations while this did not—*held*, to be a "regular passenger train," within the meaning of the act approved May 29, 1879, which requires all such trains to stop at county-seat stations a sufficient length of time to receive and let off passengers with safety. The act does not, perhaps, include a wild train, a freight or excursion train, or a special train. *Chicago & A. R. Co. v. People*, 13 *Am. & Eng. R. Cas.* 42, 105 *Ill.* 657.—REVIEWED IN *Illinois C. R. Co. v. People*, 143 *Ill.* 434.

A through train of cars, equipped and operated as other passenger trains, carrying passengers and baggage, and running upon a time-table the same as other trains, and differing from them only in that it does not stop at all the stations, is a regular passenger train, within the meaning of § 25 of the Illinois act in relation to fencing and operating railroads, as amended in 1879. *Illinois C. R. Co. v. People*, 143 *Ill.* 434, 33 *N. E. Rep.* 173.—REVIEWING *Chicago & A. R. Co. v. People*, 105 *Ill.* 657.

Where a company has constructed its road through or into a county seat, and has located a passenger station there for several years, the statute requires it to continue to stop its trains there; and its obligation to perform this duty is not affected by the circumstance that such station may be the terminus of the road. *Illinois C. R. Co. v. People*, 143 *Ill.* 434, 33 *N. E. Rep.* 173.—REVIEWING *People ex rel. v. Louisville & N. R. Co.*, 120 *Ill.* 48.

The Illinois act of 1855, enabling railway companies to enter into operative contracts, and the act of 1867, to facilitate travel and transportation, in no manner interfere with

the right of the state to require such companies to stop all their regular passenger trains at stations in county seats long enough for passengers to get on or off the same. *Illinois C. R. Co. v. People*, 143 Ill. 434, 33 N. E. Rep. 173.—APPROVING *Stone v. Illinois C. R. Co.*, 116 U. S. 347; *Louisville, N. O. & T. R. Co. v. Mississippi*, 133 U. S. 587.—Compare *Lake Erie & W. R. Co. v. People*, 42 Ill. App. 387.

Where a railroad is built to a town, as required by its charter, and a depot is established at the end of its line within such town, which is a county seat, the company will have no discretion as to which of its passenger trains shall stop there and which shall not, as it would have, within certain reasonable limitations, if such town was not a county seat; but all its passenger trains must stop at such place. It is not sufficient that all its trains may stop at a new depot located at a junction with another road, a quarter of a mile beyond the corporate limits of such town. *People ex rel. v. Louisville & N. R. Co.*, 120 Ill. 48, 10 N. E. Rep. 657.—QUOTED IN *Chicago & A. R. Co. v. Suffern*, 38 Am. & Eng. R. Cas. 508, 129 Ill. 274, 21 N. E. Rep. 824. REVIEWED IN *Illinois C. R. Co. v. People*, 143 Ill. 434.

216. Duty to stop alongside station platform.*—Passengers by railway should be afforded an opportunity of getting into the cars from the platform of the station, and where, under the evidence, it was doubtful whether plaintiff had had such an opportunity afforded her, and further evidence on that point was thought desirable for an intelligent direction to the jury on the question of contributory negligence, the court granted a new trial. *Hall v. McFadden*, 19 New Brun. 340.

217. Safe means of ingress.—(1) *Rule stated.*—It is the duty of a company not only to carry its passengers safely but also to afford them the opportunity of ingress and egress, and to provide means for them to get on and off the car safely. *Dunn v. Pennsylvania R. Co.*, 20 Phila. (Pa.) 258.

It is the duty of a company to furnish safe and proper means of ingress and egress to and from its trains, platforms, station approaches, etc. *Moses v. Louisville, N. O. & T. R. Co.*, 30 Am. & Eng. R. Cas. 556, 39 La. Ann. 649, 2 So. Rep. 567.

This must be done at all points where the

carrier receives or discharges passengers. *Redner v. Lehigh & H. R. R. Co.*, 73 Hun (N. Y.) 562, 26 N. Y. Supp. 1050, 56 N. Y. S. R. 230.—FOLLOWING *Hulbert v. New York C. R. Co.*, 40 N. Y. 145.

And the duty is not discharged by providing a board walk only three or four inches wide between the station and the cars. *Redner v. Lehigh & H. R. R. Co.*, 73 Hun (N. Y.) 562, 26 N. Y. Supp. 1050, 56 N. Y. S. R. 230.

(2) *Illustrations.*—It is the duty of a company, before the departure of its passenger train from a station, to clear the way, by the removal of freight trains between it and the depot buildings, so that passengers can approach the passenger train with safety. If the passenger train should leave before giving the holder of a ticket a safe means of access to it, the company would be liable. *Chicago & N. W. R. Co. v. Coss*, 73 Ill. 394.

T., a young lady, purchased a ticket with the intention of becoming a passenger on a train, and in attempting, at night, to enter the train while it was standing at a station, walked off the front platform of the ladies' car and was physically injured by the fall. She sued the railroad company for damages, alleging that the accident was caused by the negligence of the defendant in not having sufficient lights about the train. *Held*, that accidents of this character are not such as are ordinarily caused only by the negligence of the carrier. *Chicago, St. L. & N. O. R. Co. v. Trotter*, 60 Miss. 442.

A person going along a passageway of boards three or four inches in width, extending from waiting-room to platform, could have no reasonable anticipation that the person in front of her, going the same way, would, without warning, suddenly turn and thereby accidentally throw her therefrom. *Redner v. Lehigh & H. R. R. Co.*, 73 Hun (N. Y.) 562, 26 N. Y. Supp. 1050, 56 N. Y. S. R. 230.

218. Duty to assist passenger.*—Where access to a train at a station is easy, it is not required of the company's employees to assist a passenger in getting on board. *Yarnell v. Kansas City, Ft. S. & M. R. Co.*, 113 Mo. 570, 21 S. W. Rep. 1.

A company is bound to exercise due care in providing for its passengers while they

* See also *post*, 240.

Duty to assist passenger to enter car, see note, 15 L. R. A. 434.

* See also *post*, 229.

are waiting for its trains, and it is liable for the consequences of a neglect to properly direct them respecting the mode of entering its cars. Whether or not it is the duty of the company's employes to assist a passenger in getting upon a car must be determined by the circumstances of each particular case, and therefore the question may be left to the jury. If the company's employes permit or direct passengers to enter the car at some other place than the platform or place provided for such purpose, they are held to the utmost care in avoiding injuries to the passengers. *Allender v. Chicago, R. I. & P. R. Co.*, 43 Iowa 276, 14 Am. Ry. Rep. 443.

It is the duty of a company to provide suitable and safe means to passengers for entering and leaving cars; but having done this and having stopped its train in proper position and for a reasonable time, to enable passengers to avail themselves of those means in entering and alighting, it is not bound to render personal assistance, nor to hold the train until those in charge of it see that the passengers have in fact alighted. *Raben v. Central Iowa R. Co.*, 31 Am. & Eng. R. Cas. 45, 74 Iowa 732, 34 N. W. Rep. 621.—REVIEWING *Allender v. Chicago, R. I. & P. R. Co.*, 37 Iowa 264, 43 Iowa 276.

219. Reasonable time in which to enter car.*—Railroad trains are bound to stop at stations a reasonable length of time to enable passengers to get on. *Swigert v. Hannibal & St. J. R. Co.*, 9 Am. & Eng. R. Cas. 322, 75 Mo. 475. *Carr v. Eel River & E. R. Co.*, 58 Am. & Eng. R. Cas. 239, 98 Cal. 366, 33 Pac. Rep. 213.

It is the duty of companies to give their passengers a reasonable time and opportunity to approach and leave their trains, and the duty is reciprocal. Passengers owe it to themselves and to the company to act with reasonable care in alighting from and boarding trains. *Falls v. San Francisco & N. P. R. Co.*, 97 Cal. 114, 31 Pac. Rep. 901.

It is the duty of a company to give passengers a reasonable time to get inside of the cars before starting them either backward or forward in a violent manner, though such movement of the train may be required to start it, as where an engine happens to be on a dead centre and is heavily loaded. *Dillon v. Manhattan R. Co.*, 16 N.

Y. S. R. 767, 49 *Hun (N. Y.)* 608, 1 *N. Y. Supp.* 679.

A company is in duty bound to stop its cars and let them remain at rest long enough for persons to get on and off with safety, and the servants in charge of an approaching train must govern their conduct accordingly. *Weber v. Kansas City Cable R. Co.*, 41 Am. & Eng. R. Cas. 117, 100 Mo. 194, 12 S. W. Rep. 804, 13 S. W. Rep. 587, 7 L. R. A. 819.

A carrier need not wait for a passenger to reach his seat before starting the train, unless there is some special reason therefor, as in case of a weak or lame person, and then the carrier must have notice of the fact creating the exception. *Yarnell v. Kansas City, Ft. S. & M. R. Co.*, 113 Mo. 570, 21 S. W. Rep. 1.

All that the law requires of a company is that its train shall stand at stations a reasonable time to permit passengers to enter before the advertised time for departure. Ordinarily twenty to thirty minutes is more than is required for such purpose; and in the mean time the company has a right to move the train backward and forward for the purpose of shifting cars and making up the train. *Flint & P. M. R. Co. v. Stark*, 38 Mich. 714.—APPROVED IN *Kendrick v. Towle*, 60 Mich. 363, 1 Am. St. Rep. 526, 27 N. W. Rep. 567.

The court below directed the jury that it was the duty of the conductor to wait a reasonable time after the call was given for the passengers to get on board, and to see if there were any in the waiting-rooms or elsewhere. *Held*, that this direction went too far, and was wrong. *Hall v. McFadden*, 19 *New Brun.* 340.

Ordinarily a passenger train is only required to stop at a regular station long enough to enable passengers, by the exercise of due care and diligence, to get on and off with safety; but when the train, instead of stopping, only checks its speed for a few minutes, the duty devolves on the railroad servants, before increasing the speed of the train, to see that no passenger, attempting to get on or off, is in a dangerous position. *Montgomery & E. R. Co. v. Stewart*, 91 Ala. 421, 8 So. Rep. 708.

220. Prematurely starting train, generally.—If one entitled to the rights of a passenger on a railway train is, without being guilty of contributory negligence, injured in the effort to get on the train,

*See also *post*, 234.

Duty to give passengers time to get on and off, see 58 A.A. & ENG. R. CAS. 229, *abstr.*

which has started from a stopping place before the time designated to him by the conductor in charge, the company is liable in damages for the injury. *Texas & P. R. Co. v. Davidson*, 68 *Tex.* 370, 4 *S. W. Rep.* 636.

The fact that the conductor of a train about to leave a station is induced by the conduct and conversation of a person on the station platform to believe that he does not intend to take passage on the train will not relieve the company from liability for injuries received by such person in consequence of the train being started without giving him time to get on, if the conductor actually sees him attempting to get on when he gives the order to start. *Swigert v. Hannibal & St. J. R. Co.*, 9 *Am. & Eng. R. Cas.* 322, 75 *Mo.* 475.—REVIEWED IN *Fulks v. St. Louis & S. F. R. Co.*, 111 *Mo.* 335.

221. Starting train while passenger is getting on.*—When passengers are getting on or off a train, suddenly to put it in motion, so as to endanger their safety, without giving any signal is an act of negligence. *Keating v. New York C. & H. R. R. Co.*, 49 *N. Y.* 673; *affirming* 3 *Lans.* 469.—FOLLOWED IN *Pfeffer v. Buffalo R. Co.*, 4 *Misc. (N. Y.)* 465.—But see *Michigan C. R. Co. v. Coleman*, 28 *Mich.* 440, 12 *Am. Ry. Rep.* 59.

A company is liable to a passenger who sustains injuries caused by the officer in charge of a train putting it in motion, knowing that such passenger is in the act of getting on board, although such person negligently remained in the waiting-room after being notified to board the train. *Gulf, C. & S. F. R. Co. v. Fox*, (*Tex.*) 33 *Am. & Eng. R. Cas.* 543, 6 *S. W. Rep.* 569.

It is negligence in an engineman to suddenly and violently move a passenger train at a time and place where passengers may be expected to be getting on and off the train. And this is so although the train has not come to a full stop, but is very slowly moving. *Nance v. Carolina C. R. Co.*, 94 *N. Car.* 619.

Total inattention to a passenger getting on in the dark, and starting the train while, with ordinary care, he is attempting to get on, when the circumstances are such as constitute an invitation to the passenger to make the attempt, make the company liable for any injuries he may receive thereby.

Chicago & N. W. R. Co. v. Drake, 33 *Ill. App.* 114.

A father and mother with five children went to a station on defendant's road to take train as passengers. He bought two whole and two half tickets. The train was a local freight train, with caboose for passengers. After it had stopped and passengers were getting out of the caboose, the father, with one child, went up the steps into the car, followed by a friend with another. The mother followed, and just as she had gotten up the steps, without any signal from whistle or bell, but only at a slight wave of the hand from conductor to engineer, the train, with a sudden and violent jerk, started backward, the steps of the caboose striking the deceased, a child of tender years, who was standing on the end of the ties, and throwing him under the wheels of the train and causing his death. The conductor had seen the parties approaching the caboose with their luggage, but paid no attention to them. *Held*, the defendant company was negligent and liable. *Norfolk & W. R. Co. v. Gracelose*, 88 *Va.* 267, 13 *S. E. Rep.* 454.

222. Prematurely calling out "all aboard."—The call of the conductor, "all aboard," may be considered as giving passengers to understand that the cars are ready and it is safe for them to enter, unless they see something to the contrary; and such call may be considered as an invitation to passengers to enter, and, if given prematurely, justifies the jury in finding the company guilty of negligence. So *held*, where a passenger who could not get a seat was told that another car would be attached, and upon its being run down against the train, and the conductor calling "all aboard," he attempted to pass from one car to such additional car and was injured by reason of the car not being yet coupled. *Lent v. New York C. & H. R. R. Co.*, 44 *Am. & Eng. R. Cas.* 373, 120 *N. Y.* 467, 24 *N. E. Rep.* 653, 31 *N. Y. S. R.* 538; *affirming* 22 *J. & S.* 317, 8 *N. Y. S. R.* 93.—FOLLOWING *Filer v. New York C. R. Co.*, 49 *N. Y.* 47, 59 *N. Y.* 351, 68 *N. Y.* 124; *Maher v. Central Park, N. & E. R. R. Co.*, 67 *N. Y.* 55.

223. Giving signals and warnings.*—A company professing to provide rapid

* See also *ante*, 134, 199; *post*, 394, 473.

Injury to passenger where unauthorized person gives a signal to start, see 58 *AM. & ENG. R. CAS.* 229, *abstr.*

* See also *ante*, 205; *post*, 248, 293, 385.

transit, or of making short stops at its stations, has imposed upon it the duty of giving passengers clear and intelligible signals indicating when it is safe or not to board the trains. *McQuade v. Manhattan R. Co.*, 21 J. & S. (N. Y.) 91; affirmed in 109 N. Y. 636, mem., 16 N. E. Rep. 681, 15 N. Y. S. R. 993. See also *Keating v. New York C. & H. R. R. Co.*, 49 N. Y. 673; affirming 3 Lans. 469.

If a train be brought to a station in such a manner as to induce passengers to believe that it is stopped for their reception, and then starts while they are getting on, without giving any signal or caution, it is guilty of negligence, whether the starting was necessary or not, and whether the stop was actually to take on passengers or not. If the train is not ready to receive passengers, it is the duty of the company to have some one present to warn them and prevent their entrance, and not to start the train when they are getting on without giving any warning. *Curtis v. Detroit & M. R. Co.*, 27 Wis. 158, 5 Am. Ry. Rep. 368.—REVIEWED IN *Hartwig v. Chicago & N. W. R. Co.*, 1 Am. & Eng. R. Cas. 65, 49 Wis. 358; *Duane v. Chicago & N. W. R. Co.*, 35 Am. & Eng. R. Cas. 416, 72 Wis. 523, 7 Am. St. Rep. 879, 40 N. W. Rep. 394.

It is the duty of a company, through its agents, to give reasonable signals of the departure of trains—such signals as would ordinarily attract the attention of passengers and those interested in the movements of cars. Should a passenger needlessly linger about a depot or station and neglect to board a train, then the company as to such passenger is only bound to ordinary diligence, and it would be the duty of such passenger to use caution in observing signals which might be given. *Perry v. Central R. Co.*, 66 Ga. 746.

Defendant was a conductor upon a railway owned by the crown. While at a station he was, by the regulations of the railway, under the orders of the station master as regards the time of starting the train. But it was his duty to give the signal to the engine-driver to go ahead. It was also his duty not to give the signal while passengers were getting on board; and in order that he might be in a position to see whether there were any getting on board he should stand, when making the signal, "near the front end of the first passenger car." The defendant in this case left the platform, passed

across the train to a platform on the opposite side of the track, and gave the signal to start, the time for starting having already expired. After the signal, and while the cars were in motion, the plaintiff, who was waiting on the platform, in attempting to get on board was thrown down and injured. On motion to enter a nonsuit it was contended that the action would not lie as the defendant was an employé of the crown and would not be liable except for misfeasance, and that while at the station he was under the control of the station master. *Hehl*, that even if it were necessary to show misfeasance in order to sustain the action against the defendant, the giving of the signal to start under such circumstances was evidence of a wrongful act by him. *Hall v. McFadden*, 19 New Brun. 340.

224. Duty to furnish passenger with a seat.*—Railway companies are bound to provide safe places for those whom they accept as passengers, and to make reasonable provision for seating those whom they undertake to carry. *Louisville & N. R. Co. v. Kelly*, 13 Am. & Eng. R. Cas. 1, 92 Ind. 371, 47 Am. Rep. 149. *Hardenburgh v. St. Paul, M. & M. R. Co.*, 34 Am. & Eng. R. Cas. 359, 39 Minn. 3, 38 N. W. Rep. 625, 12 Am. St. Rep. 610.

Unless a sudden and unusual influx of passengers renders it impracticable, the conductor of a passenger train must provide a seat for a ticket-holder in the car in which his ticket entitles him to ride; and to do this must, if necessary, limit passengers to single seats. *Louisville, N. O. & T. R. Co. v. Patterson*, 69 Miss. 421, 13 So. Rep. 697.

It is essential that good order should prevail on passenger trains, which is not likely to occur if passengers are left to shift and scramble for themselves in obtaining seats. If there be no sitting room for male passengers, who are excluded by a regulation of the company from the ladies' car, and there be no room to seat them there, they cannot be left standing without breach of the contract of carriage. *Bass v. Chicago & N. W. R. Co.*, 36 Wis. 450, 9 Am. Ry. Rep. 101.

The evidence tended to show that plaintiff, who was a passenger, was excluded from the ladies' car and could not obtain a seat in the other cars, and was left stand-

* Right of passenger to seat, see note, 22 L. R. A. 259.

ing by the train officers, without a seat, for a considerable length of time without any attention. *Held*, in the absence of any explanation of such neglect, that it showed a breach of duty. *Bass v. Chicago & N. W. R. Co.*, 36 *Wis.* 450, 9 *Am. Ry. Rep.* 101.

*g. Letting off Passengers.**

225. Duty to carry to point of destination.—It is the carrier's duty to transport and place their passengers safely at the place of destination, and if injury to the passenger ensues from a failure to observe due care, the carrier is *prima facie* responsible. *Lambeth v. North Carolina R. Co.*, 66 *N. Car.* 494.

Where the company undertakes to carry a passenger to a particular station, and the train on which she takes passage is one which, under the company's regulations, is required to receive and discharge passengers at such station, the company will commit an actionable wrong in requiring the passenger to leave the train before reaching her destination. *Sira v. Wabash R. Co.*, 115 *Mo.* 127, 21 *S. W. Rep.* 905.

A female passenger was carelessly directed by a brakeman to leave the train at night about three miles from the station, at a place where she was a stranger, and without knowing that she was not near the station. The exertion of walking to her place of destination brought on severe sickness. *Held*, that the company was liable. *Brown v. Chicago, M. & St. P. R. Co.*, 3 *Am. & Eng. R. Cas.* 444, 54 *Wis.* 342, 11 *N. W. Rep.* 356, 911, 41 *Am. Rep.* 41.—DISTINGUISHED IN *Hawkins v. Front St. Cable R. Co.*, 3 *Wash.* 592. REVIEWED IN *Lewis v. Flint & P. M. R. Co.*, 54 *Mich.* 55.

226. Duty to carry to station named in ticket.†—A passenger on a mixed train has a right to be safely put off at a regular station to which he has bought a ticket. *Thomas v. Charlotte, C. & A. R. Co.*, 38 *So. Car.* 485, 17 *S. E. Rep.* 226.

* See also *post*, 292, 392-440.

Duty to land passengers safely, see note, 3 *L. R. A.* 368.

Duty of conductors in stopping and starting trains, see note, 13 *L. R. A.* 95.

Liability for injury to passenger in alighting from train, see notes, 52 *Am. & Eng. R. Cas.* 289; 16 *Id.* 350; 3 *L. R. A.* 368; 7 *Id.* 112; 33 *Am. & Eng. R. Cas.* 518, *abstr.*

Injuries to passengers alighting at stations, see note, 30 *Am. & Eng. R. Cas.* 578.

† Rule as to stopping train at station to which ticket runs, see note, 41 *Am. Dec.* 480.

When a person, purchasing a ticket expressly for a particular train of cars, at the time of the purchase is informed by the agent of the company that the train will stop at the station for which the ticket is purchased, he has a right to take passage on such train, and it is the duty of the company to allow him to leave the train at that station. *Pittsburgh, C. & St. L. R. Co. v. Nuzum*, 50 *Ind.* 141, 9 *Am. Ry. Rep.* 396.—DISTINGUISHED IN *Hicks v. Hannibal & St. J. R. Co.*, 68 *Mo.* 329. QUOTED IN *Lake Erie & W. R. Co. v. Mays*, 4 *Ind. App.* 413.

Plaintiff purchased a ticket to a certain station, but by mistake took a freight train which was only authorized to carry passengers to a point ten miles short of his destination. The conductor, after the train had started, informed him that he was on the wrong train, but he declined to leave it after being offered an opportunity to do so. Plaintiff surrendered his ticket, which was canceled, and was required to leave the train upon reaching the point limited for the carriage of passengers on that train. *Held*, that there was no cause of action against the company, as the conductor gave the information before the ticket was canceled, unless the passenger was induced to take the train on the direction of the ticket agent, as he claimed. *South & N. Ala. R. Co. v. Huffman*, 76 *Ala.* 492, 52 *Am. Rep.* 349.

The plaintiff, having purchased at Birmingham a ticket to Hanceville, a station ten miles beyond Blount Springs, by mistake entered a freight train which, by the regulations of the company, was not authorized to carry passengers beyond Blount Springs; and being informed by the conductor after the train had started, that he was on the wrong train and could not be carried beyond Blount Springs, he declined to leave the train, as the conductor offered him an opportunity to do, and declared that he would go on; and having surrendered his ticket, which the conductor thereupon canceled, he traveled to Blount Springs and was there required by the conductor to leave the train. *Held*, that these facts showed no wrong on the part of either the conductor or the company; though, if the conductor had taken and canceled the ticket on presentation, without giving the information as stated, he would probably have been guilty of a tort. *South & N. Ala. R. Co. v. Huffman*, 76 *Ala.* 492, 52 *Am. Rep.* 349.

A company, which owned also a line of steamers, sold plaintiff a ticket which entitled him to be carried by a steamer to a certain station or to the nearest one on the opposite bank of the river. The boat refused to land him at the station, claiming that the landing had been abandoned, but there was other evidence tending to show that the refusal was in retaliation for his refusing to give the boat all of his shipping business. *Held*, that after having sold a ticket for the landing the company was liable for actual damages for failing to land him. *Brulard v. The Alvin*, 45 Fed. Rep. 766.

227. — or station to which fare has been collected.—A company which as a common carrier receives a passenger and collects her fare to a particular station, with knowledge on the part of the conductor that she intends and desires to leave the train at that station, is charged by law with the duty of stopping the train at the station and affording her an opportunity to get off. *Caldwell v. Richmond & D. R. Co.*, 89 Ga. 550, 15 S. E. Rep. 678.

When a company by its agents takes the fare of a passenger to a particular station on its road, it is bound to stop at that station that he may get off the cars; it is not sufficient that the speed of the cars is slackened. And if, after passing the station, the speed of the car is again slackened, that the passenger may get off, and, under the direction of the conductor, he does get off, and in so doing gets injured, the company is liable. *Georgia R. & B. Co. v. McCurdy*, 45 Ga. 288.—FOLLOWED IN *Western R. Co. v. Young*, 51 Ga. 489.

Where a passenger sues to recover damages by reason of the train not stopping at his destination to let him off, it being a station where it is its duty to stop, it is no defense that the conductor offered to let him off at an intermediate station, and to give him a pass by which he could take the next train, where such offer was not accepted. *Ohio & M. R. Co. v. People ex rel.*, 29 Ill. App. 561.

A conductor agreeing to put a passenger off at a station is bound to stop the train at that place, so that the passenger can get off in safety, even though his ticket is only to the last station passed before reaching it, additional fare being receivable if demanded; but the mere agreement and duty to stop and the ringing of the bell by the conductor are not sufficient ground and induce-

ment by the conductor to induce the passenger to believe that the train had stopped. When the train fails to stop at the station of destination of a passenger, and he is not directed or induced at the time by act or word of the company's agent to get off, and he does get off, he does so at his own risk. *East Tenn., V. & G. R. Co. v. Massengill*, 15 Lea (Tenn.) 328.—DISTINGUISHED IN *Louisville & N. R. Co. v. Stacker*, 86 Tenn. 343, 6 Am. St. Rep. 840, 6 S. W. Rep. 737.

228. Stopping at recently established station.—In suit against a company for failing to carry plaintiff to its original depot, where it appeared that the company had abandoned its old depot for one half a mile short of that terminus—*held*: (1) that although the change had been adopted only a few weeks prior to his purchase of ticket, yet the running of the trains having been uniformly to the new depot since that change, will be considered as a usage of the company, in reference to which plaintiff must be held to have contracted; (2) that, *a fortiori*, such is the case where plaintiff knew of the change at the time of procuring his ticket. *Martindale v. Kansas City, St. J. & C. B. R. Co.*, 60 Mo. 508.

229. Duty to draw up alongside station platform.*—(1) *Generally.*—It is the duty of the conductor of a train to stop the cars at the depot platforms for the safe landing of passengers. *St. Louis, I. M. & S. R. Co. v. Cantrell*, 8 Am. & Eng. R. Cas. 198, 37 Ark. 51, 40 Am. Rep. 105.

And if passengers are required to alight at any other point, the company is liable for any injury resulting thereby to such passengers. *New York, C. & St. L. R. Co. v. Doane*, 37 Am. & Eng. R. Cas. 87, 115 Ind. 435, 15 West. Rep. 465, 17 N. E. Rep. 913, 1 L. R. A. 157, 7 Am. St. Rep. 451.

The stopping of a train out of the usual place, beyond the platform where passengers generally alight, is improper. *Flanagan*

* See also *ante*, 216; *post*, 264.

Duty to bring train to standstill at platform to enable passengers to alight, see note, 7 AM. REP. 706.

Passengers injured by alighting from train which did not stop at platform, see note, 27 AM. & ENG. R. CAS. 115.

Injury to passengers owing to cars being left at a distance from station or platform, see note, 3 AM. & ENG. R. CAS. 384.

v. *New York, N. H. & H. R. Co.*, 5 *Silo. Sup. Ct. (N. Y.)* 495.

Where a train is stopped near a station, or is so stopped that the passenger cars are not alongside the platform, it is the duty of the conductor, if requested by any passenger, to move the train backward or forward as desired, to enable the passengers to alight on the platform. *Memphis & C. R. Co. v. Whitfield*, 44 *Miss.* 466.—DISTINGUISHING *Siner v. Great Western R. Co.*, L. R. 3 Ex. 150; *Evansville & C. R. Co. v. Duncan*, 28 *Ind.* 442; *Jeffersonville R. Co. v. Hendricks*, 26 *Ind.* 228; *Pennsylvania R. Co. v. Aspell*, 23 *Pa. St.* 147; *Foy v. London, B. & S. C. R. Co.*, 18 *C. B. N. S.* 225.

Where a train pulls up at a platform so that nothing but the forward end of the smoking-car is at the platform, passengers in the rear cars, especially ladies, are not bound to go through the smoker to alight; and if in consequence of the position of the train they are injured in getting off from the car in which they have been riding, it is the fault of the company. *Cartwright v. Chicago & G. T. R. Co.*, 16 *Am. & Eng. R. Cas.* 321, 52 *Mich.* 606, 18 *N. W. Rep.* 380, 50 *Am. Rep.* 274.

A freight train carrying passengers should stop its caboose reasonably near the platform, regard being had to the surroundings, situation, and location; and where it was stopped one hundred and twenty to one hundred and fifty feet from the platform at noon time, with a clear, unobstructed, smooth pathway leading thereto, and plaintiff accepts the same without protest, it would seem sufficient. *Hays v. Wabash R. Co.*, 51 *Mo. App.* 438.

(2) *English cases.*—A train drew up at a station with two of the carriages beyond the platform. The servants of the company called out to the passengers to keep their seats, but were not heard by the plaintiff and other passengers in one of these carriages. After waiting some little time, and the train not having put back, the plaintiff got out, and in so doing fell and was injured. *Held*, that there was evidence of negligence on defendant's part to go to the jury. *Rose v. North Eastern R. Co.*, L. R. 2 Ex. D. 248, 46 *L. J. Ex.* 374, 25 *W. R.* 205, 35 *L. T.* 693; *reversing* 34 *L. T.* 761.

Where a long train stops at a station platform so that part of it is alongside the parapet of a bridge, and after the name of the station had been called out a passenger

steps upon the parapet, believing it to be the platform, and falls over, it is for the jury to say whether there was an invitation to the passenger to alight; and if they find for the passenger the court will not say that there was no evidence of negligence on the part of the company. *Whittaker v. Manchester, S. & L. R. Co.*, 22 *L. T.* 545.

A train drew up at a station with part of one of the carriages beyond the platform. A passenger in that carriage, having parcels in her hands, opened the door and waited on the iron step some time for assistance; but no one coming, she attempted to alight by getting onto the footboard, and in so doing fell. *Held*, that there was evidence of negligence to go to the jury. *Robson v. North Eastern R. Co.*, L. R. 2 Q. B. D. 85, 46 *L. J. Q. B. D.* 50, 25 *W. R.* 418, 35 *L. T.* 535; *affirming* 32 *L. T.* 551, L. R. 10 Q. B. 271, 44 *L. J. Q. B.* 112, 23 *W. R.* 791.

A passenger heard the name of his station called out two or three times by one of the porters. The part of the train in which he was had stopped at a place about thirty-five feet from the end of the platform. There were no lights there, and in stepping out he fell upon his head and was injured. *Held*, that there was evidence of negligence on the part of the company. *Gill v. Great Eastern R. Co.*, 26 *L. T.* 945.

A company is guilty of negligence in not providing means of alighting where its cars are not drawn up to a platform, and passengers are required to descend three feet to the ground; and a lady who, instead of availing herself of two steps, with the assistance of a gentleman jumps from the first step to the ground and sustains spinal injuries, is entitled to recover. *Foy v. London, B. & S. C. R. Co.*, 18 *C. B. N. S.* 225, 13 *W. R.* 293, 11 *L. T.* 606.—COMMENTED ON IN *Siner v. Great Western R. Co.*, L. R. 4 Ex. 117, 38 *L. J. Ex.* 67, 20 *L. T.* 114, 17 *W. R.* 417.

230. Announcement of station.*—

(1) *Rule stated.*—In order to afford passengers an opportunity to leave trains at their destination, the company is bound to have the names of the stations announced, upon the arrival of the train, and then to stop a

* See also *post*, 411.

Calling name of station and stopping train, see note, 30 *AM. & ENG. R. CAS.* 577.

Duty to announce station where passenger has arrived at destination or is to change cars, see note, 15 *L. R. A.* 347.

sufficient length of time for the passengers to get off with safety. *Louisville, N. O. & T. R. Co. v. Mask*, 64 Miss. 738, 2 So. Rep. 360. *Lehman v. Louisiana Western R. Co.*, 37 La. Ann. 705. *Dorrah v. Illinois C. R. Co.*, 30 Am. & Eng. R. Cas. 576, 65 Miss. 14, 7 Am. St. Rep. 629, 3 So. Rep. 36.

It is not the duty of conductors to see to the debarkation of passengers; but they should have the stations announced, and stop long enough for passengers to get off. *New Orleans, J. & G. N. R. Co. v. Statham*, 42 Miss. 607.—QUOTED IN *Nunn v. Georgia R. Co.*, 71 Ga. 710, 51 Am. Rep. 284.

A company is not legally responsible for the action of persons not its servants in falsely announcing the arrival of a train at a station, whereby a passenger in attempting to alight from the train is injured. *Columbus & I. C. R. Co. v. Farrell*, 31 Ind. 408.

Whether a company is guilty of carelessness in notifying passengers in the night-time that a station is at hand, and then stopping short of such station, depends upon circumstances. *Central R. Co. v. Van Horn*, 38 N. J. L. 133, 13 Am. Ry. Rep. 36.—QUOTED IN *Memphis & L. R. R. Co. v. Stringfellow*, 21 Am. & Eng. R. Cas. 374, 44 Ark. 322, 51 Am. Rep. 598. REVIEWED IN *Smith v. Georgia Pac. R. Co.*, 41 Am. & Eng. R. Cas. 143, 88 Ala. 538.

The mere fact that a train has stopped and the name of the station is called out is not evidence of an invitation on the part of the company for passengers to alight. *Lewis v. London, C. & D. R. Co.*, 43 L. J. Q. B. 8, L. R. 9 Q. B. 66, 22 W. R. 153, 29 L. T. 397.

(2) *Illustrations*.—In case the conductor announces a station, at which his train is not bound to stop, just before the same is reached, and if, following such announcement, the train actually does stop at the station platform, a passenger for such station would be justified in presuming it was for the purpose of discharging him there and in proceeding to get off; and if, while it is so stopped, and with due promptness and care the passenger attempts to get off, and is thrown down and injured by the starting up of the train, that presumption would become conclusive on the company. It could not avoid liability for such injury by stopping the train again a few rods further on. *McNulta v. Ensich*, 134 Ill. 46, 24 N. E. Rep. 631; reversing 31 Ill. App. 100.

Where the ordinary signal is given on approaching a station, and it is announced in

the usual manner by the brakeman or conductor, so as to lead a passenger to believe the train was going to stop at such station, and it does stop there, the company cannot avoid liability to the passenger for an injury caused by the train starting before he has time to get off, by showing those in charge of the train intended to go on further before discharging passengers, of which no notice was given. *McNulta v. Ensich*, 134 Ill. 46, 24 N. E. Rep. 631; reversing 31 Ill. App. 100.

A passenger train was run beyond a platform at a certain station and stopped over a culvert, and the name of the station was called as a warning for passengers who got off at that station to leave. It was in the night-time, and a passenger, supposing he was alighting on the platform, stepped out and was greatly injured. *Held*, that the company was liable. *Columbus & I. C. R. Co. v. Farrell*, 31 Ind. 408.—QUOTED IN *Memphis & L. R. R. Co. v. Stringfellow*, 21 Am. & Eng. R. Cas. 374, 44 Ark. 322, 51 Am. Rep. 598.

A conductor has no right to assume, because he does not see a passenger in the passenger coach when it is nearing its station, that the passenger has left, when so doing would require him to leap from a moving train in the dark, as such risks are not generally taken by sane and prudent people. It is the duty of the conductor to know that he has passengers for that station, and to have the name of the station announced and stop the train. So *held*, where a conductor looked in a car from one platform and, not seeing a passenger, ordered the train to move on, whereas the passenger was on the other platform awaiting the train to stop. *Louisville, N. O. & T. R. Co. v. Mask*, 64 Miss. 738, 2 So. Rep. 360.

Where a conductor on a dark night announced the approach of a station, and soon after stopped the train on a bridge, without notice that the station was not reached, a passenger (who was killed in getting off the car) had a right to suppose the train was at the station, and the negligence of the company was such as to warrant the submission of the case to the jury. *Philadelphia, W. & B. R. Co. v. McCormick*, 124 Pa. St. 427, 16 Atl. Rep. 848.—FOLLOWING *Philadelphia & R. R. Co. v. Edelstein*, 23 W. N. C. (Pa.) 342, 16 Atl. Rep. 847.

231. Awakening or arousing passenger.—It is the duty of the conductor

or brakeman on a passenger train to call out the stations, but not to awaken passengers; it being the passenger's duty to keep awake if he wishes to alight. *Nichols v. Chicago & W. M. R. Co.*, 52 *Am. & Eng. R. Cas.* 304, 90 *Mich.* 203, 51 *N. W. Rep.* 364.

It is not necessary that a conductor should give passengers when ready to leave the train any other than the customary warning and an opportunity to allow them to avail themselves of it. A mere voluntary promise on the part of a conductor to wake a drowsy passenger, and failure to do so, whereby the passenger is carried beyond his destination, furnishes no cause of action against the company. *Nunn v. Georgia R. Co.*, 71 *Ga.* 710, 51 *Am. Rep.* 284.—QUOTING *Pennsylvania R. Co. v. Kilgore*, 32 *Pa. St.* 294; *New Orleans, J. & G. N. R. Co. v. Statham*, 42 *Miss.* 607. REVIEWING *South-ern R. Co. v. Kendrick*, 40 *Miss.* 374.

A man who enters a railroad car sick and very drowsy, and who goes to sleep after he is aboard, cannot complain if the conductor fails to awaken him at his place of destination; and the company will not be liable if he is carried beyond his station by reason of the conductor agreeing to wake him and failing to do so. *Sevier v. Vicksburg & M. R. Co.*, 18 *Am. & Eng. R. Cas.* 245, 61 *Miss.* 8, 48 *Am. Rep.* 74.—DISTINGUISHED IN *Weightman v. Louisville, N. O. & T. R. Co.*, 70 *Miss.* 563.

Plaintiff, who was shown to be a morphine eater and subject to spells of drowsiness, entered a train and claimed that she informed the conductor that she was sick, who promised to let her know when she reached her destination, but which he failed to do, and that she did not hear the station called. Her attorney, who was familiar with the locality, testified that he got off at the station, but did not hear it called. The train porter testified positively that the station was called, and gave reasons why he knew it. The conductor denied that plaintiff had any conversation with him about informing her of her station. *Held*, that the evidence was not sufficient to warrant a recovery against the company for carrying the plaintiff beyond her station. *Tillery v. Bond*, 38 *Fed. Rep.* 825.

232. Giving reasonable opportunity to alight, generally.*—The duties

*Duty to give passenger opportunity to alight, see note, 7 *L. R. A.* 689.

of carriers of passengers are not limited to the mere transportation of them. They are bound to provide safe and convenient modes of access to their trains and of departure from them. *Philadelphia, W. & B. R. Co. v. Anderson*, 44 *Am. & Eng. R. Cas.* 345, 72 *Md.* 519, 20 *Atl. Rep.* 2.—QUOTING *Baltimore & O. R. Co. v. Worthington*, 21 *Md.* 283; *Stokes v. Saltonstall*, 13 *Pet. (U. S.)* 181; *Stockton v. Frey*, 4 *Gill (Md.)* 314.

The law imposes upon the conductor of a railroad train, acting as the agent of the corporation engaged in the carriage of passengers, the obligation of carrying the passenger safely to his point of destination, announcing the arrival of the train at the station, and giving reasonable opportunity to the passengers to leave the cars. When this is done the duty of the conductor ceases. *Hurt v. St. Louis, I. M. & S. R. Co.*, 34 *Am. & Eng. R. Cas.* 422, 94 *Mo.* 255, 13 *West. Rep.* 233, 237, 7 *S. W. Rep.* 1.—QUALIFYING *Kelly v. Hannibal & St. J. R. Co.*, 70 *Mo.* 604.—DISTINGUISHED IN *Burbridge v. Kansas City Cable R. Co.*, 36 *Mo. App.* 669.

The duty to use the highest degree of care practicable in regard to passengers does not cease upon the arrival of the train at the place of the passenger's destination, but it is still bound to furnish him an opportunity to alight and to use the utmost care and diligence in providing him a safe passage from the train to the platform of the depot. *Atchison, T. & S. F. R. Co. v. Shean*, 58 *Am. & Eng. R. Cas.* 360, 18 *Colo.* 368, 33 *Pac. Rep.* 108, *Denver & R. G. R. Co. v. Hodgson*, 18 *Colo.* 117, 31 *Pac. Rep.* 954.—QUOTED AND FOLLOWED IN *Atchison, T. & S. F. R. Co. v. Shean*, 18 *Colo.* 368.

The implied contract of a carrier of passengers to carry them safely to their destination includes the duty of furnishing a reasonable opportunity to alight from the train in safety at the end of the journey. *Chicago & A. R. Co. v. Arnol*, 58 *Am. & Eng. R. Cas.* 411, 144 *Ill.* 261, 33 *N. E. Rep.* 204.—QUOTING *McNulta v. Ensich*, 134 *Ill.* 46.—*Richmond City R. Co. v. Scott*, 44 *Am. & Eng. R. Cas.* 418, 86 *Va.* 902, 11 *S. E. Rep.* 404.

The company is not relieved of this duty by the fact that the conductor does not know that a passenger intends to leave, and did not see him leave the car, unless the passenger was so situated as to be concealed

from observation. *McDonald v. Long Island R. Co.*, 116 N. Y. 546, 22 N. E. Rep. 1068, 27 N. Y. S. R. 481; *affirming* 6 N. Y. S. R. 691, 43 Hun 637.

A carrier of passengers is bound to safely carry them and allow them sufficient time and opportunity to leave the cars; and it is the duty of passengers to use reasonable care and diligence to leave the car, and to avail themselves of the opportunity offered by the carrier to do so. *Southern R. Co. v. Kendrick*, 40 Miss. 374.—QUOTING *Pennsylvania R. Co. v. Kilgore*, 32 Pa. St. 294.—REVIEWED IN *Dawson v. Louisville & N. R. Co.* (Ky.) 11 Am. & Eng. R. Cas. 134.

There was evidence that the plaintiff, a passenger, proceeded to alight at a station, but that sufficient time was not afforded her therefor; that as she reached the door of her car the train started; that, seeing her approach, a brakeman pulled a bell-cord and gave the customary signal to stop the train; that the plaintiff placed her hand against the jamb of the door to steady herself; that after this signal was given the train was brought to a sudden stop, and that in consequence the door, which was ajar and unfastened, was forcibly closed and the plaintiff's hand injured. *Held*, that the evidence established a *prima-facie* case of negligence on the part of the company in failing to afford the plaintiff sufficient opportunity to alight. *Madden v. Missouri Pac. R. Co.*, 50 Mo. App. 666.—QUOTING *Pennsylvania Co. v. Roy*, 102 U. S. 451.

233. Duty to actually stop train.*

—A conductor is required, after having at a proper time announced the station, to stop the train and hold it for such reasonable time as will permit the passengers to alight in safety; but he is not required to know that all the passengers destined for that station have alighted before starting the train again. *Raben v. Central Iowa R. Co.*, 33 Am. & Eng. R. Cas. 520, 73 Iowa 579, 5 Am. St. Rep. 708, 35 N. W. Rep. 645.

It is culpable negligence not to stop a train entirely at a regular station to which it has sold a ticket, and give a passenger time and opportunity to alight. It is also negligence for its officers to induce a passenger to leave a train while in motion.

* See also *ante*, 214-216.

Duty to stop train to allow passenger to alight, see note, 7 L. R. A. 112.

Failure to stop at stations, see note, 30 Am. & Eng. R. Cas. 626.

Butcher v. New York C. & H. R. R. Co., 21 Am. & Eng. R. Cas. 361, 98 N. Y. 128.—FOLLOWING *Filer v. New York C. R. Co.*, 49 N. Y. 51.—FOLLOWED IN *Lent v. New York C. & H. R. R. Co.*, 44 Am. & Eng. R. Cas. 373, 120 N. Y. 467, 24 N. E. Rep. 653, 31 N. Y. S. R. 538. QUOTED IN *Weiler v. Manhattan R. Co.*, 53 Hun (N. Y.) 372, 25 N. Y. S. R. 543, 6 N. Y. Supp. 320.

A carrier in stopping its cars is not bound to stop them so as to avoid danger to persons who attempt to get off before the stoppage is complete. *Blodgett v. Bartlett*, 50 Ga. 353.

A train was kept in motion when approaching a station by a passenger pulling the bell rope as a signal to go on. Plaintiff, who was a passenger, had full knowledge that the rope was pulled by a passenger without authority, but attempted to leave the train while it was in motion. *Held*, that it was error to instruct the jury that a failure to stop at the station, under the circumstances, was negligence. *Mississippi & T. R. Co. v. Harrison*, 39 Am. & Eng. R. Cas. 449, 66 Miss. 419, 6 So. Rep. 319.

Appellee was a passenger upon one of the appellant's trains from B. to L. When the latter place was reached the train did not stop, but slackened in speed, so that two male passengers alighted in safety in appellee's presence. She was standing on the platform waiting for the cars to stop. Seeing that they were not stopping, she asked an employé of appellant, whom she supposed to be conductor, if she should jump off, and he directed her to wait until the train got opposite the depot. The train continued to move with increasing speed, and finally appellant's servant told her she would have to jump off, which she did, receiving the injuries for which she seeks compensation. Appellant was guilty of negligence in not stopping the train, and judgment is affirmed. *Texas & N. O. R. Co. v. Bingham*, 2 Tex. Civ. App. 278, 21 S. W. Rep. 569.

234. Duty to allow a reasonable time to alight.*—(1) *Generally*.—It is the duty of a company to stop its train at a station for a reasonable time, in order that passengers may get on and off its cars with safety to themselves; and if it fails so to do, and injury results to passengers from the

* Reasonable time to alight, see note, 16 Am. & Eng. R. Cas. 346. Also *ante*, 219.

starting of the train while passengers are alighting the company is guilty of negligence, and is responsible in damages for such injury. *Carr v. Eel River & E. R. Co.*, 58 Am. & Eng. R. Cas. 239, 98 Cal. 366, 33 Pac. Rep. 213. *Pennsylvania R. Co. v. Kilgore*, 32 Pa. St. 292.—QUOTED IN *Nunn v. Georgia R. Co.*, 71 Ga. 710, 51 Am. Rep. 284.—*St. Louis, I. M. & S. R. Co. v. Persson*, 30 Am. & Eng. R. Cas. 567, 49 Ark. 182, 4 S. W. Rep. 755. *Terre Haute & I. R. Co. v. Buck*, 18 Am. & Eng. R. Cas. 234, 96 Ind. 346, 49 Am. Rep. 168. *Lehman v. Louisiana Western R. Co.*, 37 La. Ann. 705. *Straus v. Kansas City, St. J. & C. B. R. Co.*, 27 Am. & Eng. R. Cas. 170, 86 Mo. 421; affirming 75 Mo. 185. *Richmond v. Quincy, O. & K. C. R. Co.*, 49 Mo. App. 104. *Chicago, B. & Q. R. Co. v. Landauer*, 54 Am. & Eng. R. Cas. 640, 36 Neb. 642, 54 N. W. Rep. 976. *Onderdonk v. New York & S. B. R. Co.*, 74 Hun 42, 26 N. Y. Supp. 310, 56 N. Y. S. R. 190. *Flanagan v. New York, N. H. & H. R. Co.*, 5 Silo. Sup. Ct. (N. Y.) 495. *Washington & G. R. Co. v. Harmon*, 147 U. S. 571, 13 Sup. Ct. Rep. 557. *Chicago & A. R. Co. v. Arnol*, 58 Am. & Eng. R. Cas. 411, 144 Ill. 261, 33 N. E. Rep. 204.

Where a train is stopped at a station to which the company contracts to carry a passenger, the company is liable if reasonable time to leave is not afforded, and he is injured in an attempt to alight after it has started and while in motion, if he does not in getting off incur a danger obvious to the mind of a reasonable man. *Central R. & B. Co. v. Miles*, 41 Am. & Eng. R. Cas. 149, 88 Ala. 256, 6 So. Rep. 696.—REVIEWING *Ricketts v. Birmingham St. R. Co.*, 85 Ala. 600; *Central R. & B. Co. v. Letcher*, 69 Ala. 106.

When a reasonable time has thus elapsed it is no part of the duty of the servants of such corporation to make personal inspection of or to interrogate the remaining passengers to see whether they intend leaving the cars. The law imposes no such onerous duty upon a carrier of passengers, and if it should appear in evidence, in any given case, that passengers similarly situated, as to age, sex, and so forth, as the party complaining, have safely left the cars prior to any injury or accident complained of, this would afford ground for legitimate inference by the jury that sufficient time had been granted to the passenger, who sues for the negligent injury, to have alighted in safety. *Hurt v. St. Louis, I. M. & S. R. Co.*, 34 Am.

& Eng. R. Cas. 422, 94 Mo. 255, 13 West. Rep. 233, 237, 7 S. W. Rep. 1.

If a carrier of passengers by railway stops the train long enough for the passenger, by the use of reasonable expedition, to get off, then there is no cause of complaint. *Culbertson v. Chicago, M. & St. P. R. Co.*, 50 Mo. App. 556.

For a statement of the rules as to the length of time railroad cars should stop at a station to allow passengers to alight, see *Keller v. Sioux City & St. P. R. Co.*, 27 Minn. 178, 6 N. W. Rep. 486.—REVIEWED IN *Griswold v. Chicago & N. W. R. Co.*, 23 Am. & Eng. R. Cas. 463, 64 Wis. 652.

(2) *Illustrations*.—In an action for a personal injury received while alighting from a train, the evidence justifies a verdict for plaintiff, where it appeared that he was prompt enough in moving out of the car, that the stop was unreasonably brief, and that the conductor was not sufficiently careful in ascertaining whether all the passengers were out. *Illinois C. R. Co. v. Taylor*, 46 Ill. App. 141.

A company is negligent in failing to stop its trains a sufficient time to enable a female passenger laden with heavy bundles to get from her seat and alight from the train in safety, and in failing to render her assistance in that behalf, where it appeared that it was the custom at the station in question to assist lady passengers off, and it further appeared that the conductor knew that the passenger desired to get off at that station and that she was encumbered with bundles. *Toledo, St. L. & K. C. R. Co. v. Wingate*, (Ind.) 58 Am. & Eng. R. Cas. 232, 37 N. E. Rep. 274.

When a man becomes a passenger on a car, with his wife and little children, he is their guardian and protector and has the supervision of their safety, and they, so far as the act of debarkation is concerned, are to be regarded, to all intents and purposes, as a unit; and the same rule which accords to the family group a reasonable time to debark must, of necessity, include within it the right to take their baggage with them when leaving the car. *Hurt v. St. Louis, I. M. & S. R. Co.*, 34 Am. & Eng. R. Cas. 422, 94 Mo. 255, 13 West. Rep. 233, 237, 7 S. W. Rep. 1.

In an action by a woman in good health, sixty-five years old, and weighing one hundred and seventy pounds, and who was a passenger on defendant's train, to recover

damages for personal injuries caused by starting the train when she was in the act of alighting, the jury may take into consideration the "age, sex, and physical condition" of the plaintiff in determining whether the train stopped sufficiently long to enable her to get off. *Hickman v. Missouri Pac. R. Co.*, 91 Mo. 433, 4 S. W. Rep. 127.

Where the evidence as to the time which a train stopped at a station is conflicting, plaintiff's witnesses having testified that it stopped from 10 to 20 seconds and defendant's witnesses that it stopped a minute, and that from 10 to 15 passengers, mostly ladies, got off the train, and one or two passengers got on it while it was at rest, the question whether the train stopped a reasonable and proper time to allow passengers to alight safely is for the jury. *Pennsylvania R. Co. v. Lyons*, 41 Am. & Eng. R. Cas. 154, 129 Pa. St. 113, 18 Atl. Rep. 759.

235. — in case of sick or decrepit passengers.*—Sick persons and persons unable to take care of themselves should provide themselves with proper assistance while traveling in railroad cars. And if a person is sick and, from inability to walk without assistance, requires longer delay at the station than is usual to alight, he should give timely notice thereof to the conductor. *New Orleans, J. & G. N. R. Co. v. Statham*, 42 Miss. 607.—APPROVED IN Louisville, N. & G. S. R. Co. v. Fleming, 14 Lea (Tenn.) 128.

Carriers must afford a reasonable time to passengers, whether young or old, to leave the cars in safety, and if the time-tables do not allow sufficient time for this purpose, and an injury is thereby occasioned, the company will be liable therefor. But the age or decrepitude of a passenger will not determine the time of the stoppage of a train on its arrival at a station. *Toledo, W. & W. R. Co. v. Baddeley*, 54 Ill. 19.—QUOTED IN Dawson v. Louisville & N. R. Co., (Ky.) 11 Am. & Eng. R. Cas. 134.

236. Duty to provide safe place of egress, generally.†—A carrier of passengers is bound to provide reasonably safe places for passengers to alight from trains. *Terre Haute & I. R. Co. v. Buck*, 18 Am. & Eng. R. Cas. 234, 96 Ind. 346, 49 Am. Rep.

168. *Lehman v. Louisiana Western R. Co.*, 37 La. Ann. 705. *Onderdonk v. New York & S. B. R. Co.*, 74 Hun (N. Y.) 42, 26 N. Y. Supp. 310, 56 N. Y. S. R. 190.

And it is liable for any injury received by its passengers due to its failure to discharge them at a safe place. *Van Ostran v. New York C. & H. R. R. Co.*, 35 Hun (N. Y.) 590; affirmed (P) in 104 N. Y. 683, mem., 7 N. Y. S. R. 868. *Louisville, N. A. & C. R. Co. v. Lucas*, 119 Ind. 583, 21 N. E. Rep. 968.

The company is liable for accidents happening by reason of the neglect of such duty to passengers, in descending from a car when at rest at a station, if the circumstances are such as to induce the passenger to believe that he has reached his point of destination and that it is safe for him to get out. *Falk v. New York, S. & W. R. Co.*, (N. J.) 58 Am. & Eng. R. Cas. 191, 29 Atl. Rep. 157.

A company has not discharged its whole duty to the passenger when it has provided a safe exit from its cars while at the same time there exists another way which is not safe, and which is in such general use by its passengers as to induce the belief that it was permitted, in part at least, for that purpose. *Missouri Pac. R. Co. v. Long*, 81 Tex. 253, 16 S. W. Rep. 1016.

237. — at intermediate station.—When a passenger enters a train and pays the regular fare to be transported from one particular station to another, his contract does not obligate the corporation to furnish him with safe egress and ingress at any intermediate station. *State v. Grand Trunk R. Co.*, 58 Me. 176.

238. Safe platforms, appliances, and boxes.—(1) Platforms.*—A company is bound to provide safe and sufficient platforms for the landing of passengers, of sufficient length to afford safe egress to passengers from an ordinary train. *St. Louis, I. M. & S. R. Co. v. Cantrell*, 8 Am. & Eng. R. Cas. 198, 37 Ark. 519, 40 Am. Rep. 105.

It must provide platforms at its stations on which passengers may alight, and deliver passengers on such platforms. *Memphis & C. R. Co. v. Whitfield*, 44 Miss. 466.

Where a company has a platform and other facilities for entering and leaving the cars with safety on the depot side of their track, the failure to have the opposite side likewise prepared as a place for entering and

* See also ante, 113, 145, 146.

† See also ante, 217.

* See also STATIONS AND DEPOTS, 76-88.

leaving the cars cannot be regarded as negligence; they may select and adhere to such arrangement of their depots and platforms as they see fit, if those they make are safe and commodious. *Michigan C. R. Co. v. Coleman*, 28 Mich. 440, 12 Am. Ry. Rep. 59.

The high degree of care which a company owes to its passengers extends to all necessary appliances to enable them to safely leave the cars. It is negligence to leave a wheel-box or its guard so out of repair as to be liable to throw down a passenger alighting from the car. *Chase v. Jamestown St. R. Co.*, 38 N. Y. S. R. 954, 60 Hun 582, mem., 15 N. Y. Supp. 35; affirmed in 133 N. Y. 619, mem., 30 N. E. Rep. 1150, 44 N. Y. S. R. 931.

The accident occurred at night during a snowstorm. It was intensely dark, and the platforms of the cars were covered with snow. Plaintiff, a female, was unattended and encumbered with heavy clothing and packages. There was no platform at the station, and defendant's servants offered her no assistance. The court instructed the jury that if there was no platform or other proper landing at the stopping place, and defendant's servants rendered plaintiff no assistance, and if, for want of such landing and assistance, plaintiff was injured, without fault on her part, she should recover. *Held*, no error. *Alexandria & F. R. Co. v. Herndon*, 87 Va. 193, 12 S. E. Rep. 289.—QUOTING *McDonald v. Chicago & N. W. R. Co.*, 26 Iowa 124.

(2) *Boxes*.—If a company instead of furnishing a platform for passengers to alight on furnishes but a small box, it is its duty to render such assistance to passengers so as to make the box as safe as a platform. *Missouri Pac. R. Co. v. Wortham*, 37 Am. & Eng. R. Cas. 82, 73 Tex. 25, 3 L. R. A. 368, 10 S. W. Rep. 741.

Proof that a company failed to furnish a platform for the use of passengers, but used a box only eleven inches square on the top and a little larger at the bottom, justifies the jury in finding that the company has failed to furnish sufficient platform accommodations. And this is so regardless of the time it has been used or the number of persons who had used it, or the amount of expert testimony as to its safety. *Missouri Pac. R. Co. v. Wortham*, 37 Am. & Eng. R. Cas. 82, 73 Tex. 25, 3 L. R. A. 368, 10 S. W. Rep. 741.

2 D. R. D.—26.

239. Rule where there is no platform—Flag-station.—The high degree of care which a company must exercise in providing safe accommodations for passengers for leaving the cars is not discharged by providing "a reasonably safe appliance" for so doing instead of the usual platform. It is its duty to provide the safest. *Missouri Pac. R. Co. v. Wortham*, 37 Am. & Eng. R. Cas. 82, 73 Tex. 25, 3 L. R. A. 368, 10 S. W. Rep. 741.

A passenger train stopped at a flag-station where there were no passenger accommodations, but where it usually stopped, at or somewhere near a public crossing. To allow a freight train to pass the train went a little beyond the crossing, and a lady passenger, having a ticket to that place, reached the steps to alight but found the ground overspread with water from excessive rains. She remarked to the conductor on the unsuitableness of the spot, to which he replied in an impatient manner, "No matter, it is the station." She did not demand to have the train backed or refuse to alight, but accepted his assistance and stepped off. Ordinarily one place there was as convenient as another, and at this time the crossing, though not covered with water, was muddy and the ground everywhere wet. Much water could have been avoided by passing back through the sleeper, but this was not suggested. *Held*, she could not recover for injuries resulting from getting her feet wet. *Alabama & V. R. Co. v. Stacey*, 68 Miss. 463, 9 So. Rep. 349.

240. Duty to assist passenger.*—(1) *Generally*.—It is not the duty of a company to furnish some one to aid a passenger in alighting from its cars. *Laffin v. Buffalo & S. W. R. Co.*, 30 Am. & Eng. R. Cas. 596, 106 N. Y. 136, 7 Cent. Rep. 793, 12 N. E. Rep. 599, 8 N. Y. S. R. 596; reversing 36 Hun 638, mem.—APPLIED IN *Buck v. Manhattan R. Co.*, 32 N. Y. S. R. 51, 10 N. Y. Supp. 107. QUOTED IN *Hanrahan v. Manhattan R. Co.*, 6 N. Y. Supp. 395.

Or to point out to him the proper place to alight, where they have no knowledge of his desire or intention to do so. *Nichols v. Chicago & W. M. R. Co.*, 52 Am. & Eng. R. Cas. 304, 90 Mich. 203, 51 N. W. Rep. 364.

This duty depends very largely upon circumstances. If a train be stopped at a

* See also *ante*, 218.

Duty of company's employes to assist in landing passenger safely, see note, 11 L. R. A. 367.

place where passengers can only with difficulty get out, the company is bound to assist them *Memphis & C. R. Co. v. Whitfield*, 44 Miss. 466.—DISTINGUISHED in *Thompson v. New Orleans, J. & G. N. R. Co.*, 50 Miss. 315.

It is error to charge, as a matter of law, that it is the duty of a conductor to assist passengers from the train. The question of whether due care has been used is for the jury. It is equally error to charge that it is the duty of the conductor to assist aged, helpless, and infirm passengers. *Simms v. South Carolina R. Co.*, 30 Am. & Eng. R. Cas. 571, 27 So. Car. 268, 3 S. E. Rep. 301.

(2) *Female passengers.**—A company is not required to assist, through its conductor, a female passenger having two small children to alight from the train at the station of her destination. *Raben v. Central Iowa R. Co.*, 33 Am. & Eng. R. Cas. 520, 73 Iowa 579, 5 Am. St. Rep. 708, 35 N. W. Rep. 645.

Where a train is drawn up at a station so as to leave some of the carriages beyond the platform, and a female passenger in one of such carriages waits for some time looking out for assistance, and is seen by the station master, who was then helping other passengers, and who gives her no caution, whereupon she alights and receives injuries, there is evidence of negligence on the part of the company to be submitted to the jury. *Thompson v. Belfast, H. & B. R. Co.*, 5 Ir. C. L. 517.

It being the duty of a company to exercise the highest degree of care for the safety of its passengers in alighting from its cars, it is for the jury to determine whether such care included the duty in the particular case of assisting a woman laden with bundles in alighting from the train. *Texas & P. R. Co. v. Miller*, 79 Tex. 78, 15 S. W. Rep. 264.—DISAPPROVING *Jeffersonville, M. & I. R. Co. v. Hendricks*, 41 Ind. 48; *Jeffersonville R. Co. v. Hendricks*, 26 Ind. 232. REVIEWING *Missouri Pac. R. Co. v. Wortham*, 73 Tex. 27.

The court did not charge or intimate that it was the duty of the conductor to help the woman injured in this case from the car. There was no error in adding the qualification to the effect that the servants or agents of the company must be at fault, though the conductor was not bound to help women

from the cars. *Central R. Co. v. Whitehead*, 74 Ga. 441.

241. Duty to warn, instruct, or inform passengers.*—(1) *Generally.*—A passenger has a right to expect that the carrier had employed a skilful and prudent conductor who had experience and knowledge in his business sufficient to correctly advise and direct them as to the proper time and manner of alighting from the train. *Lambeth v. North Carolina R. Co.*, 66 N. Car. 494.

A railway is bound to give its passengers reasonable warning and direction as to alighting from its trains, and the passenger is not bound to know at his peril the authority of the various servants of the company. *Wilburn v. St. Louis, I. M. & S. R. Co.*, 36 Mo. App. 203.—REVIEWING *Lake Shore & M. S. R. Co. v. Brown*, 123 Ill. 162, 5 Am. St. Rep. 510.

It is negligence not to warn passengers that it is unsafe to alight from the rear platform of a car, though there may be no danger in alighting from the front platform. *McDonald v. Illinois C. R. Co., (Iowa)* 58 Am. & Eng. R. Cas. 263, 55 N. W. Rep. 102.

When the servants of a company see that its passengers are in the habit of leaving its cars by a door not provided for the purpose, it would seem to be their duty to warn such passengers that there is another door, which they are expected to use, provided for such exit. *Missouri Pac. R. Co. v. Long*, 81 Tex. 253, 16 S. W. Rep. 1016.

In an action by one so received on a freight train, for injuries sustained from falling over an embankment in attempting to alight, it appeared that the defendant did not stop its train at the usual stopping place, where it was safe for passengers to alight, but, on the contrary, at an unusual place, where it was unsafe and dangerous, before reaching which stopping place the station "Paris" was announced, thereby inviting plaintiff, nothing to the contrary appearing, to get off when and where the train should stop. *Held*, that these facts, in connection with the further facts that the night was very dark and that the passengers in the caboose could not for that reason see the danger, and that the conductor, on leaving the caboose with the

* See also *ante*, 240.

* See also *ante*, 134, 199, 222; *post*, 394, 473.

light, could or might have seen it, made his failure to warn the passengers of the dangerous character of the surroundings gross negligence. *McGee v. Missouri Pac. R. Co.*, 31 *Am. & Eng. R. Cas.* 1, 92 *Mo.* 203, 10 *West. Rep.* 282, 4 *S. W. Rep.* 739.—FOLLOWED IN *Griffith v. Missouri Pac. R. Co.*, 98 *Mo.* 168, 11 *S. W. Rep.* 559.

A company is guilty of negligence in inviting a passenger to step from a carriage to a dimly-lighted platform without cautioning him concerning a space between the platform and the carriage, "caused by a curve in the platform," into which the passenger fell and was injured. *Praeger v. Bristol & E. R. Co.*, 24 *L. T.* 105.—FOLLOWED IN *Cockle v. London & S. E. R. Co.*, *L. R.* 7 *C. P.* 321, 41 *L. J. C. P.* 140, 27 *L. T.* 320, 20 *W. R.* 754.

Bringing a train to a standstill at a place at which it is unsafe for a passenger to alight, under circumstances which warrant the passenger in believing that it is intended he shall get out, and that he may do so with safety, without any warning of his danger, amounts to negligence on the part of the company. *Cockle v. London & S. E. R. Co.*, *L. R.* 7 *C. P.* 321, 41 *L. J. C. P.* 140, 20 *W. R.* 754, 27 *L. T.* 320.

(2) *When need not warn*.—Crossing of railways.—It cannot be said, as matter of law, that a company is under obligation to notify passengers not to alight at an intervening railway crossing because it has announced the succeeding station at such. *Minock v. Detroit, G. H. & M. R. Co.*, 97 *Mich.* 425, 56 *N. W. Rep.* 780.

The usages of companies in the running of trains and taking and discharging passengers are matters of common knowledge, which fact they may properly take into consideration; and they are under no obligation to guard against an exodus of passengers at a railway crossing at which they do not discharge passengers, merely because they have given the name of the next station after the last preceding stop. *Minock v. Detroit, G. H. & M. R. Co.*, 97 *Mich.* 425, 56 *N. W. Rep.* 780.

(3) *Signals*.—In the absence of a custom to give signals for passengers to get off, a company is not bound to give any signal for such purpose, after having stopped its train and kept it standing by the station a sufficient time to allow passengers to alight by the exercise of ordinary and reasonable diligence on their part. *Atlanta & W. P.*

R. Co. v. Dickerson, 89 *Ga.* 455, 15 *S. E. Rep.* 534.

242. Misdirections of employees.—

(1) *Right to rely on information given.**—Passengers have a right to rely, until differently informed, on the information received by them from ticket agents in answer to their inquiries as to the stoppages of trains. But they must not disregard reasonable means of information. *Lake Shore & M. S. R. Co. v. Pierce*, 3 *Am. & Eng. R. Cas.* 340, 47 *Mich.* 277, 11 *N. W. Rep.* 157.—QUOTED IN *Dye v. Virginia Midland R. Co.*, 9 *Mackey (D. C.)* 63.

A passenger unacquainted with the route of the railroad, and with the location of towns and cities along such route, may lawfully rely upon the statements of the conductor and brakemen in charge of the train in regard to his stopping place; and if, so relying, such passenger leaves the train at the wrong place, and is damaged thereby, the railroad company will be liable to such passenger for such damages, induced by the negligence of its agents in charge of the train, if there be no contributory negligence of such passenger. (Woods, J., dissenting.) *Pennsylvania Co. v. Hoagland*, 3 *Am. & Eng. R. Cas.* 436, 78 *Ind.* 203.—DISTINGUISHED IN *Cincinnati, H. & I. R. Co. v. Carper*, 31 *Am. & Eng. R. Cas.* 36, 112 *Ind.* 26, 11 *West. Rep.* 223, 13 *N. E. Rep.* 122.

(2) *Illustrations*.—Where the ticket agent at the time of selling a ticket to a passenger erroneously informs him that the train for which the ticket is sold is a through train, and will take him to his destination without change of cars, the passenger has a right to rely upon such information unless a different announcement is seasonably made upon the train by one of the train officials in such manner and under such circumstances that it can be reasonably said the passenger should have heard it; and a general announcement to all the passengers is not sufficient unless the jury are satisfied that it was heard by the plaintiff. *Dye v. Virginia Midland R. Co.*, 9 *Mackey (D. C.)* 63.—QUOTING *Lake Shore & M. S. R. Co. v. Pierce*, 47 *Mich.* 277.

Two trains left the same station within one hour of each other. Just before the first one left plaintiff applied for a ticket, and was told by the agent that the first train, which was then at the station, was

* See also *ante*, 135.

the train, which plaintiff took. The train, in fact, did not go to his destination, but at an intermediate point went on a branch road; but by stopping at such intermediate station plaintiff could resume his journey by the second train. *Held*, that if notice was given to the passengers that they must change cars at such intermediate station, in such a manner that persons of ordinary intelligence, and exercising ordinary caution, would have heard it, then the company was not liable, if he remained on the first train beyond the junction where he should have left it. *Barker v. New York C. R. Co.*, 24 N. Y. 599.

243. Urging or compelling passenger to get off train in motion.*—(1) *Rule stated.*—It is negligent and unwarrantable conduct on the part of a conductor in charge of a train to notify or advise a passenger to leave the train while in motion under circumstances likely to expose him to accident or injury. *Jones v. Chicago, M. & St. P. R. Co.*, 41 Am. & Eng. R. Cas. 169, 42 Minn. 183, 43 N. W. Rep. 1114.

An order or direction from a trainman to a passenger to alight from a moving train does not necessarily constitute negligence; whether it is so will depend upon attending circumstances. *Wilburn v. St. Louis, I. M. & S. R. Co.*, 48 Mo. App. 224.

(2) *Illustrations.*—A male passenger of mature years, and of sharp business understanding, and acquainted with the circumstances, asked the privilege of being put off a train, for his own convenience, some distance from the station. He was told by the conductor that uptown business men sometimes got off at the place, but that the train only slowed up—did not stop. When plaintiff was about to get off he was thrown down by a sudden jerk or starting of the train. He claimed to have acted entirely on his own judgment, and without any compulsion on the part of the conductor, except that he recommended plaintiff to get off the rear platform. *Held*, that the conductor was not guilty of such negligence as to make the company liable. *Chicago, B. & Q. R. Co. v. Hazard*, 26 Ill. 373.—REVIEWED IN *Louisville, N. A. & C. R. Co. v. Johnson*, 44 Ill. App. 56.

The train upon which the plaintiff was a passenger stopped when a certain station

was called. The plaintiff arose from his seat to get off, when the conductor told him to hurry or he would be carried by. The plaintiff, thinking that it was the usual place for discharging passengers, and being unable to see on account of the darkness, stepped from the platform and fell several feet, receiving the injuries complained of. *Held*, that the company was guilty of negligence, and was liable for the injury. *International & G. N. R. Co. v. Smith*, (Tex.) 44 Am. & Eng. R. Cas. 324, 14 S. W. Rep. 642.

244. Duty to stop at crossing of another road.*—A company owes no duty to a passenger on its road to stop the train at a station because a junction is there made with another road, unless he desire to be transferred to a train on such other road, in which case alone the statute (Gen. St. Mo. p. 340, § 29) is applicable. *Logan v. Hannibal & St. J. R. Co.*, 12 Am. & Eng. R. Cas. 141, 77 Mo. 663.

The fact that a state law requires trains to be brought to a full stop when approaching the crossing of another railroad does not make it negligence to fail to stop at such place, to allow a passenger to get off, especially where the passenger has not notified the conductor that he wished to depart at that point, and the conductor has not agreed to allow him to do so. *Louisville, N. A. & C. R. Co. v. Johnson*, 44 Ill. App. 56.—REVIEWING *Chicago, B. & Q. R. Co. v. Hazard*, 26 Ill. 373.

245. Duty to stop for passenger at places other than stations.†—A passenger on a railway train has no right to demand that he be put off at a point where there is no regular station, unless he has contracted for that privilege with some agent of the company having the real or apparent power to make such a contract. *Hull v. East Line & R. R. Co.*, 28 Am. & Eng. R. Cas. 221, 66 Tex. 619, 2 S. W. Rep. 831.

And this rule applies even if such passenger shall have mistakenly embarked thereon, and shall have paid the passage-money. *Wells v. Alabama G. S. R. Co.*, 40 Am. & Eng. R. Cas. 645, 67 Miss. 24, 6 So. Rep. 737.—APPLIED IN *Alabama G. S. R. Co. v. Carmichael*, 90 Ala. 19.

* See also *post*, 407, 429-431, 470, 496.

† See also CROSSING OF RAILWAYS, 80-83. Obligation to stop train at point other than station, see note, 18 AM. & ENG. R. CAS. 272.

If the conductor agree to put a passenger off at a particular place, which is not a station or regular stopping place, it will be the duty of the conductor to stop the train at the place, so that the passenger could get off in safety, although the passenger had a ticket only to the last station passed before reaching the place at which he was to be put off. *Western R. Co. v. Young*, 51 Ga. 489, 7 Am. Ry. Rep. 352.—FOLLOWING *Georgia R. & B. Co. v. McCurdy*, 45 Ga. 288.

If the trains were accustomed to stop at the platform at which plaintiff desired to alight, although it was neither constructed nor owned by the company, an implied contract that passengers might stop there may be raised. *Louisville & N. R. Co. v. Johnston*, 79 Ala. 436.

246. Starting train after expiration of reasonable time.—In the case of ordinary railroad trains stopping at regular times and stations, the conductor is only required to wait long enough to give passengers a reasonable time to get off or on, and may then start his train again, unless he sees some person attempting to alight, or in other perilous position; but where the trains are drawn by horses, and there are no regular stations or stopping places, he is required not only to stop a reasonable time, but to see and know, before starting again, that no passenger is in the act of getting off or on, or otherwise in a perilous position; and this latter rule is applicable to street railways operated by dummy-engines. *Highland Ave. & B. R. Co. v. Burt*, 48 Am. & Eng. R. Cas. 56, 92 Ala. 291, 9 So. Rep. 410.—APPLYING *North Birmingham St. R. Co. v. Calderwood*, 89 Ala. 247.

Where the conductor, after allowing a sufficient length of time for passengers to alight, starts the train before the passenger is in the act of getting off, and is therefore guilty of no negligence, and after the train is in motion the passenger who has been dilatory jumps from the train and is injured, he cannot recover. *Straus v. Kansas City, St. J. & C. B. R. Co.*, 6 Am. & Eng. R. Cas. 384, 75 Mo. 185.

When the servants of a corporation engaged in the business of a common carrier afford passengers a reasonable time to leave the cars after the arrival at the end of their journey, they have the right, after the expiration of such reasonable period, to pre-

sume that all the passengers whose place of destination is then reached have left the cars, as is customary for passengers in like circumstances. *Hurt v. St. Louis, I. M. & S. R. Co.*, 34 Am. & Eng. R. Cas. 422, 94 Mo. 255, 13 West. Rep. 233, 237, 7 S. W. Rep. 1.

If a passenger remains in a seat after the train has stopped, and he has had a reasonable opportunity to get up, the conductor may assume that he does not intend to leave the train at that station, and may move on. *McDonald v. Long Island R. Co.*, 116 N. Y. 546, 22 N. E. Rep. 1068, 27 N. Y. S. R. 481; affirming 6 N. Y. S. R. 691, 43 Hun 637.

When a train has made a reasonable stop and passengers have not given notice or other evidence of their intention to alight, the starting of the train is not *per se* negligence for which the company will be held liable. *Chicago, B. & Q. R. Co. v. Landaver*, 54 Am. & Eng. R. Cas. 640, 36 Neb. 642, 54 N. W. Rep. 976.

Ordinarily the employes in charge of a train do not owe a duty to the passengers on board to stop longer than is sufficient for them safely and conveniently to get off; but even after the usual stop it is negligence for them to start the train if they know, or have reason to believe, that the passenger intending to alight, from age or infirmity, requires a longer time than usual to alight. *Georgia Pac. R. Co. v. West*, 66 Miss. 310, 6 So. Rep. 207.

Though it would ordinarily be negligence for a company after stopping at a station for a passenger to alight to again put the train in motion before a sufficient and reasonable time to leave the train has elapsed, yet if after the lapse of such reasonable time the train is again put in motion without giving signal of an intention to move, by whistle or otherwise, such act would not be negligence *per se*. There is no statute in Texas requiring a company to give signal of intention to move the train from a station where it may have stopped for a passenger to alight. *Gulf, C. & S. F. R. Co. v. Williams*, 70 Tex. 159, 8 S. W. Rep. 78.

247. Starting train while passenger is alighting.*—It is the clear duty of

* Liability for negligently starting a train when passenger is in act of alighting, see note, 1 L. R. A. 542, 52 AM. & ENG. R. CAS. 295, *abstr.*

Liability for injuries to passengers in alighting from moving train, as affected by whether

a railway carrier to take care not to start the train while passengers are in the act of getting off. *Lehman v. Louisiana Western R. Co.*, 37 La. Ann. 705. *Chicago, B. & Q. R. Co. v. Landauer*, 54 Am. & Eng. R. Cas. 640, 36 Neb. 642, 54 N. W. Rep. 976.

Where the company does not halt its train at a station a sufficient length of time to enable a passenger, by the use of reasonable diligence, to get off before it is started again, and it is so started while the passenger is in the act of alighting, whereby he is thrown down and injured, the company is liable. *Straus v. Kansas City, St. J. & C. B. R. Co.*, 6 Am. & Eng. R. Cas. 384, 75 Mo. 185.—FOLLOWED IN *Swigert v. Hannibal & St. J. R. Co.*, 9 Am. & Eng. R. Cas. 322, 75 Mo. 475.—*Jeffersonville R. Co. v. Hendricks*, 26 Ind. 228.

If the train was stopped a sufficient length of time for plaintiff to conveniently alight, and, without any fault of defendant's servants, he failed to do so, and the conductor, not knowing and not having reason to suspect that the plaintiff was in the act of alighting, caused the train to start while he was so alighting, the defendant would not be liable. *Straus v. Kansas City, St. J. & C. B. R. Co.*, 27 Am. & Eng. R. Cas. 170, 86 Mo. 421. *Straus v. Kansas City, St. J. & C. B. R. Co.*, 6 Am. & Eng. R. Cas. 384, 75 Mo. 185.

If a conductor has reason to believe that any passenger who has reached his destination, though dilatory, may be in the act of alighting, and he starts his train without examination or inquiry, and such passenger is thereby injured, the company will be liable. *Straus v. Kansas City, St. J. & C. B. R. Co.*, 27 Am. & Eng. R. Cas. 170, 86 Mo. 421. *Georgia Pac. R. Co. v. West*, 66 Miss. 310, 6 So. Rep. 207.

A passenger who was encumbered with bundles was found mortally wounded just beyond a station, and from the position of his body and the packages, the facts indicated that he had attempted to get off after the train started from the station, but there was no direct evidence as to how he was injured. There was evidence that other passengers, who were unencumbered, had

sufficient time was allowed to alight, see note, 21 L. R. A. 363.

Injury to a passenger while alighting from a train caused by its starting without a signal, see 33 AM. & ENG. R. CAS. 522, *abstr.*, and note, 16 AM. & ENG. R. CAS. 346.

barely time to get off before the train started. *Held*, that the evidence justified the jury in finding that the accident was due to the sudden starting of the train. *Flanagan v. New York, N. H. & H. R. Co.*, 29 N. Y. S. R. 543, 55 Hun 611, *mem.*, 5 Silv. Sup. Ct. 495, 8 N. Y. Supp. 744; *affirmed in* 125 N. Y. 773, *mem.*, 36 N. Y. S. R. 1011.—*QUOTING Tolman v. Syracuse, B. & N. Y. R. Co.*, 98 N. Y. 198.

248. Sudden jerks and starts.*—

(1) *Rule stated*.—The sudden jerking of a train backward while passengers are rightfully passing out of the cars is liable to produce accidents, and is negligence. *Sauter v. New York C. & H. R. R. Co.*, 66 N. Y. 50; *affirming* 6 Hun 446.—FOLLOWED IN *Macer v. Third Ave. R. Co.*, 15 J. & S. (N. Y.) 461.

If porters at a railway station open a carriage door and invite a passenger to get out before the train has stopped, and while alighting she is injured owing to a sudden acceleration of speed, the company is liable. *London & N. W. R. Co. v. Hellawell*, 26 L. T. 557.

(2) *Illustrations*.—A company, whose duty it was to stop its train within eight hundred feet of a railroad intersection, on approaching such intersection stopped momentarily at a station platform about five hundred feet from the same, such train not being obliged to stop at that station, and then started with a violent jerk, whereby a passenger was injured while attempting to get off, and then stopped again some fifty or sixty yards nearer the intersection. *Held*, that evidence of such facts was sufficient to authorize an instruction based on the neglect to stop the train at the station a sufficient time to enable the passenger to get off in safety. *McNulta v. Ensck*, 134 Ill. 46, 24 N. E. Rep. 631; *reversing* 31 Ill. App. 100.

A conductor who suddenly starts a train while a female passenger is on the car steps in the act of alighting, and then takes hold of her and pulls her from the moving train, is guilty of a tort for which the company is liable, though the act may be a mere negligent, and not a wilful, one. In so doing the conductor must be regarded as acting within the line of his duty. *Louisville, N. A. &*

* See also *ante*, 205, 221; *post*, 293, 385.

Liability for throwing an intoxicated passenger down while alighting, by a sudden jerk of the train, see 39 AM. & ENG. R. CAS. 452, *abstr.*

C. R. Co. v. Wood, 113 *Ind.* 544, 12 *West. Rep.* 311, 14 *N. E. Rep.* 572, 16 *N. E. Rep.* 197.—*APPROVING* *Terre Haute & I. R. Co. v. Jackson*, 81 *Ind.* 19.

A passenger was informed by a conductor when a train was nearing a station that the train would stop for water. Just as the passenger was on the lower step in the act of alighting, and just as the train stopped, it suddenly started without any warning, and threw him to the ground. *Held*, that the company was liable for the injury. *Wood v. Lake Shore & M. S. R. Co.*, 8 *Am. & Eng. R. Cas.* 478, 49 *Mich.* 370, 13 *N. W. Rep.* 779.

Plaintiff's evidence tended to show that he was a passenger on defendant's road; that the name of the station to which he was destined was called out, and the train stopped; that as he reached the platform of the car it started back with a sudden jerk, which threw him forward, and he fell through between the cars; that the train immediately started forward again, and while plaintiff lay on the track he was struck by a car-wheel, either as the train moved backward or forward. The court charged, in substance, that if this was true, and the motion backward was caused by the engine, defendant was chargeable with negligence, and that it was immaterial whether the injury was caused by the motion forward or backward. *Held*, no error; that a jerking of a train backward, under such circumstances, was negligence, and that the latter part of the charge was to be interpreted as referring to the immediate, not to the proximate, cause of the injury. *Milliman v. New York C. & H. R. R. Co.*, 66 *N. Y.* 642; *affirming* 4 *Hun* 409, 6 *T. & C.* 585.

Where a station has been announced, the train stopped at the accustomed place, and a passenger, who was descending the steps in the act of alighting, was thrown down either by the sudden jerking of the car or its unexpected forward motion—*Held*, that plaintiff, being on the platform in response to the defendant's invitation to alight, was guilty of no negligence; and the defendant, having violated its duty by moving the train when the plaintiff had a legal right to assume that it would remain stationary, was guilty of negligence for which an action would lie. *Norfolk & W. R. Co. v. Prinnett*, (Va.) 30 *Am. & Eng. R. Cas.* 574, 3 *S. E. Rep.* 95.—*QUOTING* *Pennsylvania R. Co. v. Aspell*, 23 *Pa. St.* 149.

249. Liability when one is pushed off by fellow-passenger.*—A woman is not entitled to recover damages from a company for personal injuries where it appears from her own testimony that, when she was about to descend from the lower step of a car to the ground, she was jostled off by another passenger rudely pushing by her to enter the car. *Ellinger v. Philadelphia, W. & B. R. Co.*, 153 *Pa. St.* 213, 25 *Atl. Rep.* 1132.—*DISTINGUISHING* *Pennsylvania R. Co. v. Peters*, 116 *Pa. St.* 206.

250. Riding on trains which do not stop at station, generally.†—A company may adopt a regulation that one of its through, or fast, trains, running regularly on its road, shall stop only at certain designated stations or places. *Atchison, T. & S. F. R. Co. v. Gants*, 34 *Am. & Eng. R. Cas.* 290, 38 *Kan.* 608, 17 *Pac. Rep.* 54.

By his ticket a passenger on a train acquires the right only to be carried according to the custom of the road. He has the right to go to the place which his ticket calls for on any train that usually carries passengers to that place, but he cannot insist on being carried out of the customary course of the road. *Beauchamp v. International & G. N. R. Co.*, 9 *Am. & Eng. R. Cas.* 307, 56 *Tex.* 239.—*QUOTING* *Chicago & A. R. Co. v. Randolph*, 53 *Ill.* 511.

A passenger has no right on train which does not stop at the station designated in his ticket. *Chicago, St. L. & P. R. Co. v. Bills*, 104 *Ind.* 13, 3 *N. E. Rep.* 611.

If a conductor of a fast train receives fare from passengers to a station at which such train is not advertised or scheduled to stop, it becomes the duty of the conductor to notify the passengers so paying that the train will not stop at that station, or to carry them to such station and then give them sufficient time to get off in safety. *McNulla v. Ensich*, 134 *Ill.* 46, 24 *N. E. Rep.* 631; *reversing* 31 *Ill. App.* 100.

Where a person purchasing a ticket has full knowledge that under a new schedule the train that he contemplates taking will not stop at the station at the end of his journey, as it had been in the habit of doing, but he enters the train and is again urged by the conductor to leave it, and it further appears that there are other trains that do stop at the station which give

* See also *ante*, 129, 133; *post*, 313-324.

† See also *ante*, 83.

ample accommodation at that point, he cannot recover for being carried beyond his station. *Texas & P. R. Co. v. White*, 4 *Tex. App. (Civ. Cas.)* 451, 17 *S. W. Rep.* 419.

251. Conductor's right to refuse to stop.—Where a passenger gets on the wrong train by mistake the carrier is not bound to stop to allow him to get off at any but a regular station or stopping place. *Columbus, C. & I. C. R. Co. v. Powell*, 40 *Ind.* 37.

In the absence of an express contract to the contrary, the holder of a railroad ticket is to be carried according to the reasonable rules and regulations of the company, and the latter is not bound to stop the train and discharge the passenger at a station where, under such rules, the train does not stop. *Plott v. Chicago & N. W. R. Co.*, 21 *Am. & Eng. R. Cas.* 319, 63 *Wis.* 511, 23 *N. W. Rep.* 412.—QUOTING *Chicago & A. R. Co. v. Randolph*, 53 *Ill.* 510.

Where under the rules a train is not scheduled to stop at a certain station a conductor who refuses to stop to discharge a passenger holding a ticket therefor acts properly and within his duty, although the passenger took the train by the direction of an agent of the company who was authorized to direct passengers. *Sira v. Wabash R. Co.*, 58 *Am. & Eng. R. Cas.* 538, 115 *Mo.* 127, 21 *S. W. Rep.* 905.

If trains are arranged in a certain way and their time fixed with regard to limited stoppages, a conductor would never be safe if he were bound at his peril to ascertain from any mere stranger the existence of an agreement to change the arrangement and stop at an unusual place. *Atchison, T. & S. F. R. Co. v. Gants*, 34 *Am. & Eng. R. Cas.* 290, 38 *Kan.* 608, 17 *Pac. Rep.* 54.

252. — at flag-stations.*—When a company sells a ticket to a flag-station, at which its trains do not stop unless signaled, or when there are on board passengers bound for such station, it is the duty of the conductor before reaching the station to ascertain from a passenger holding such ticket his destination, and to stop the train there for the purpose of allowing the passenger to leave the train. This rule, under special circumstances, is subject to exceptions. *Chattanooga, R. & C. R. Co. v. Lyon*,

52 *Am. & Eng. R. Cas.* 307, 89 *Ga.* 16, 15 *S. E. Rep.* 24, 15 *L. R. A.* 857.

A passenger cannot complain of a railroad company's refusal to put her off at a flag-station short of the destination named in her ticket, although she had been previously permitted to get on and off at such station, there being no allegation that it was ever the custom of the company to so accommodate passengers. *Matthews v. Charleston & S. R. Co.*, 38 *So. Car.* 429, 17 *S. E. Rep.* 225.

253. No agreement to stop implied from collecting fare.—By the rules of a company a fare of 25 cents was charged for any distance not exceeding eight miles. Plaintiff applied to the ticket agent at M. for a ticket to R., which was refused because R. was not a stopping place. She then entered the train and informed the conductor that she wished to go to R. The conductor collected from plaintiff the fare, 25 cents, and informed her that the train did not stop at R., and that she could leave the train at W. W. and R. were both within eight miles of M. Held, that the evidence was insufficient to establish any special contract to carry plaintiff to R. *Wells v. Alabama G. S. R. Co.*, 40 *Am. & Eng. R. Cas.* 645, 67 *Miss.* 24, 6 *So. Rep.* 737.

254. — or taking up ticket.—Should a person get on a train, without the consent of the employes of the road, not accustomed to stop at the station to which he desired to go, and for which his ticket called, the taking up of his ticket merely, without an agreement to stop at the desired station, would not amount to an undertaking by the company to put him off at that place. *Chicago & A. R. Co. v. Randolph*, 53 *Ill.* 510.—QUOTED IN *Plott v. Chicago & N. W. R. Co.*, 21 *Am. & Eng. R. Cas.* 319, 63 *Wis.* 511.—*St. Louis, I. M. & S. R. Co. v. Atchison*, 47 *Ark.* 74, 14 *S. W. Rep.* 468.

255. Special agreement by conductor to stop.—Where a passenger takes passage upon a train which, under the regulations of the company, does not stop at the station his ticket calls for, the fact that the conductor takes up his ticket and expressly agrees to stop the train and let the passenger off at the station, but which he fails to do, will not make the company liable. *Ohio & M. R. Co. v. Hatton*, 60 *Ind.* 12.—FOLLOWED IN *Pittsburgh, C. & St. L. R. Co. v. Nuzum*, 60 *Ind.* 533.

* See also *ante*, 214.

256. No right to ask company to depart from its rules or custom.—

When a passenger purchases a ticket he only acquires the right to be carried according to the custom of the road. He has a right to go to the place for which his ticket calls on any train that usually carries passengers to that place. But he does not acquire the right to insist that the company shall carry him out of the customary course of their road. It was his duty, when he obtained a ticket, to inform himself as to the usual mode of travel on the road, and, so far as the customary mode of carrying passengers is reasonable, he should conform to it. *Chicago & A. R. Co. v. Randolph*, 53 Ill. 510. —QUOTED IN *Beauchamp v. International & G. N. R. Co.*, 9 Am. & Eng. R. Cas. 307, 56 Tex. 239.—*Logan v. Hannibal & St. J. R. Co.*, 12 Am. & Eng. R. Cas. 141, 77 Mo. 663.

In an action for failing to stop a train and let a passenger off at a station for which he had purchased a ticket, where the evidence tended to show that the defendant ran two daily trains that stopped at the station for which the passenger held the ticket, and also ran a through train which, by the rules of the company, was not allowed to stop at such station, and that when the ticket was taken up by the conductor on the latter train he informed the plaintiff that he must get off at a station before reaching the one for which he held a ticket or go to the next station beyond, and that the plaintiff voluntarily went on to the station beyond—*held*, that it was error to instruct the jury that if the plaintiff purchased his ticket for the station at which he wished to stop he had a right to enter the first train due after he purchased the ticket, unless he was informed, before he entered the train, that it would not stop at the station for which the ticket was purchased. *Pittsburgh, C. & St. L. R. Co. v. Nuzum*, 50 Ind. 141, 9 Am. Ry. Rep. 396.

257. Where by custom the train habitually stops at station.—The fact that one of such trains had occasionally stopped at one of such stations would not estop the company from running the train in the ordinary way, or make it a duty to stop there, on any particular occasion. *Plott v. Chicago & N. W. R. Co.*, 21 Am. & Eng. R. Cas. 319, 63 Wis. 511, 23 N. W. Rep. 412.

If a person is not informed by the agent

from whom he purchased a return ticket that the train upon which the agent knew the passenger proposed to return would not stop at that station, and the passenger was misled by the company's custom of habitually stopping its trains there upon being flagged, such passenger is entitled to recover damages. *St. Louis, I. M. & S. R. Co. v. Adcock*, 40 Am. & Eng. R. Cas. 682, 52 Ark. 406, 12 S. W. Rep. 874.

Though one knows that a certain fast passenger train, as a rule, does not stop at the station of his residence in this state, yet if there is a custom for such train to stop there for the accommodation of passengers holding tickets purchased from connecting railways in other states, he may avail himself of this custom by purchasing such a ticket in another state and making a contract for transportation to said station on said fast train. *Humphries v. Illinois C. R. Co.*, 70 Miss. 453, 12 So. Rep. 155.

A freight train was in the habit of carrying passengers to a certain station. Plaintiff purchased a ticket for such station, but was informed by the conductor that that train would not stop at such station and advised to take passage with another extra train, to which he applied and was refused passage, and plaintiff entered the first train, informing the conductor of the facts, and was by it carried to the next station beyond the one named in his ticket. *Held*, that the company was liable. *Chicago, R. I. & P. R. Co. v. Fisher*, 66 Ill. 152.

258. Passenger's duty to inform himself as to stops, generally.*—It is the duty [of a person about to take passage on a train to inform himself when, where, and how he can go and stop, according to the regulations of the railway company; and if he makes a mistake, not induced by the company, against which ordinary care in this respect would have protected him, he has no remedy against the company for the consequences. *Beauchamp v. International & G. N. R. Co.*, 9 Am. & Eng. R. Cas. 307, 56 Tex. 239.—FOLLOWED IN *Texas & P. R. Co. v. Ludlam*, 57 Fed. Rep. 481.—*Texas & P. R. Co. v. Ludlam*, 57 Fed. Rep. 481.—FOLLOWING *Beauchamp v. International & G. N. R. Co.*, 56 Tex. 239.—*Little Rock & Ft. S. R. Co. v.*

* See also *ante*, 66.

Passengers must take notice of regulations as to stoppage of trains at stations, see note, 44 Am. & Eng. R. Cas. 292.

Miles, 13 *Am. & Eng. R. Cas.* 10, 40 *Ark.* 298, 48 *Am. Rep.* 10. *Pittsburgh, C. & St. L. R. Co. v. Nuzum*, 50 *Ind.* 141, 9 *Am. Ry. Rep.* 396. *Ohio & M. R. Co. v. Applewhite*, 52 *Ind.* 540. *Atchison, T. & S. F. R. Co. v. Gants*, 34 *Am. & Eng. R. Cas.* 290, 38 *Kan.* 608, 17 *Pac. Rep.* 54. *Logan v. Hannibal & St. J. R. Co.*, 12 *Am. & Eng. R. Cas.* 141, 77 *Mo.* 663. *Plott v. Chicago & N. W. R. Co.*, 21 *Am. & Eng. R. Cas.* 319, 63 *Wis.* 511, 23 *N. W. Rep.* 412.

In the absence of statutory provision to the contrary, a company may adopt a regulation that a certain train or trains of passenger cars running regularly on its road shall not stop at designated stations or places, and one traveling as a passenger on such road is bound to inquire whether the train upon which he takes passage stops at the station or place to which he is going. *Pennsylvania Co. v. Wents*, 3 *Am. & Eng. R. Cas.* 478, 37 *Ohio St.* 333. *Texas & P. R. Co. v. Ludlam*, 57 *Fed. Rep.* 481.

And when a person purchases a ticket, he should ascertain before getting on a train whether such train will only stop at the principal stations or at all of them; and were he to get on one that was not accustomed to stop at the station to which he desired to go, and for which his ticket called, he would not, without an agreement to stop, have any right to insist upon the company's changing the course of their business for his accommodation, and to serve his convenience. *Chicago & A. R. Co. v. Randolph*, 53 *Ill.* 510.

Persons desiring tickets of travel are expected to inform themselves as to the train they wish to take and must take for their destination. If they do not understand or see the schedule posters or time-tables provided by the company, it is their duty in law to inquire and learn what train they should take to reach the point they wish. And if a mistake is made, not induced by the company, against which ordinary diligence as to inquiry would have protected, no redress against the company will be accorded. *Duling v. Philadelphia, W. & B. R. Co.*, 27 *Am. & Eng. R. Cas.* 84, 66 *Md.* 120, 6 *Atl. Rep.* 592.

It is the duty of a passenger to inquire before embarking on a train whether it will stop at the station of his destination; and if he does so, and is misled by an agent authorized to speak for the company, he has his action against the company for the mis-

directions, but not for the refusal of the conductor to stop there if it be a station at which the train is forbidden to stop by the regulations of the company. *St. Louis, I. M. & S. R. Co. v. Atchison*, 47 *Ark.* 74, 14 *S. W. Rep.* 468.

259. Failure of passenger to make proper inquiry.—It is not negligence for the conductor to refuse to stop his train at a station forbidden by the regulations of the road, to land a passenger who has embarked on the train without attempting to learn whether it would stop there, though the conductor has taken up his ticket. *St. Louis, I. M. & S. R. Co. v. Rosenberry*, 45 *Ark.* 256.

Where a person who had purchased a ticket for passage to a certain station, by his own fault or mistake got upon a train which, by the regulations of the company, did not stop at that station, he could not recover damages of the company for the refusal and failure of the conductor to stop the train and let him off at said station. *Ohio & M. R. Co. v. Applewhite*, 52 *Ind.* 540.

260. Falling short of station.—Where a railroad receives a person as a passenger on its freight train, its conductor is guilty of a breach of duty in requiring him to alight at a distance from the station to which he paid his fare. *Adams v. Missouri Pac. R. Co.*, 41 *Am. & Eng. R. Cas.* 105, 100 *Mo.* 555, 12 *S. W. Rep.* 637, 13 *S. W. Rep.* 509.—*QUOTING Winkler v. St. Louis, I. M. & S. R. Co.*, 21 *Mo. App.* 106.

Where a passenger attempts to alight from a freight train at a point where such train is stopped short of the station, and is told by a brakeman to remain aboard, since the train would be moved further down, and upon its failure to stop again was told and assisted by the brakeman to get off and was injured in so doing, the company is not relieved from liability by any custom that passengers on freight trains shall leave them at the place where they stop, or by the fact that had it not been for the invitation to remain aboard in the first instance its contract would have been completed when the passenger was allowed opportunity to get off. *Eddy v. Wallace*, 52 *Am. & Eng. R. Cas.* 265, 49 *Fed. Rep.* 801, 4 *U. S. App.* 264, 1 *C. C. A.* 435.—*DISTINGUISHED IN*

* See also *post*, 410, 411.

Carrying passenger beyond station and putting him off at a coal-chute, where he is injured, see 5: *AM. & ENG. R. CAS.* 372, *abstr.*

Poulin v. Canadian Pac. R. Co., 52 Am. & Eng. R. Cas. 188, 52 Fed. Rep. 197, 6 U. S. App. 298, 3 C. C. A. 23.

201. Overshooting station, generally.—(1) *Rule stated.*—Running a train a little beyond the station before stopping still is not negligence *per se*; nor is the delay thereupon for a period necessary to reverse the motion so as to back it to the usual stopping place. *Taber v. Delaware, L. & W. R. Co.*, 71 N. Y. 489; *affirming 4 Hun 765*.

Where a company carries a passenger beyond and away from all its usual stopping places to a place where there are no accommodations for alighting, and the company knows there is special risk and hazard, owing to the switching of the engine, it is its duty to use every precaution for the protection of the passenger against danger from the passing engine; and whether it did so or not is a proper question of fact for the jury. *Franklin v. Southern Cal. Motor Road Co.*, 85 Cal. 63, 24 Pac. Rep. 723.

In such case it is a question of fact for the jury to determine whether the passenger, with the knowledge she possessed as to the peril of the place, and with the presumption she was entitled to indulge in as to the degree of care which the employes of defendant would exercise for her protection, was herself guilty of negligence which proximately contributed to her injury. *Franklin v. Southern Cal. Motor Road Co.*, 85 Cal. 63, 24 Pac. Rep. 723.

Negligence is not absolute, but is relative to circumstances surrounding the case, and always relates to some circumstance of time, place, and person. Contributory negligence is generally an inference from facts and circumstances which it is the province of the jury to find.—*Franklin v. Southern Cal. Motor Road Co.*, 85 Cal. 63, 24 Pac. Rep. 723.

The fact that the engineer was unable to stop the train at a place where passengers were in the habit of alighting, through the

failure of the air-brakes to work properly, is not evidence of negligence, where the defect in the brakes is unexplained and is fairly attributable to mere accident, and all other reasonable efforts were made to stop the train. *Porter v. Chicago & W. M. R. Co.*, 80 Mich. 156, 44 N. W. Rep. 1054.

It is not negligence on the part of a conductor of a freight train which is carrying passengers also to run it beyond the platform to allow another train to pass, when it is the custom to operate the freight train in that way. *Hemmingway v. Chicago, M. & St. P. R. Co.*, 28 Am. & Eng. R. Cas. 216, 67 Wis. 668, 31 N. W. Rep. 268.—QUOTED IN *Dowd v. Chicago, M. & St. P. R. Co.*, 84 Wis. 105.

(2) *Illustrations.*—A passenger traveling on a train by arrangement with the conductor and being carried several miles beyond her destination, cannot recover damages on that account, when it appears that she knew the rules of the railroad company forbade the train to stop at that point, and that the regular agent had refused her a ticket for that reason. *Alabama G. S. R. Co. v. Carmichael*, 44 Am. & Eng. R. Cas. 286, 90 Ala. 19, 8 So. Rep. 87.—APPLYING *Wells v. Alabama G. S. R. Co.*, 67 Miss. 24, 6 So. Rep. 737.—REVIEWED IN *Manning v. Louisville & N. R. Co.*, 95 Ala. 392.

A passenger was aroused from sleep at night and was told that his station was reached; both the conductor and brakeman urged him to hurry and get off. As he did so he fell and was injured, caused by the train having passed the platform. *Held* that the company was liable for the injury received. *St. Louis, I. M. & S. R. Co. v. Cantrell*, 8 Am. & Eng. R. Cas. 198, 37 Ark. 519, 40 Am. Rep. 105.—QUOTED IN *Little Rock & Ft. S. R. Co. v. Atkins*, 46 Ark. 423.

T. went aboard the cars and paid fare to Boguichitto. The train did not stop, but ran past two miles to a water-tank. T. demanded that the train should return. The conductor was courteous and polite, and submitted the option to T. to leave the train at the tank or ride to the next station and return to Boguichitto free of charge. T. accepted the latter alternative. *Held*, that this was a compulsory choice. The train upon which he returned ran beyond the station and landed him about 150 yards beyond, and he voluntarily jumped off without injury. On the trial the counsel

² See also *post*, 412, 413.

Carrying passenger beyond his station. Liability of company for injury caused by walking back, see 27 AM. & ENG. R. CAS. 147, *abstr.*

Carriage of passenger beyond destination, see notes, 13 AM. & ENG. R. CAS. 52; 18 *Id.* 259, 263; 7 L. R. A. 113; 52 AM. & ENG. R. CAS. 314, *abstr.*

Carrying passenger beyond station. Injuries by alighting from moving train. Contributory negligence, see note, 47 AM. & ENG. R. CAS. 572.

for defendants demurred to the testimony, and the court sustained the demurrer. *Held*, that this was error. *Thompson v. New Orleans, J. & G. N. R. Co.*, 50 *Miss.* 315.—DISTINGUISHING *Heirn v. M'Caughan*, 32 *Miss.* 17; *New Orleans, J. & G. N. R. Co. v. Hurst*, 36 *Miss.* 660; *Mobile & O. R. Co. v. McArthur*, 43 *Miss.* 180; *Memphis & C. R. Co. v. Whitfield*, 44 *Miss.* 466. REVIEWING *Southern R. Co. v. Kendrick*, 40 *Miss.* 374.

When a passenger on a dummy line is carried past the street crossing which was his destination and ordinary stopping place to the next crossing, where the train came to a full stop, and no notice was given him of an intention to back the train, it is proper to submit to the jury whether this was an implied invitation by those in charge of the train for him to get off at that point. *Gadsden & A. U. R. Co. v. Causler*, 58 *Am. & Eng. R. Cas.* 258, 97 *Ala.* 235, 12 *So. Rep.* 439.

(3) — *English cases.*—A company is not guilty of negligence in backing a train at a station for the purpose of bringing the carriages alongside the platform very shortly after the name of the station had been called out and the train stopped, and is not liable to a passenger about to alight who was thrown down and injured in consequence of the backing of the train. *Lewis v. London, C. & D. R. Co.*, 43 *L. J. Q. B.* 8, *L. R.* 9 *Q. B.* 66, 22 *W. R.* 153, 29 *L. T.* 397.

Where a train overshot a station platform in the daytime, and a porter called out several times the name of the station and let out some passengers, and a reasonable time for backing the train up to the platform had elapsed, and there was at hand no servant whom a passenger could request to have the train backed, and he, while cautiously alighting, fell and was injured, there was evidence of negligence on the part of the company. *Nicholls v. Great Southern & W. R. Co.*, 7 *Ir. C. L.* 40, 21 *W. R.* 387.

A company is liable for injuries to a passenger who, in the dark, after the name of the station had been called and the train stopped, seeing passengers alight attempts to get off but, the carriage having overshot the platform, falls to the embankment and is hurt. *Weller v. London, B. & S. C. R. Co.*, *L. R.* 9 *C. P.* 126, 43 *L. J. C. P.* 137, 22 *W. R.* 302, 29 *L. T.* 888.

262. Right to be carried back to station.—If a passenger, put off a train on a dark night beyond the station, was not aware that he had been carried beyond his station, his failure to demand that he be taken back to his station is not a waiver of his rights, and does not discharge the railroad's obligation to put him off at the proper place. *Winkler v. St. Louis, I. M. & S. R. Co.*, 21 *Mo. App.* 99.

If the passenger, in such a case, was apprised of the place where he was asked to get off, and of the existence of the trestle between that place and the station, his failure to object would be a waiver of his right to be carried back. *Winkler v. St. Louis, I. M. & S. R. Co.*, 21 *Mo. App.* 99.—DISTINGUISHING *Trigg v. St. Louis, K. C. & N. R. Co.*, 74 *Mo.* 147.

263. Carrier's liability when passenger is put off beyond station.—

(1) *When liable.*—The contract of the carrier is to safely carry passengers to the platform of the depot at their station; and the company is liable in damages for carrying a female passenger past her station and then inducing her to leave the train on a dark and stormy night, among various railroad tracks, cars, engines, and ditches. *Warden v. Missouri Pac. R. Co.*, 35 *Mo. App.* 631.

A passenger who has been carried beyond the station platform has a right to rely on the assistance offered by the conductor and brakeman to aid her in getting off the train, and if, by reason of the flustered state of her mind and the fear of being carried beyond her destination, she does not notice the distance of the car-step from the ground, and they fail to assist her from the car without injury, it is the fault of the carrier. *Foss v. Boston & M. R. Co.*, (N. H.) 47 *Am. & Eng. R. Cas.* 566, 21 *Atl. Rep.* 222.

Where a woman, accompanied by two small children, is carried past her station, which is also her home, and where she is not fully informed as to the difficulty of getting back to the station, she is not barred from recovering damages because she insists on being put off, rather than be carried on to the next station and be left in a city where she is unacquainted, and in the night-time, without money. *Galveston, H. & H. R. Co. v. Crispi*, 73 *Tex.* 236, 11 *S. W. Rep.* 187.

Where a female passenger sues for being carried past her station in the night-time, and being put off, alone and unprotected, at

a considerable distance beyond the station on the prairie, it cannot be said that she was guilty of contributory negligence in not getting off at the station, where the proofs show that the train stopped, but where her evidence is uncontradicted that the name of the station was not called; and even if she was, it was not the proximate cause of the injury complained of, which consisted in putting her off at a lonely place, unprotected, and for refusing to back the train to the station as she requested. *Texas & P. R. Co. v. Pollard*, 2 *Tex. App. (Civ. Cas.)* 424.

(2) *When not liable.*—In an action for carrying a passenger some distance beyond the station and then putting her off, it is proper to charge that there can be no recovery if she got off without objection and without requesting that the train be run back to the depot. *Gulf, C. & S. F. R. Co. v. Head*, 4 *Tex. App. (Civ. Cas.)* 313, 15 *S. W. Rep.* 504.

A passenger is not entitled to recover for being carried past his station, where it appears that he got on a train to go to a station that he knew was a flag-station, where trains stopped only on being signaled, or upon notice by passengers to the conductor, and he failed to give any notice until he was two miles past the station, when the conductor gave him his choice to be put off there or be carried on to the next station, four miles further, and at his choice was put off about sundown, walking back without any ill effects; that he was an able-bodied man and the weather good. *Gulf, C. & S. F. R. Co. v. Ryan*, 4 *Tex. App. (Civ. Cas.)* 529, 18 *S. W. Rep.* 866.

A passenger was carried beyond her point of destination. The train was stopped and the conductor proposed backing to the platform, but the passenger declined, and stated that she preferred getting off at the place where the train then was. She was assisted from the train, and while alighting was injured. In a suit for damages—*held*, that by so doing she changed the character and extent of the obligation upon the carrier. There being evidence of such change, it was proper to instruct the jury to find for the defendant, "if you find from the evidence that after having carried plaintiff past the platform the conductor stopped the train and offered to carry her back to the platform, and that plaintiff thereupon requested to be allowed to get off where she

did get off, and that the conductor used ordinary care in assisting her to get off." *Conwill v. Gulf, C. & S. F. R. Co.*, 85 *Tex.* 96, 19 *S. W. Rep.* 1017.

264. Excuse for overshooting station.*—Where the evidence shows that the officers in charge of a train made every effort to stop at a station and failed, owing to imperfect communication with the engineer, an action will not lie by a passenger whose destination was the station in question and who was forced by reason of the non-stopping of the train to walk back one half a mile. *Louisville & N. R. Co. v. Dancy*, (Ala.) 11 *So. Rep.* 796.

In an action under How. Mich. St. § 3324, inflicting a penalty for carrying a passenger past a regular station, it appeared that the snow was drifted badly near the station, that a freight train was following closely, that it was night, and that the engineer and conductor, exercising their honest judgment, thought it safer and better to stop about three fourths of a mile beyond the depot, where there was no danger of being stalled. *Held*, that under the circumstances there was a "legal or just excuse" for failing to stop at the station within the provisions of the statute relieving the company from liability where such an excuse is shown. *Reed v. Duluth, S. S. & A. R. Co.*, (Mich.) 58 *Am. & Eng. R. Cas.* 77, 59 *N. W. Rep.* 144.

k. At Stations Before Boarding or After Alighting.†

265. Generally.‡—(1) *Statement of rule.*—It is the legal duty of carriers of passengers to provide platform and other accommodations for passengers who desire to take their trains at stations where passengers are usually taken on or put out, and to furnish safe and proper means of ingress

* See also *ante*, 229.

† See also *post*, 441-456; and STATIONS AND DEPOTS, 58-145.

‡ Duties and liabilities to passengers in and about stations, see note, 1 *L. R. A.* 157; 58 *AM. & ENG. R. CAS.* 182, *abstr.*

Duty of keeping station safe for passengers, see note, 23 *AM. & ENG. R. CAS.* 517.

Liability for defects in stations and grounds, see 27 *AM. & ENG. R. CAS.* 130, *abstr.*

Liability for injuries caused by defective station appointments, see notes, 30 *AM. & ENG. R. CAS.* 171; 27 *Id.* 130.

When passenger may recover for injuries received by cars which projected over platform striking him, see 33 *AM. & ENG. R. CAS.* 510, *abstr.*

and egress to and from trains, platforms, station approaches, etc. *Moses v. Louisville, N. O. & T. R. Co.*, 30 *Am. & Eng. R. Cas.* 556, 39 *La. Ann.* 649, 2 *So. Rep.* 567.

They must provide reasonable accommodations at their stations for passengers who have occasion to travel on their roads and keep in a safe condition all portions of their platforms to which the public do or would naturally resort, as well as all portions of their station grounds reasonably near to the platforms, where those who have purchased tickets with a view to take passage on their cars would naturally or ordinarily go. *Stewart v. International & G. N. R. Co.*, 2 *Am. & Eng. R. Cas.* 497, 53 *Tex.* 289.

The company must so arrange its station or depot that a passenger who gets off at the depot or place to alight may get off the car without danger; and it is also its duty to furnish such a way of exit from the depot over its right of way that the passenger may go away from the place at which he is invited to get on and off, without danger to life or limb; but it is not its duty to see him safe and secure in his exit from the track, and over its right of way. The carrier is not bound to insure him a safe exit from the depot, but to insure only a safe way for him to use for an exit. *Central R. Co. v. Thompson*, 76 *Ga.* 770.

Carriers must at all times so adjust their business as to make it safe for passengers (including those who are partially disabled in sight, hearing, limbs, or physical strength), on the arrival and stoppage of a train, to pass between it and the depot; and when, from any unforeseen contingency, it is not safe, it is the duty of the employes to know it and to take proper precautions to prevent the passengers from exposing themselves to danger. The passengers have a right to assume that it is safe for them to so pass until notified to the contrary and to act accordingly. *Gonzales v. New York & H. R. Co.*, 39 *How. Pr. (N. Y.)* 407.

(2) *Illustrations.*—If a company negligently injures passengers who remain about the station after they have had a reasonable time to depart after leaving the train, and after its liability as a carrier has ceased, it will be liable. *Imhoff v. Chicago & M. R. Co.*, 22 *Wis.* 681.

Where a railroad company uses a wharf and by its notices directs passengers to use it in transferring from a train to a boat, so

that the wharf becomes necessary to the proper operation of the road, the railroad must exercise the same degree of care in making the wharf safe as is required of carriers of passengers, though it allows passengers to disembark at its depot some distance away from the boat. *Knight v. Portland, S. & P. R. Co.*, 56 *Me.* 234.

A passenger started to leave the depot platform at a place not intended for that purpose, with a view of crossing the track at a point where she had no right to cross it. While still on the platform she received an injury caused by the negligence of defendant's servants. *Held*, that the company was liable; that when it provides a platform at its station in such a manner as to invite passengers to walk over it while waiting for trains, or while preparing to leave the station, it is bound to exercise due care towards such passengers while upon the platform. *Keefe v. Boston & A. R. Co.*, 27 *Am. & Eng. R. Cas.* 137, 142 *Mass.* 251, 7 *N. E. Rep.* 874.

Where mail-bags are customarily thrown from the car upon the platform over which passengers are expected to pass, it is its duty to guard against accidents caused by passengers stumbling over such bags in the dark even though the bags are thrown out by postal clerks in the service of the post-office department. *Sargent v. St. Louis & S. F. R. Co.*, 114 *Mo.* 348, 21 *S. W. Rep.* 823. —QUOTING *Carpenter v. Boston & A. R. Co.*, 97 *N. Y.* 494; *Snow v. Fitchburg R. Co.*, 136 *Mass.* 552. *REVIEWING Muster v. Chicago, M. & St. P. R. Co.*, 61 *Wis.* 326.

A passenger, aged sixty-seven years and in good health, was directed by the conductor to get off defendant's train, a freight carrying passengers, before reaching his station. His duties requiring haste, he started along the train on the roadbed, which was fenced with barb-wire, and soon came to a bridge, to get over which he had to mount a flat car, as did also another passenger. Reaching the front of the car and being fearful lest the train might start, he, having first examined the ground, jumped from the coupling outward with one hand on the flat car in front, and in landing broke both bones of his leg. *Held*, that the facts did not constitute a cause of action against the defendant. *Adams v. Missouri Pac. R. Co.*, 41 *Am. & Eng. R. Cas.* 105, 100 *Mo.* 555, 12 *S. W. Rep.* 637, 13 *S. W. Rep.* 509.

It is a question for the jury whether a

company has taken proper precautions to regulate the movements of a crowd of excursionists at its station, owing to the pressure of which a passenger is thrust off the platform and hurt. *Hogan v. South Eastern R. Co.*, 28 L. T. 271.

266. Degree of care required of carrier.*—A carrier of passengers is held to the highest degree of care as to the condition of its engines, cars, roadway, bridges, and other appliances, because negligence as to them involves extreme peril; but the rule ceases with the risk of it. Therefore a passenger's detention at a station, or his exit to his train, is not attended with the hazards pertaining to the journey, and the duty is lessened to that of a reasonable care in the protection of the passenger. *Taylor v. Pennsylvania Co.*, 50 Fed. Rep. 755.

It is the duty of a company to provide for a passenger a safe passage to the train he desires to take, and to take reasonable care that he shall not while on its premises be exposed to any unnecessary danger, or to one of which it is aware. It is bound to exercise the utmost vigilance, not only in guarding its passengers against careless interference by others, but even against violence; and if, in consequence of its neglecting this duty, a passenger receives injury, which, in view of all the circumstances, might have been reasonably anticipated, it is liable. In such cases, however, *scienter* is the gist of the action. *Carpenter v. Boston & A. R. Co.*, 21 Am. & Eng. R. Cas. 331, 97 N. Y. 494, 49 Am. Rep. 540.—*FOLLOWING* *Stewart v. Brooklyn & C. T. R. Co.*, 90 N. Y. 588; *Flint v. Norwich & N. Y. Transp. Co.*, 34 Conn. 554.

After a passenger leaves the train and is still on the company's grounds, the company is only bound to exercise ordinary care to prevent an injury. So where a passenger was injured by stepping on shingles on the station grounds it was error to charge the jury that the company "was bound to take every possible precaution against injury to plaintiff, and was liable if human foresight could have prevented" the injury. *Moreland v. Boston & P. R. Co.*, 141 Mass. 31, 6 N. E. Rep. 225.—*DISTINGUISHED* IN *Dodge v. Boston & B. Steamship Co.*, 37 Am. & Eng. R. Cas. 67, 148 Mass. 207, 19 N. E. Rep. 373, 2 L. R. A. 83.

* See also *ante*, 137-160, 162-164, 180; *post*, 288, 348, 417; and STATIONS AND DEPOTS, 61, 78, 91.

A great many trains passing a particular station every day make the approach to and departure from that station very dangerous, and the diligence and care of the company in protecting its passengers in coming and going must be proportionate to the risk incurred by them, and such danger also requires of the passenger cautious circumspection, proportioned to such risk. *Wallace v. Wilmington & N. R. Co.*, (Del.) 18 Atl. Rep. 818.

A passenger being on the company's track under circumstances which did not create any duty on its part towards him, the fact that the company was guilty of negligence short of wilful, was irrelevant. *Henry v. St. Louis, K. C. & N. R. Co.*, 12 Am. & Eng. R. Cas. 136, 76 Mo. 288, 43 Am. Rep. 762.

The duty imposed upon the company toward a passenger who, while on a continuous journey, in going to and returning from the eating stations provided by the company for the accommodation of passengers, as to safety in alighting, is the same as that owing to ordinary passengers at the stations of their destinations. *Atchison, T. & S. F. R. Co. v. Shean*, 58 Am. & Eng. R. Cas. 360, 18 Colo. 368, 33 Pac. Rep. 108.

267. Proximate cause.*—A passenger who was told by a brakeman to change cars at a way-station entered another car, but was told by one of the company's servants there that he could not remain inside the car as the train was not ready. The passenger after remaining a short time on the platform of the car alighted, and while standing on a track near that on which the car was, was injured by another train. *Held*, that his expulsion from the car was not the proximate cause of the injury. *Henry v. St. Louis, K. C. & N. R. Co.*, 12 Am. & Eng. R. Cas. 136, 76 Mo. 288, 43 Am. Rep. 762.—*DISTINGUISHED* IN *Alabama G. S. R. Co. v. Arnold*, 30 Am. & Eng. R. Cas. 546, 80 Ala. 600. *QUOTED* IN *Hudson v. Wabash & W. R. Co.*, 32 Mo. App. 667.

Where a passenger is put off in the dark beyond the station and is injured in the station grounds while trying to find his way back to the station, the injury received is not a remote consequence of the wrong done by the railroad in carrying him beyond

* See also *ante*, 128; *post*, 344, 416, 482.

the station and putting him off at a point beyond where he was entitled to get off. *Winkler v. St. Louis, I. M. & S. R. Co.*, 21 Mo. App. 99.

268. Defective platforms, generally.*—It is the duty of a company, without an order from the railroad commission, to provide platforms, or suitable substitutes therefor, at stopping places where it is accustomed to receive and discharge passengers, and to furnish proper lights when trains arrive or depart in the night; and the neglect of this duty is negligence. *Ensley R. Co. v. Chewning*, 50 Am. & Eng. R. Cas. 46, 93 Ala. 24, 9 So. Rep. 458.

Where a company allows a hole to remain in its platform until a passenger steps in it and is injured, it is error to charge the jury that the company was not liable "unless it fail to use ordinary care after being aware of plaintiff's danger." The negligence in allowing the hole to remain was the proximate cause of the accident, whether that was before or after the danger to plaintiff was known. *Louisville & N. R. Co. v. Wolfe*, 80 Ky. 82.

Plaintiff, a passenger, in attempting to step from the car to the station platform, missed the platform, fell between it and the car, and was injured. The distance between the platform and the car was eleven inches. The lower step of the car was eight inches below the top of the platform, and one foot seven inches distant therefrom. The second step was about four inches below the platform and two feet two inches therefrom. Plaintiff stepped from the second step without having hold of the iron railing on either side, and without looking to see the station platform. The platform had been used for many years, and prior to the accident no one had been injured or had suffered any inconvenience. It did not appear but that the platform was constructed in the ordinary way, or that the space between it and the car was more than was requisite, and there was no complaint that the platform was out of order. *Held*, that the facts did not justify a verdict for plaintiff. *Laffin v. Buffalo & S. W. R. Co.*, 30 Am. & Eng. R. Cas. 596, 106 N. Y. 136, 7 Cent. Rep. 793, 12 N. E. Rep. 599, 8 N. Y. S. R. 596; *reversing* 36 Hun 638, *mem.*—REVIEWING *Dougan v.*

Champlain Transp. Co., 56 N. Y. 1; *Loftus v. Union Ferry Co.*, 84 N. Y. 455; *Burke v. Witherbee*, 98 N. Y. 562.—FOLLOWED IN *Kelly v. Manhattan R. Co.*, 112 N. Y. 443, 20 N. E. Rep. 383, 21 N. Y. S. R. 507. QUOTED IN *Hanrahan v. Manhattan R. Co.*, 53 Hun (N. Y.) 420, 24 N. Y. S. R. 790, 6 N. Y. Supp. 395. REVIEWED IN *Alabama G. S. R. Co. v. Arnold*, 35 Am. & Eng. R. Cas. 466, 84 Ala. 159, 4 So. Rep. 359, 5 Am. St. Rep. 354.

In an action to recover for injuries received by one who was about to take passage on a train at night, by falling from a platform which was alleged to be insufficient and not lighted, an instruction correctly states the law which is to the effect that it is the duty of a company at stations where it receives passengers to have and keep in a reasonably safe condition suitable approaches to and from its cars, and at night, if needed, to have them sufficiently lighted to enable passengers to safely pass from the station-house to the trains. *Texas & P. R. Co. v. McKenzie*, 2 Tex. Unrep. Cas. 307.

269. — at eating-house stations.*—A land company having built a hotel at a railroad station, which was used as an eating-house for passengers, and having constructed two bridges or platforms over a small stream which ran between the hotel and the track, using and keeping one of them in repair, while the other was used and was to be kept in repair by the railroad company, being built on its right of way, an action for damages lies against the railroad company, but not against the land company, at the suit of a passenger who, having gone over the first bridge into the hotel, received personal injuries from a defect in the other as he was returning to the cars; nor is the passenger chargeable with contributory negligence because he "could have seen the hole if he had been specially looking for it," when the evidence shows that the accident occurred at night, and that there was no light or other warning signal posted at the spot. *Watson v. East Tenn., V. & G. R. Co.*, 92 Ala. 320, 8 So. Rep. 770; *further appeal*, 94 Ala. 634. And see *Peniston v. Chicago, St. L. & N. O. R. Co.*, 34 La. Ann. 777. See also *Atchison, T. & S. F. R. Co. v. Shean*, 58 Am. & Eng. R. Cas. 360, 18 Colo. 368, 33 Pac. Rep. 108.

* See also *ante*, 189; STATIONS AND DEPOTS, 76-88.

Liability for injuries to passengers caused by defective platform, see note, 11 L. R. A. 721.

* See also *ante*, 30, 237; and title REFRESHMENT-ROOMS.

270. Station doors.—The fact that there was a screw-eye in the door projecting nine sixteenths of an inch, which was used to fasten the door back, and which struck the plaintiff, did not show that the door was negligently constructed. *Graeff v. Philadelphia & R. R. Co., (Pa.) 58 Am. & Eng. R. Cas. 431, 28 Atl. Rep. 1107.*

The company was not negligent in failing to have the door constructed partially of glass, so that persons using it from opposite sides would be visible to each other. *Graeff v. Philadelphia & R. R. Co., (Pa.) 58 Am. & Eng. R. Cas. 431, 28 Atl. Rep. 1107.*

271. Insufficiently lighted stations and grounds.*—It is the legal duty of the company to furnish at night sufficient lights to securely guide the way and the steps of their passengers, as well as servants necessary to inform them and instruct them as to the location of the trains, and as to the usual and safest mode of reaching them. This rule, which courts must rigidly enforce, is violated by a company which, for any reason, leaves one or more coaches of a passenger train outside of the depot yard or station grounds at which the train stops to take on and put out passengers, and which thus obstructs at night the lights so placed by the city as to illuminate both sides of the track on which the train stands. *Moses v. Louisville, N. O. & T. R. Co., 30 Am. & Eng. R. Cas. 556, 39 La. Ann. 649, 2 So. Rep. 567.*

When carrying passengers over long journeys carriers are bound to provide easy modes and to allow a reasonable time to their passengers to obtain food and necessary refreshments. They are bound to furnish safe and proper means of ingress and egress to and from trains to the eating-stations, whether said eating-houses be under the control of the railroad or a third person. This obligation includes the duty of providing sufficient lights for the safety of their passengers going to or coming from meals had at night, and giving them correct information as to the exact location of their respective trains, when trains have been moved during the absence of the passengers at their meals. *Peniston v. Chicago, St. L. & N. O. R. Co., 34 La. Ann. 777.*—FOLLOWED IN *Turner v. Vicksburg, S. & P. R. Co., 37 La. Ann. 648.*

A company which maintains a trestle as

an approach to its station is bound to use extraordinary care to keep the same in a safe condition, and is liable for an injury sustained by an intending passenger by reason of the faulty construction and improper lighting of such approach. *Johns v. Charlotte, C. & A. R. Co., 58 Am. & Eng. R. Cas. 175, 39 So. Car. 162, 17 S. E. Rep. 698.*

A company is liable for injuries to a passenger seeking to board one of its trains at night, who finds no one to inform him how to reach the sleeping-car attached to the train, which is left standing outside of the yards, and to which a sidewalk, erected by the company under a contract with the city, leads in a direct route, from which the passenger falls by reason of defective or insufficient lights. *Moses v. Louisville, N. O. & T. R. Co., 30 Am. & Eng. R. Cas. 556, 39 La. Ann. 649, 2 So. Rep. 567.*—REVIEWING *McDonald v. Chicago & N.W. R. Co., 26 Iowa 124; Martin v. Great Northern R. Co., 16 C. B. 179.*

There was evidence before the jury that there were no lights at the stopping place, and the court charged that if the accident was caused by the defendant company's failing to light the place, it was liable for damages. *Held, no error. Alexandria & F. R. Co. v. Herndon, 87 Va. 193, 12 S. E. Rep. 289.*

272. Approaches.*—It is the duty of carriers of passengers to keep their stations, and the approaches thereto, in such condition that those who have occasion to use them for the purpose designed may do so with safety. It is also the duty of the carrier to provide safe and convenient means of entrance to and departure from their trains. *Little Rock & Ft. S. R. Co. v. Cavenesse, 48 Ark. 106, 2 S.W. Rep. 505. Stewart v. International & G. N. R. Co., 2 Am. & Eng. R. Cas. 497, 53 Tex. 289.*

273. Defects in premises near station grounds.†—The officers of a company have the right to presume that passengers will only attempt to get on and off its cars at the places designated by the company for such purpose, and it is not the duty of the company to keep its track clear

* See also STATIONS AND DEPOTS, 99-101.

† See also STATIONS AND DEPOTS, 92-97.

Passenger falling into hole in leaving station may recover for injuries received, see 33 AM. & ENG. R. CAS. 509, *abstr.*

* See also STATIONS AND DEPOTS, 102-105.

2 D. R. D.—27.

for those who may see proper to pursue the cars while leaving a depot or station; and more especially would this be true as to those who pursue the cars to a point beyond that assigned by the company for receiving and discharging passengers. *Perry v. Central R. Co.*, 66 Ga. 746.

Where a passenger is carried beyond his point of destination, it is the duty of those in charge of the train to either back to the station or to notify the passenger how and where to alight, give warning of any dangers incident to alighting at that place, and give him such assistance or instructions as may be necessary to insure his safety; and if he is injured in making his way back to the station, without fault, the company is liable. *New York, C. & St. L. R. Co. v. Doane*, 37 Am. & Eng. R. Cas. 87, 115 Ind. 435, 15 West. Rep. 465, 17 N. E. Rep. 913, 1 L. R. A. 157, 7 Am. St. Rep. 451.

Uncontroverted evidence that the company stopped its train at night for half an hour or more, to await the arrival of another train, over an open ditch six feet deep, into which the plaintiff, carefully leaving the train as he had a right to do, fell and was injured, and that the existence of this ditch was known to defendant's conductor, is so strong that the jury are bound to find for the plaintiff. *Montgomery & W. P. R. Co. v. Boring*, 51 Ga. 582.—FOLLOWED AND REVIEWED IN *Dice v. Willamette T. & L. Co.*, 8 Oreg. 60.

274. Open cattle-guards.—Where a train stops at night only to allow another train to pass, and those in charge of the train give no notice to passengers to leave the cars, a passenger who leaves, and is injured by falling into a cattle-guard, cannot recover; and it matters not that he was told by a third party that the train was at a point where he wished to get off. *Frost v. Grand Trunk R. Co.*, 10 Allen (Mass.) 387.—DISTINGUISHED IN *Bullard v. Boston & M. R. Co.*, 27 Am. & Eng. R. Cas. 117, 64 N. H. 27.

A passenger who is, through no fault of his, carried some distance beyond his station, on a dark night, and there put off the train, and in going back to the station falls through a cattle-guard or trestle and is injured, may recover the damage from the company. *Winkler v. St. Louis, I. M. & S. R. Co.*, 21 Mo. App. 99.—DISTINGUISHED IN *Dunn v. Cass Ave. & F. G. R. Co.*, 98 Mo. 652, 11 S. W. Rep. 1009. QUOTED IN *Adams*

v. Missouri Pac. R. Co., 41 Am. & Eng. R. Cas. 105, 100 Mo. 555, 12 S. W. Rep. 637.

Where a company constructs cattle-guards lapping several feet onto a highway near its station, it is liable for the death of a passenger who, after leaving the station and on her way home, falls into such cattle-guard by reason of its being covered with snow, and not visible, and is killed by a passing train before she can extricate herself. *Hoffman v. New York C. & H. R. R. Co.*, 75 N. Y. 605; affirming 13 Hun 589.—FOLLOWING *Hulbert v. New York C. R. Co.*, 40 N. Y. 145.—APPLIED IN *Van Ostran v. New York C. & H. R. R. Co.*, 35 Hun (N. Y.) 590. REVIEWED IN *Reid v. New York, N. H. & H. R. Co.*, 44 N. Y. S. R. 688, 63 Hun 630, 17 N. Y. Supp. 801.

On a dark, rainy, and snowy night plaintiff went to defendant's depot to take a caboose-car at the rear end of defendant's freight train. The train stopped with the caboose-car several rods north of the depot platform, and two car-lengths north of a cattle-guard which was constructed across both tracks of the road and between them, and was partly uncovered. Plaintiff was told by the night-watchman that he would have to walk back to get on the caboose, and while on his way to the caboose met the conductor with a lantern, accompanying lady passengers from the caboose; nothing was said to him by the conductor, and before plaintiff reached the caboose he fell into the open cattle-guard and was injured. He had been in the habit of taking this train with the caboose standing north of the platform, but had never taken it with the caboose standing north of the cattle-guard, and he had never noticed the situation and condition of the cattle-guard, nor did he know before the accident that the caboose stood north of it. *Held*, that these facts warranted the jury in finding that defendant was guilty of negligence. *Hartwig v. Chicago & N. W. R. Co.*, 1 Am. & Eng. R. Cas. 65, 49 Wis. 358, 5 N. W. Rep. 865.—QUOTING *Delamaty v. Milwaukee & P. du C. R. Co.*, 24 Wis. 578. REVIEWING *Curtis v. Detroit & M. R. Co.*, 27 Wis. 158; *Davis v. Chicago & N. W. R. Co.*, 18 Wis. 175; *Quaife v. Chicago & N. W. R. Co.*, 48 Wis. 513.

275. Rubbish near the track.—If the name of a station is called out and the train stops a considerable time before it moves again, and in the mean time a passen-

ger for such station goes out in the dark and falls over some rubbish near the track, sustaining injuries, the company is liable. *Bridges v. North London R. Co.*, 43 L. J. Q. B. 151, L. R. 7 Q. B. 213, 23 W. R. 62, 30 L. T. 844; *reversing* 40 L. J. Q. B. 188, L. R. 6 Q. B. 377, 19 W. R. 824, 24 L. T. 385.

276. Right to rely on safety of premises.—The passenger is justified in assuming that the company has, in the exercise of due care, so regulated its trains that the road will be free from interruption or obstruction when passenger trains stop at a depot or station to receive and deliver passengers. *Baltimore & O. R. Co. v. State*, 12 Am. & Eng. R. Cas. 149, 60 Md. 449.—QUOTED IN *Atchison, T. & S. F. R. Co. v. Shean*, 18 Colo. 368.—*Gonzales v. New York & H. R. Co.*, 39 How. Pr. (N. Y.) 407.

Railroad companies are bound to keep all places in safe condition where it is their custom to receive passengers, whether they be at the station or not; and passengers have a right to assume that the grounds for a distance in which passengers necessarily and naturally go in reaching cars are safe, even on a dark night. *Hulbert v. New York C. R. Co.*, 40 N. Y. 145.—APPLIED IN *Clussman v. Long Island R. Co.*, 9 Hun (N. Y.) 618. DISTINGUISHED IN *Cincinnati, H. & I. R. Co. v. Carper*, 31 Am. & Eng. R. Cas. 36, 112 Ind. 26, 11 West. Rep. 223, 13 N. E. Rep. 122. QUOTED IN *Reid v. New York, N. H. & H. R. Co.*, 44 N. Y. S. R. 688, 63 Hun 630, 17 N. Y. Supp. 801. REVIEWED IN *Timpson v. Manhattan R. Co.*, 52 Hun (N. Y.) 489, 24 N. Y. S. R. 629, 5 N. Y. Supp. 684.

277. Collisions with baggage trucks.—In an action for personal injuries to a passenger by coming into collision with a baggage truck, while walking along the platform at a station, after alighting from a train, the questions whether he backed against the truck or was struck by it, whether he or the servant of the corporation who was pulling the truck was in the exercise of due care, and whether the platform was properly lighted, are for the jury. *Keeffe v. Boston & A. R. Co.*, 27 Am. & Eng. R. Cas. 137, 142 Mass. 251, 7 N. E. Rep. 874.

278. Passenger struck by mail-bag.—Where mail-bags are customarily discharged upon a passenger platform, it is the duty of the company to guard against injuries to passengers by reason of the presence of such mail-bags, and this duty extends to every part of the platform. *Sargent v. St. Louis & S. F. R. Co.*, 58 Am. & Eng. R. Cas. 184, 114 Mo. 348, 21 S. W. Rep. 823, 19 L. R. A. 460. Compare *Ohio & M. R. Co. v. Simms*, 43 Ill. App. 260.

A company is liable for an injury to a passenger who is injured while on a platform by a United States mail agent throwing a mail-bag against him, where it appears that the company knew of the dangerous habit of throwing out the mail-bags on the platform and took no steps to prevent it. *Carpenter v. Boston & A. R. Co.*, 21 Am. & Eng. R. Cas. 331, 97 N. Y. 494, 49 Am. Rep. 540.—DISTINGUISHING *Nolton v. Western R. Corp.*, 15 N. Y. 444; *Blair v. Erie R. Co.*, 66 N. Y. 313; *Pennsylvania R. Co. v. Price*, 23 Alb. L. J. 69; *Putnam v. Broadway & S. A. R. Co.*, 55 N. Y. 113; *Muster v. Chicago, M. & St. P. R. Co.*, 61 Wis. 325.—FOLLOWED IN *Carpenter v. Boston & A. R. Co.*, 105 N. Y. 627. QUOTED IN *Sargent v. St. Louis & S. F. R. Co.*, 114 Mo. 348. REVIEWED IN *Ohio & M. R. Co. v. Simms*, 43 Ill. App. 260.—Compare *Carpenter v. Boston & A. R. Co.*, 24 Hun (N. Y.) 104.

A passenger injured while waiting on a station platform by a mail-bag thrown from the train according to custom, while running at full speed, may sue the company for such injury. *Snow v. Fitchburg R. Co.*, 18 Am. & Eng. R. Cas. 161, 136 Mass. 552, 49 Am. Rep. 40.

279. Obstructing passage between train and station, generally.—In defendant's station there was a movable baggage platform on iron tracks parallel with the car-tracks. The top of this truck was on a level with the platforms of the cars. The train on which plaintiff was a passenger stopped in such a position that one end of her car was opposite the truck, so that passengers getting out at that end, which was in the direction of the outlet to the street, would be obliged to step upon the truck. The plaintiff got off upon the truck and fell off, and was injured. *Held*, that the question whether defendant was negligent in having the truck where it was, and

* See also STATIONS AND DEPOTS, 113.

† See STATIONS AND DEPOTS, 66.

* See also CARRIAGE OF MAILS, 7.

in stopping the car opposite to it, was for the jury. *Bethmann v. Old Colony R. Co.*, 155 Mass. 352, 29 N. E. Rep. 587.

There was evidence that plaintiff had never before come into that part of the station where she was injured. She testified that the car was full of passengers; that she was near the middle of the car, and all the passengers were going out one way; that those before her got out upon a truck which stood in front of her end of the car on a level with the car platform, which she supposed to be the platform of the station, and that she followed them. Held, that the question whether plaintiff exercised due care was for the jury. *Bethmann v. Old Colony R. Co.*, 155 Mass. 352, 29 N. E. Rep. 587.

280. — by standing cars.—Where a company runs a freight train between its platform and the track where passenger trains come in, and cuts the freight cars apart to allow passengers to pass through, it must use reasonable care to protect passengers from injury. A passenger injured by the cars being shoved together without sufficient warning may recover damages. *Louisville, N. O. & T. R. Co. v. Thompson*, 30 Am. & Eng. R. Cas. 541, 64 Miss. 584, 1 So. Rep. 840.

Where a train stops in such a way as to block up the ordinary crossing to the station, and the ticket collector tells the passengers who have alighted to pass on, and a passenger passes down the train to cross behind it, and from the want of a light stumbles over some hampers and is injured, it being the practice of passengers to cross behind the train, when long, without interference from the company, evidence of negligence on the part of the company is disclosed. *Nicholson v. Lancashire & Y. R. Co.*, 3 H. & C. 534, 34 L. J. Ex. 84, 12 L. T. 391.

281. Running train or engine between car and station.*—(1) *Without warning or signals.*†—A company is liable for injuring a passenger, while alighting from a train, by suddenly backing the train without giving any notice either by bell or whistle. *Imhoff v. Chicago & M. R. Co.*, 22 Wis. 681.

A company cannot be said to be wholly

* Liability for killing a passenger by a train on adjoining track, see 26 AM. & ENG. R. CAS. 234, *abstr.*

† See also *ante*, 134, 199, 223, 241.

free from negligence when it calls upon passengers to disembark for the purpose of going to its passenger depot, and then without any warning or information that a train is about to cross the path, immediately and before passengers have time to get out of danger, silently runs a train upon them. *Armstrong v. New York C. & H. R. R. Co.*, 66 Barb. (N. Y.) 437; affirmed in 64 N. Y. 635, *mem.*

A failure of an express train, passing a station at an unusual rate of speed when an accommodation train is at the station, to sound a whistle is negligence. *Gonzales v. New York & H. R. Co.*, 39 How. Pr. (N. Y.) 407.

In such case it was the duty of the conductor and engineer of the accommodation train to know whether their train was out of time, and whether it was probable that the express train would pass the station while their train was there, and to keep a lookout for the express train and signal to it, if it was near; and it was also their duty to see that the passengers should be prevented from leaving the train on the side on which the express would pass, or at least to give them notice of its approach, and to request them to sit still until it had passed, or to leave the train on the other side; and a failure to do so is negligence. *Gonzales v. New York & H. R. Co.*, 39 How. Pr. (N. Y.) 407.

(2) *At a high rate of speed.**—It is negligence to run a train, without warning, at a high rate of speed past a station at which another train has stopped and is discharging passengers, many of whom must cross the track upon which the train is running in order to reach their homes. *Robostelli v. New York, N. H. & H. R. Co.*, 34 Am. & Eng. R. Cas. 515, 33 Fed. Rep. 796. *Denver & R. G. R. Co. v. Hodgson*, 18 Colo. 117, 31 Pac. Rep. 954.

It is negligence to permit an express train to pass a station at an unusual rate of speed when it is perceived that an accommodation train is at the station. It is the duty of the conductor or engineer under such circumstances to slacken its speed or to stop before reaching the station. *Gonzales v. New York & H. R. Co.*, 39 How. Pr. (N. Y.) 407.

It is culpable and gross negligence to attempt to run a freight train at a speed of six to eight miles an hour past a station

* See also *ante*, 193.

just at the time a passenger train has stopped, and on an intervening track between the station and the passenger train, over which passengers must cross in going to or from their trains; and especially is this so where trains were not in the habit of passing the station in that way. *Terry v. Jewett*, 78 N. Y. 338; *affirming* 17 Hun 395. —DISTINGUISHING *Warren v. Fitchburg R. Co.*, 8 Allen (Mass.) 227. FOLLOWING *Klein v. Jewett*, 26 N. J. Eq. 474; *affirmed* in 27 N. J. Eq. 550. —DISTINGUISHED IN *De Kay v. Chicago, M. & St. P. R. Co.*, 39 Am. & Eng. R. Cas. 463, 41 Minn. 178, 4 L. R. A. 632.

(3) *Illustrations.*—To permit a train to pass on a track between a depot and another track on which a passenger train is standing while discharging and receiving passengers, just as passengers are passing from the depot to take that train, and across which track they are obliged to walk to reach their train, without any provision being made on the part of the company to avert danger, is actionable negligence. *Klein v. Jewett*, 26 N. J. Eq. 474; *affirmed* in 27 N. J. Eq. 550. —FOLLOWED IN *Terry v. Jewett*, 78 N. Y. 338.

It is gross negligence to run an engine between a passenger train and a waiting-room at a time when passengers may desire to pass from the platform to the train, and when they have a right to believe they might do so with safety. *Hirsch v. New York & G. L. R. Co.*, 6 N. Y. Supp. 162. —FOLLOWING *Terry v. Jewett*, 78 N. Y. 338.

The plaintiff, while undertaking to cross a track between the station-house and the train he desired to enter, was struck and injured by defendant's train which came along on such intervening track. *Held*, that the defendant was guilty of gross negligence; that whether plaintiff was chargeable with contributory negligence in attempting to cross without looking, was for the jury. *Hirsch v. New York & G. L. R. Co.*, 25 N. Y. S. R. 156, 53 Hun 633, *mem.*, 6 N. Y. Supp. 162; *affirmed* in 125 N. Y. 701, *mem.*, 34 N. Y. S. R. 1012.

Plaintiff alighted from one of defendant's trains at a depot, on the side of the train away from the depot, and in passing over another track was struck by the engine of another train and injured. The bell of the engine was ringing, and the train was moving at a speed not exceeding two or three

miles an hour. Neither the engineer nor the fireman saw the plaintiff, and he testified that he did not see the train because of the steam from the engine of the other train obstructing his vision. The train from whence plaintiff alighted had started from the depot before the trains met. *Held*: (1) that the evidence failed to show any negligence on defendant's part, so that the submission of the question to the jury was error; (2) that a rule of the defendant prohibiting trains from approaching stations when other trains are discharging their passengers had no application, as the train from whence plaintiff alighted had discharged its passengers and both trains were moving. *Goldberg v. New York C. & H. R. Co.*, 133 N. Y. 561, 30 N. E. Rep. 597, 44 N. Y. S. R. 71; *reversing* 60 Hun 586, 39 N. Y. S. R. 785, 15 N. Y. Supp. 579.

A passenger was struck by an engine between the walls of a depot and a platform while attempting to get on a train. There was evidence that the view of the engine was cut off, and that there was much noise at the time, so its approach could not be heard. There was other evidence that he ran from the depot carelessly after seeing the train. *Held*, the case was one proper for the jury. *Jones v. East Tenn., V. & G. R. Co.*, 128 U. S. 443, 9 Sup. Ct. Rep. 118. —FOLLOWING *Kane v. Northern C. R. Co.*, 128 U. S. 91. —FOLLOWED IN *Dunlap v. Northeastern R. Co.*, 130 U. S. 649. QUOTED IN *Southern Pac. Co. v. Lafferty*, 57 Fed. Rep. 536.

But as to a person who leaves a train before it arrives at the station, with intervening tracks between him and the passenger platform, it is not, as matter of law, negligence on the part of the company to run trains or engines rapidly past or through the station at such a time on such intervening tracks. *Parsons v. New York C. & H. R. Co.*, 37 Hun (N. Y.) 128.

(4) *Hand-car.*—To propel a hand-car past a station at the rate of 15 miles an hour, on a down-grade, without a bell or other notice, at an hour when passengers are gathering to take a train, is negligence; and the negligence is rendered more pronounced and striking by the fact that a freight train was lying in front of the station, which would tend to attract attention and to some extent obscure the view. *Conklin v. New York C. & H. R. Co.*, 43 N. Y. S. R. 414, 63 Hun 628, 17 N. Y. Supp. 651.

282. Management of switch.—If, by displacement of a switch by a servant of a company, a train due over the main track of a railroad is diverted to a side-track, and comes into collision there with other cars, and puts in peril passengers on an adjoining platform, it is competent for a jury to find that the omission to replace the switch was culpable negligence. *Caswell v. Boston & W. R. Corp.*, 98 Mass. 194.

While a female passenger was standing at a proper place awaiting a passenger train, through the negligence of servants of the company in displacing a switch she became frightened, believing that she was in danger from an approaching train from another direction, and, in attempting to escape, fell and was injured. The evidence showed that fleeing in the direction in which she did brought her into greater danger than if she had stood still. *Held*, that a jury was warranted in giving her damages, though the immediate cause of the injury was caused by falling over a rail while running. *Caswell v. Boston & W. R. Corp.*, 98 Mass. 194.

283. Escapement of steam.—Where the owners of a steamboat provided a pass-way which was exposed to escaping steam, and a passenger was injured in consequence by the escaping steam—*held*, that the owners were liable. *Gruber v. Washington & J. R. Co.*, 21 Am. & Eng. R. Cas. 438, 92 N. Car. 1.

284. Injuries at flag-stations.*—If at a flag-station the place is ordinarily safe and convenient for passengers to get on and off trains, the company is not liable for failure to furnish special accommodations to keep them off the wet ground in time of much rain. *Alabama & V. R. Co. v. Stacy*, 68 Miss. 463, 9 So. Rep. 349.

285. At stopping places other than stations.†—A passenger was put off at one end of a trestle, and his gun, which was in the baggage-car, at the other. After crossing to get the gun, and while returning with it, he slipped, fell, and received personal injury. *Held*, the railway company was liable for any injury to the passenger which was the probable and natural consequence of his being put off its train at one end of the trestle and his gun at the other, but not for injuries such as the one received by plaintiff, resulting from dangers

which a prudent man with time to consider would have avoided. *International & G. N. R. Co. v. Folliard*, 66 Tex. 603, 1 S. W. Rep. 624.

4. Transportation on Freight Trains,* Hand-cars, etc.

286. On freight trains, generally.—The fact that a company, for the comfort of the persons availing themselves of the opportunity, attaches a passenger coach, instead of the ordinary caboose-car, to a freight train, does not change the character of the train from a freight to a passenger, nor make it one intended to serve the public as the usual means of transportation. *Connell v. Mobile & O. R. Co.*, (Miss.) 7 So. Rep. 344.

287. Care demanded of the carrier.—A company may make itself answerable to a different liability by habitually carrying passengers on its freight trains, or by holding itself out to the public as so doing, or by failing to give any notice of its regulations, or by failing, at an established depot where it keeps its tickets for sale, to afford the passenger an opportunity to procure a ticket. *Jones v. Wabash, St. L. & P. R. Co.*, 17 Mo. App. 158.—QUOTING *Rutledge v. Hannibal & St. J. R. Co.*, 78 Mo. 291. *RECONCILING Kansas Pac. R. Co. v. Kessler*, 18 Kan. 523; *Chicago & A. R. Co. v. Flagg*, 43 Ill. 364; *Illinois C. R. Co. v. Johnson*, 67 Ill. 312; *Myrtle v. St. Louis & S. E. R. Co.*, 51 Ind. 566; *Evans v. Memphis & C. R. Co.*, 56 Ala. 246.

When a company receives and undertakes to carry a passenger upon a freight train it is bound by all the obligations of a common carrier of passengers upon regular passenger trains; but the passenger accepting such passage assumes the increased risk of travel necessarily incident to the management of a freight train by prudent and competent men. *Ohio & M. R. Co. v. Dickerson*, 59 Ind. 317.—DISTINGUISHING

* See also *ante*, 3, 22, 43-51, 81, 116, 153 (2); *post*, 359.

Duties and liabilities of companies carrying passengers on freight trains, see 44 AM. & ENG. R. CAS. 311, *abstr.*

Rights of passengers riding on freight trains, see note, 2 AM. ST. REP. 39.

Passengers on freight trains, see notes, 31 AM. & ENG. R. CAS. 6; 34 *Id.* 263; 44 *Id.* 311; 21 *Id.* 243.

Liability for injury to one riding on a freight train if the relation of carrier and passenger existed, see 37 AM. & ENG. R. CAS. 135, *abstr.*

* See also *ante*, 239.

† See also *post*, 456.

Indianapolis, B. & W. R. Co. v. Beaver, 41 Ind. 493.

And it is immaterial whether the company carries more or less passengers on its freight trains, or whether or not the passengers travel on a special permit or a regular ticket. *Hazard v. Chicago, B. & Q. R. Co.*, 1 Biss. (U. S.) 503.

If a company admits a person into a caboose attached to a freight train, to be transported as a passenger, and takes the customary fare for his transportation as such, it incurs the same liability for his safety as though he had taken passage in one of its regular passenger coaches or trains. *New York, C. & St. L. R. Co. v. Doane*, 37 Am. & Eng. R. Cas. 87, 115 Ind. 435, 15 West. Rep. 465, 1 L. R. A. 157, 7 Am. St. Rep. 451, 17 N. E. Rep. 913. *Edgerton v. New York & H. R. Co.*, 39 N. Y. 227; *affirming* 35 Barb. 389.—APPLIED IN *Maher v. Manhattan R. Co.*, 53 Hun (N. Y.) 506, 26 N. Y. S. R. 742, 6 N. Y. Supp. 309. DISTINGUISHED IN *Way v. Chicago, R. I. & P. R. Co.*, 64 Iowa 48, 52 Am. Rep. 431; *Keeley v. Erie R. Co.*, 47 How. Pr. (N. Y.) 256; *Pennsylvania R. Co. v. MacKinney*, 37 Am. & Eng. R. Cas. 153, 124 Pa. St. 462. FOLLOWED IN *Hadencamp v. Second Ave. R. Co.*, 1 Sweeney (N. Y.) 490. QUOTED IN *Ohio & M. Packet Co. v. McCool*, (Ind.) 8 Am. & Eng. R. Cas. 390; *Pittsburgh, C. & St. L. R. Co. v. Williams*, 74 Ind. 462. REVIEWED IN *Kentucky C. R. Co. v. Thomas*, 79 Ky. 160.

288. Degree of care, generally.*—

(1) *Rule stated.*—When a railroad company receives, and undertakes to carry, a passenger upon a freight train, it is bound by all the obligations of a common carrier of passengers upon regular passenger trains. *Ohio & M. R. Co. v. Dickerson*, 59 Ind. 317.—DISTINGUISHING *Indianapolis, B. & W. R. Co. v. Beaver*, 41 Ind. 493.—*Pennsylvania Co. v. Newmeyer*, 52 Am. & Eng. R. Cas. 454, 129 Ind. 401, 28 N. E. Rep. 860.

If a company assumes to carry passengers for hire upon its freight trains, it must exercise the same degree of care as is required in the operation of its regular passenger trains, the difference only being that the passenger submits himself to the inconvenience and danger necessarily attending that

mode of conveyance. *Whitehead v. St. Louis, I. M. & S. R. Co.*, 39 Am. & Eng. R. Cas. 410, 99 Mo. 263, 11 S. W. Rep. 751. *Guffey v. Hannibal & St. J. R. Co.*, 53 Mo. App. 462.

Where the plaintiff had been received by the defendant as a passenger on its freight train, the same degree of care was due to him that defendant owed to passengers on its regular trains, except that, in taking the freight train, the plaintiff accepted and traveled on it, acquiescing in the usual incidents and conduct of a freight train managed by prudent and competent men. *McGee v. Missouri Pac. R. Co.*, 31 Am. & Eng. R. Cas. 1, 92 Mo. 208, 10 West. Rep. 282, 4 S. W. Rep. 739. *Illinois C. R. Co. v. Axley*, 47 Ill. App. 307.

Where a company carries for hire, in a caboose car on a freight train, all passengers that apply, it becomes to some extent a passenger train, and the company is bound to use such safeguards for the protection of its passengers as science and skill have devised, and such as experience has proved to be efficacious in accomplishing their object on such a train. Slight care is not sufficient. It is bound to employ all the means reasonably in its power to prevent accidents and protect passengers. *Indianapolis, B. & W. R. Co. v. Beaver*, 41 Ind. 493.

A passenger who takes passage upon a freight train or in a caboose or car attached to such a train cannot expect to require the conveniences, or all the safeguards against danger that he may demand, upon trains devoted to passenger service. *Chicago & A. R. Co. v. Arnol*, 144 Ill. 261, 33 N. E. Rep. 204.

But it is the duty of the railroad company, in such case, to exercise the highest degree of care consistent with the usual and practical operation of such trains, and the same presumptions arise in favor of a passenger injured thereon while obeying the regulations of the company, as in the case of a passenger on any other train. *Woolery v. Louisville, N. A. & C. R. Co.*, 27 Am. & Eng. R. Cas. 210, 107 Ind. 381, 57 Am. Rep. 114, 8 N. E. Rep. 226.

If a company carries passengers by a freight train it is bound to use reasonable care in handling the train, to avoid injuries to the passengers; and the latter upon entering such car have a right to expect as much. *Chicago & A. R. Co. v. Arnol*, 46 Ill. App. 157.

* See also *ante*, 137-160.

Less care required of company and less damages recoverable by one riding on freight train, see 39 AM. & ENG. R. CAS. 416, *abstr.*

(2) *Illustrations.* — When the caboose which is usually attached to such a freight train is in the repair shop, and a common box-car with temporary rude seats is substituted to accommodate passengers, and the use of such box-car is more dangerous, the degree of care on the part of the company is thereby increased. *Missouri Pac. R. Co. v. Holcomb*, 44 *Am. & Eng. R. Cas.* 303, 44 *Kan.* 332, 24 *Pac. Rep.* 467.

Where, in an action by a passenger for damages for injuries received as such passenger, it is shown that the train on which the plaintiff was a passenger was a freight train, not intended for both passengers and freight, the plaintiff must show gross negligence on the part of the servants of the defendant before a recovery can be had in view of section 1054 of the Mississippi Code of 1886, which provides that "for injury to any passenger upon any freight train not being intended for both passengers and freight, such company shall not be liable except for gross negligence or carelessness of its servants." *Perkins v. Chicago, St. L. & N. O. R. Co.*, 21 *Am. & Eng. R. Cas.* 242, 60 *Miss.* 726.

Public policy requires that carriers of passengers should be held to the greatest possible care and diligence; and this rule applies to freight trains carrying passengers, and to one who is traveling thereon to accompany cattle which are in the freight cars. *Indianapolis & St. L. R. Co. v. Horst*, 93 *U. S.* 291.—*FOLLOWING* Philadelphia & R. R. Co. *v. Derby*, 14 *How. (U. S.)* 486; *Steamboat New World v. King*, 16 *How. (U. S.)* 469; *New York C. R. Co. v. Lockwood*, 17 *Wall. (U. S.)* 357.—*QUOTED IN* *Arkansas Midland R. Co. v. Canman*, 52 *Ark.* 517; *Missouri Pac. R. Co. v. Holcomb*, 44 *Kan.* 332.

289. — commensurate with the mode of conveyance.*—A company undertaking to transport passengers on the top of a stock-train must use a degree of care and diligence in running the train corresponding to the mode of conveyance adopted. There might be great negligence in subjecting such a train to certain jerks and bumps which could not affect the safety of passengers transported in inclosed cars. *Tibby v. Missouri Pac. R. Co.*, 82 *Mo.* 292. And see also *Whitehead v. St. Louis, I. M. & S. R. Co.*, 39 *Am. & Eng. R. Cas.* 410, 99 *Mo.* 263, 11 *S. W. Rep.* 751. *Guffey v. Han-*

nibal & St. J. R. Co., 53 *Mo. App.* 462. *McGee v. Missouri Pac. R. Co.*, 31 *Am. & Eng. R. Cas.* 1, 92 *Mo.* 208, 10 *West. Rep.* 282, 4 *S. W. Rep.* 739. *Illinois C. R. Co. v. Axley*, 47 *Ill. App.* 307.

A company transporting passengers on a freight train is not held to a degree of care in the operation of the train that would destroy its use for its primary purpose, but it is required to exercise the highest degree of care that is practicable and consistent with the efficient use of the means and appliances adopted; and is held to the same strict accountability for negligence of its servants, injuriously affecting the passengers, as it would be if the transportation had been by a train devoted to passenger service exclusively. *Chicago & A. R. Co. v. Arnol*, 58 *Am. & Eng. R. Cas.* 411, 144 *Ill.* 261, 33 *N. E. Rep.* 204.

A company that for years has been in the habit of carrying passengers on one of its local freight trains is required to exercise the highest possible degree of care and diligence to which such trains are susceptible. *Missouri Pac. R. Co. v. Holcomb*, 44 *Am. & Eng. R. Cas.* 303, 44 *Kan.* 332, 24 *Pac. Rep.* 467.—*QUOTING* *Indianapolis & St. L. R. Co. v. Horst*, 93 *U. S.* 291.

A man who voluntarily takes passage upon an ordinary freight train of a railway on which passenger trains are provided, is entitled to expect such security only as that mode of conveyance is reasonably expected to render; and if, while seated in the cab, he is injured by a jolt or jar in coupling cars to the train, the company is not liable to him in damages, the burden being on it to show that such jolt or jar is usual and necessary. *Crine v. East Tenn., V. & G. R. Co.*, 84 *Ga.* 651, 11 *S. E. Rep.* 555.

290. Degree of care with respect to track.*—A passenger who is permitted to ride on a freight train assumes the additional risk incident to such a train, but does not assume any additional risk so far as the condition of the track is concerned. *Ohio Valley R. Co. v. Watson, (Ky.)* 58 *Am. & Eng. R. Cas.* 418, 21 *S. W. Rep.* 244.—*QUOTING* *Indianapolis & St. L. R. Co. v. Horst*, 93 *U. S.* 291.

291. Assumption of increased risks by passenger.†—When a person

* See also *ante*, 162-164.

† Persons riding on freight train assume risk of that mode of travel and are held to a notice

* See also *ante*, 152-154.

takes passage on a freight or mixed train, he assumes all risks necessarily incident to that method of transportation. *Oviatt v. Dakota C. R. Co.*, 43 Minn. 300, 45 N. W. Rep. 436. *Whitehead v. St. Louis, I. M. & S. R. Co.*, 39 Am. & Eng. R. Cas. 410, 99 Mo. 263, 11 S. W. Rep. 751. *Guffey v. Hannibal & St. J. R. Co.*, 53 Mo. App. 462. *McGee v. Missouri Pac. R. Co.*, 31 Am. & Eng. R. Cas. 1, 92 Mo. 208, 10 West. Rep. 282, 4 S. W. Rep. 739. *Illinois C. R. Co. v. Axley*, 47 Ill. App. 307. *Ohio Valley R. Co. v. Watson*, (Ky.) 58 Am. & Eng. R. Cas. 418, 21 S. W. Rep. 244. *Pennsylvania Co. v. Newmeyer*, 52 Am. & Eng. R. Cas. 454, 129 Ind. 401, 28 N. E. Rep. 860. *Ohio & M. R. Co. v. Dickerson*, 59 Ind. 317. *Woolery v. Louisville, N. A. & C. R. Co.*, 27 Am. & Eng. R. Cas. 210, 107 Ind. 381, 57 Am. Rep. 114, 8 N. E. Rep. 226. *Louisville & N. R. Co. v. Bisch*, 41 Am. & Eng. R. Cas. 89, 120 Ind. 549, 22 N. E. Rep. 662.

The only hazards assumed by the passenger are those incident to such trains, and not hazards or peril arising from the negligence or want of proper care of those in charge of it. *Chicago & A. R. Co. v. Arnol*, 58 Am. & Eng. R. Cas. 411, 144 Ill. 261, 33 N. E. Rep. 204.

A passenger on a freight train cannot require the safeguards against danger to which passengers upon trains devoted to passenger service are entitled, but he accepts the accommodations provided subject to all the ordinary inconveniences, delays, and hazards incident to such trains, when equipped in the ordinary manner of equipping such trains and managed with proper care and skill. *Chicago & A. R. Co. v. Arnol*, 58 Am. & Eng. R. Cas. 411, 144 Ill. 261, 33 N. E. Rep. 204.

If a passenger remains on the platform of a car attached to a long and heavy freight train after warning to go inside, he thereby assumes the risk of injuries which may occur by jerks necessary in starting the train. *Louisville & N. R. Co. v. Bisch*, 41 Am. & Eng. R. Cas. 89, 120 Ind. 549, 22 N. E. Rep. 662.

A person who takes passage on a freight train, knowing the risks and inconveniences incidental thereto, is bound to exercise more care with respect to his own safety and

of rules of the company, see notes, 3 L. R. A. 156; 19 Id. 310.

Carriage in private cars—assumption of risks, see PRIVATE CARS, 1, 2.

comfort than is required of him upon ordinary passenger trains. *Wallace v. Western N. C. R. Co.*, 34 Am. & Eng. R. Cas. 553, 98 N. Car. 494, 2 Am. St. Rep. 346, 4 S. E. Rep. 503.—REVIEWED IN *Smith v. Richmond & D. R. Co.*, 34 Am. & Eng. R. Cas. 557, 99 N. Car. 241, 5 S. E. Rep. 896.

One who takes passage on a freight train, although with a caboose attached, must take notice of the character of the train and use such ordinary care to avoid injury as the nature of the mode of travel will admit; one of the risks to be guarded against being that arising from the sudden jerk of the train on starting, due to the taking up of slack between the cars. *Louisville & N. R. Co. v. Bisch*, 41 Am. & Eng. R. Cas. 89, 120 Ind. 549, 22 N. E. Rep. 662.

A party who makes an arrangement to be carried on a freight car impliedly agrees to accept and be satisfied with such accommodations, as regards carriages and seats, and places of entering and leaving the carriages, as may be found in the usual course of the business. If the cars, at the time of his agreeing to his passage and taking his seat, are at a freight depot he should be satisfied with such means of entering them as are provided for the loading of freight. If the cars are at the time standing on a part of the track where there is no provision for landing or receiving either goods or passengers, he should be satisfied with such means and facilities as may casually be within his reach. The company is not bound in either case to make landings or any provision whatever for the reception or discharge of passengers where none are expected to be. *Central R. Co. v. Smith*, 76 Ga. 209, 2 Am. St. Rep. 31.

In an action for injuries received by a passenger, growing out of no risk peculiar to a freight train, it is proper for the court to refuse an instruction as to the assumption of increased risk by a passenger on a freight train. *Eddy v. Wallace*, 52 Am. & Eng. R. Cas. 265, 49 Fed. Rep. 801, 4 U. S. App. 264, 1 C. C. A. 435.

202. Taking on and letting off passengers.*—A company when carrying passengers on a freight train is not required to draw the train up to the passenger platform unless it has been the custom of the company so to do. Otherwise they have the right to receive passengers on their freight

* See also *ante*, 213-204.

trains and discharge them at the usual place adopted for that mode of travel. *Illinois C. R. Co. v. Nelson*, 59 Ill. 110, 11 Am. Ry. Rep. 148. — DISTINGUISHING *Chicago & A. R. Co. v. Flagg*, 43 Ill. 364.

It is the duty of a company carrying passengers on a freight train, in reaching the station of the passengers' destination, to bring the train to a full stop, with due and proper care and caution with reference to the personal safety of the passengers; and thereupon not to start or move forward such train in an improper and dangerous manner at a time when such passengers may rightfully, in the exercise of due care, arise from their seats and prepare to leave the train at such station. *Chicago & A. R. Co. v. Arnol*, 58 Am. & Eng. R. Cas. 411, 144 Ill. 261, 33 N. E. Rep. 204. — FOLLOWED IN *Chicago, P. & St. L. R. Co. v. Lewis*, 145 Ill. 67.

Where a freight train is accustomed to discharge its passengers at some place other than the platform, or where it is impracticable for it to reach the platform with the caboose or car in which passengers are carried, the passengers may be required to leave the train at some other appropriate and convenient place not connected with the platform; but in such case the passengers are entitled to receive such care and attention as are necessary to enable them to properly reach the station. *New York C. & St. L. R. Co. v. Doane*, 37 Am. & Eng. R. Cas. 87, 115 Ind. 435, 7 Am. St. Rep. 451, 1 L. R. A. 157, 17 N. E. Rep. 913, 15 West. Rep. 465.

Where a company attaches a regular passenger car to a freight car, and permits all to ride who wish to do so, such train is both a freight and a passenger train; and it is the duty of the company to provide a safe passageway between the station and the place where the passenger car generally lay, where it is not drawn up to the platform; and it is liable for injuries to a passenger caused by falling into an improperly constructed cattle-guard, by reason of its failure to provide a safe passageway. *Dillaye v. New York C. R. Co.*, 56 Barb. (N. Y.) 30. — EXPLAINED IN *Hoffman v. New York C. & H. R. R. Co.*, 13 Hun 589.

293. Liability for sudden jerks.* — Though one who takes passage on a freight

train as a rule takes upon himself all the hazard, inconveniences, and rules of the company incident to the running, management, and jerking of such trains, yet where such a train has stopped and a passenger been told to alight, and while doing so is thrown down and injured by the violent jerking of the train consequent to "taking up the slack" preparatory to shifting, the company is liable. *Jones v. Missouri Pac. R. Co.*, 31 Mo. App. 614.

Where a caboose attached to a freight car is provided for the accommodation of passengers and they are thereby invited to travel, those operating the train must give such passengers such attention as is consistent with the operation of such train, but not such strict attention and care as on regular passenger trains; and the company is not exempt, under the statute, from liability for an injury, but the damages should be less than if the injury had occurred on a regular passenger train. So held, where a passenger was injured by a sudden jerk of the train while he was attempting to get off. *Reber v. Bond*, 38 Fed. Rep. 822.

Companies carrying passengers on a freight train must not start such train in an improper and dangerous manner at a time when the passengers, exercising due care, arise from their seats and prepare to leave the train. *Chicago & A. R. Co. v. Arnol*, 58 Am. & Eng. R. Cas. 411, 144 Ill. 261, 33 N. E. Rep. 204.

294. Riding against carrier's rules.* — If one is riding on a freight train with the consent of the agents in charge thereof, the company owes him a duty, though he is there against the rules of the company. *Whitehead v. St. Louis, I. M. & S. R. Co.*, 39 Am. & Eng. R. Cas. 410, 99 Mo. 263, 11 S. W. Rep. 751.

295. — at the invitation of an employe.† — Where the rules of the company prohibit freight trains from carrying passengers, a conductor cannot relax the rule without the consent of the company; and where a person applies for passage on such freight train and is told by the conductor that he cannot carry him, but is afterwards told to get on by a brakeman, he cannot recover for personal injuries received

* See also *ante*, 49, 81, 116; *post*, 359.

† See also *ante*, 45, 46.

Rights of passenger riding on freight train by direction of company's officer or employe, see note, 3 L. R. A. 156.

* See also *ante*, 205, 221, 248; *post*, 385.

while on the train. *Gulf, C. & S. F. R. Co. v. Campbell*, 76 Tex., 174, 13 S. W. Rep. 19. —APPROVING Prince v. International & G. N. R. Co., 64 Tex. 146.

296. Riding on freight car instead of in caboose.*—If a passenger on a freight train is injured by simply riding on a freight car by reason of an accident to the train, the company will be liable if the rule prohibiting passengers from riding elsewhere than in the caboose is not conspicuously posted, as required by law; but it is otherwise if the injury is the result of an attempt on his part to perform an unauthorized service for the company. *Sherman v. Hannibal & St. J. R. Co.*, 4 Am. & Eng. R. Cas. 589, 72 Mo. 62, 37 Am. Rep. 423.

297. Riding on mixed trains.—A passenger upon a mixed train assumes the extra risk necessarily incident to such trains, the carrier using such diligence and care as is required on passenger trains, so far as such care is possible and reasonably consistent with the freight business. *Fisher v. Southern Pac. R. Co.*, 89 Cal. 399, 26 Pac. Rep. 894.

In an action against a company for damages for injuries received by a passenger upon a mixed passenger and freight train, through the alleged negligence of the servants of the company in coupling the cars, an instruction to the jury, asked by the plaintiff, in the language of section 2100 of the Civil Code, "that a railroad company carrying passengers paying fare must use the utmost care and diligence for their safe carriage, and must provide everything necessary for that purpose," is not erroneous because of the omission of the concluding words of the section, "and must exercise, to that end, a reasonable degree of skill." *Fisher v. Southern Pac. R. Co.*, 89 Cal. 399, 26 Pac. Rep. 894. And see also *Thomas v. Charlotte, C. & A. R. Co.*, 38 So. Car. 485, 17 S. E. Rep. 226.

298. On construction trains.†—A person riding on a construction train over and upon side-tracks constructed in the ordinary manner thereby consents to and accepts the risks incident to such a train and track; but such person may recover for an injury caused by a failure of the company to keep such track in suitable repair for the ordinary purposes for which it was

constructed and used. *Rosenbaum v. St. Paul & D. R. Co.*, 34 Am. & Eng. R. Cas. 274, 38 Minn. 173, 36 N. W. Rep. 447.—DISTINGUISHED IN *Carlson v. Oregon S. L. & U. N. R. Co.*, 21 Oreg. 450.

The presumption that one who is permitted by an employé of a company to ride upon a construction train is not lawfully thereon may be overcome by special circumstances implying the authority of such employé to grant such privilege. *Rosenbaum v. St. Paul & D. R. Co.*, 34 Am. & Eng. R. Cas. 274, 38 Minn. 173, 36 N. W. Rep. 447. And compare also *Graham v. Toronto, G. & B. R. Co.*, 23 U. C. C. P. 541.

299. On gravel trains.—A company may be liable for an injury which happens to a person who takes passage on a gravel train not engaged in carrying passengers. *Lawrenceburgh & U. M. R. Co. v. Montgomery*, 7 Ind. 474.—EXPLAINING *Fitzpatrick v. New Albany & S. R. Co.*, 7 Ind. 436.—DISTINGUISHED IN *Higgins v. Hannibal & St. J. R. Co.*, 36 Mo. 418; *Eaton v. Delaware, L. & W. R. Co.*, 57 N. Y. 382.

300. On hand-cars.*—A passenger lawfully upon a hand-car is entitled to exact of the company ordinary care for his safety. *International & G. N. R. Co. v. Prince*, 44 Am. & Eng. R. Cas. 294, 77 Tex. 560, 14 S. W. Rep. 171.

To entitle an administratrix to recover for an injury to her intestate, caused by being negligently run over by defendants' train while he was riding between stations on a hand-car at the invitation of the foreman of a section, it must appear that the company was a common carrier of passengers by hand-cars. *Hoar v. Maine C. R. Co.*, 70 Me. 65.—REVIEWING *Graham v. Toronto, G. & B. R. Co.*, 23 U. C. C. P. 541.—DISTINGUISHED IN *Pool v. Chicago, M. & St. P. R. Co.*, 3 Am. & Eng. R. Cas. 332, 53 Wis. 657.

Where a detective employed by the company was directed by its authorized agent to go from one station to another on a hand-car—held, that the company was liable for injuries received while riding on said car, caused either by its unfitness or by negligence in its operation. *Pool v. Chicago, M. & St. P. R. Co.*, 3 Am. & Eng. R. Cas. 332.—DISTINGUISHING *Hoar v. Maine C. R. Co.*, 70 Me. 65.

* See also *post*, 487-498.

† See also *ante*, 50.

Riding on construction train, see CONDUCTOR, 3.

* See also *ante*, 51.

Power of agents to permit persons to ride on engine or hand-car, see AGENCY, 63, 64.

4. *Duty to Protect Passengers.**

a. From Carriers' Servants.†

301. Generally.—Carriers are required to behave toward their passengers with civility and propriety, and to have servants and agents competent for their several employments; and for the default of their servants or agents in any of the above particulars, or generally in any other points of duty, the carrier is directly responsible. *Sherley v. Billings*, 8 *Bush* (Ky.) 147.

By the contract of carriage a carrier of passengers assumes an absolute obligation to protect them against the wilful as well as the negligent acts of its servants. *Smith v. Manhattan R. Co.*, 45 *N. Y. S. R.* 865, 18 *N. Y. Supp.* 759.—APPLYING *Stewart v. Brooklyn & C. T. R. Co.*, 90 *N. Y.* 588; *New Orleans & N. E. R. Co. v. Jopes*, 142 *U. S.* 18; *Craker v. Chicago & N. W. R. Co.*, 36 *Wis.* 657; *Goddard v. Grand Trunk R. Co.*, 57 *Me.* 202. REVIEWING *New Jersey Steamboat Co. v. Brockett*, 121 *U. S.* 637.

302. Misconduct.†—A carrier of passengers is liable for all damages which result to the passenger through the misconduct of the carrier or his employés. *Springer Transp. Co. v. Smith*, 16 *Lea* (Tenn.) 498, 1 *S. W. Rep.* 280.

A carrier of passengers is bound to protect them absolutely against the misconduct of its own servants. *New Jersey Steamboat Co. v. Brockett*, 121 *U. S.* 637, 7 *Sup. Ct. Rep.* 1039.—DISTINGUISHED IN *Central R. Co. v. Peacock*, 69 *Md.* 257. REVIEWED

* Liability of company for arrests of passengers, see **ARREST, 3**.

Passenger's right to proper treatment, see note, 3 *L. R. A.* 133.

Liability for injuries and assaults upon passengers, see note, 26 *AM. & ENG. R. CAS.* 256.

Liability for torts, see note, 12 *L. R. A.* 113.

Negligence in not furnishing effective police force to guard passengers, see note, 26 *AM. & ENG. R. CAS.* 250.

Arresting, detaining, and searching of passengers, see **AGENCY, 94**.

Liability for false imprisonment of passengers, see **FALSE IMPRISONMENT**.

Liability to suit for malicious prosecution, see **MALICIOUS PROSECUTION, 3-16**.

† Injuries to passengers by servants, see notes, 21 *AM. & ENG. R. CAS.* 336; 15 *Id.* 149; 18 *Id.* 382, 390; 34 *Id.* 350.

Liability for arrests of passengers by servants, see note, 32 *AM. ST. REP.* 100.

As to passenger's right to proper treatment from company's agents and servants, see note, 1 *L. R. A.* 682.

‡ See also **AGENCY, 96**.

IN *Smith v. Manhattan R. Co.*, 45 *N. Y. S. R.* 865.

303. — within line of employment.*—A company is liable to the same extent as an individual for any injury done to a passenger by a person in the course of his employment who is in the service of the company. *Corbett v. Twenty-third St. R. Co.*, 42 *Hun* (N. Y.) 587, 4 *N. Y. S. R.* 535.—APPLYING *Ramsden v. Boston & A. R. Co.*, 104 *Mass.* 117; *Higgins v. Watervliet Turnpike Co.*, 46 *N. Y.* 23; *Hoffman v. New York C. & H. R. R. Co.*, 87 *N. Y.* 25; *Flynn v. Central Park, etc., R. Co.*, 17 *J. & S. (N. Y.)* 81.

While a carrier of passengers, by his contract of transportation, undertakes to protect the passenger against any injury arising from the negligence or wilful misconduct of its servants when engaged in the performance of their duties, to warrant a recovery of damages alleged to have been caused by a breach of the undertaking, the negligence or wilful misconduct must not only be shown, but it must also appear that the servant was acting at the time in the course of his employment. *Mulligan v. New York & R. B. R. Co.*, 53 *Am. & Eng. R. Cas.* 47, 129 *N. Y.* 506, 29 *N. E. Rep.* 952, 42 *N. Y. S. R.* 83; *reversing* 39 *N. Y. S. R.* 20, 14 *N. Y. Supp.* 456.

It is the duty of the carrier to treat the passenger properly and carry him safely; to protect the passenger against any injury from the negligence or wilful misconduct of its servants, while performing the contract, and of his fellow-passenger and strangers, so far as practicable. *Gillingham v. Ohio River R. Co.*, 51 *Am. & Eng. R. Cas.* 222, 35 *W. Va.* 588, 14 *L. R. A.* 798, 14 *S. E. Rep.* 243.

304. — outside of line of employment† — Malice.—Where the employé goes outside of the line of his employment and, for purposes of his own, inflicts an injury upon a person having no claims upon the company, the latter is not liable; but the rule does not extend to an injury inflicted by servants of a railroad upon passengers. *Chicago & E. I. R. Co. v. Flexman*, 9 *Ill. App.* 250.

The carrier is responsible for the malicious and wanton acts of its servants to a passenger, whether done in the line of his

* See also **AGENCY, 73**.

† See also **AGENCY, 74**.

employment or not, if done during the course of the discharge of his duty to the master which relates to the passenger; but the carrier is responsible for such conduct of the servant to a stranger or trespasser only when the act is in the line of his employment. *Eads v. Metropolitan St. R. Co.*, 43 Mo. App. 536.

The rule relieving a master from liability for a malicious injury inflicted by his servant when not acting within the scope of his employment does not apply as between a common carrier of passengers and a passenger. Such a carrier undertakes to protect the passenger against any injury arising from the negligence or wilful misconduct of its servants while engaged in performing a duty which the carrier owes to the passenger. *Stewart v. Brooklyn & C. T. R. Co.*, 12 Am. & Eng. R. Cas. 127, 90 N. Y. 588, 43 Am. Rep. 185.—LIMITING *Isaacs v. Third Ave. R. Co.*, 47 N. Y. 122, 7 Am. Rep. 418.—APPLIED IN *Smith v. Manhattan R. Co.*, 45 N. Y. S. R. 865, 18 N. Y. Supp. 759. FOLLOWED IN *Carpenter v. Boston & A. R. Co.*, 21 Am. & Eng. R. Cas. 331, 97 N. Y. 494, 49 Am. Rep. 540.

305. Tortious acts, generally.*—Railroad companies are responsible to passengers for the torts of the conductors and other servants of the company employed in running trains, when such torts are committed in connection with the business intrusted to such servants, and spring from, or grow immediately out of, such business. *Gasway v. Atlanta & W. P. R. Co.*, 58 Ga. 216, 16 Am. Ry. Rep. 99.

The rule that carriers of passengers are liable for the negligent or wrongful acts of their servants and employes does not always depend upon the fact that the carrier owes a duty or is under some obligation to the party injured. *Johnson v. Chicago, R. I. & P. R. Co.*, 8 Am. & Eng. R. Cas. 206, 58 Iowa 348, 12 N. W. Rep. 329.

306. Violence.—It results necessarily that the contract between the carrier and the passenger must guarantee immunity to the passenger from violence at the hands of those whose duty it is to afford protection against violence by strangers. *Sherley v. Billings*, 8 Bush (Ky.) 147.

* See also AGENCY, 94-98.

Liability to passengers for torts of trainmen, see note, 42 AM. REP. 36.

Limitation of carrier's liability for torts of employé, see note, 1 L. R. A. 143.

It is not error for the court to instruct the jury that carriers are bound to protect their passengers from violence on the part of their servants, simply because this duty is not an absolute one in all cases. *Louisville & N. R. Co. v. Kelly*, 13 Am. & Eng. R. Cas. 1, 92 Ind. 371, 47 Am. Rep. 149.

Plaintiff sued for an injury received while getting on a boat which the company ran across an intervening water to reach the beginning of its road. He was a passenger, and while crossing the gang-plank to the deck of the boat, which was steep and slippery, he slipped upon a rope, and was about to fall when he was seized by a deck-hand and pulled so violently onto the deck that he fell and received severe injuries. Held, that the proximate cause of the accident was the rope, and that it was a careless as well as a dangerous act on the part of the company to leave it across the gang-plank, and that a verdict in favor of plaintiff should not be set aside. *Simonin v. New York, L. E. & W. R. Co.*, 36 Hun (N. Y.) 214.

And the defendant could not complain of the question being left to the jury as to whether such deck-hand was acting within the scope of his duty, as it was more favorable than the defendant had a right to demand. *Simonin v. New York, L. E. & W. R. Co.*, 36 Hun (N. Y.) 214.—FOLLOWING *Drew v. Sixth Ave. R. Co.*, 26 N. Y. 49.

307. Assaults.*—The carrier must not only protect his passengers against the violence and insults of strangers and co-passengers, but a fortiori against the violence and insults of his own servants. If this duty is not performed, if this protection is not afforded, but on the contrary the passenger is assaulted and insulted through the negligence or wilful misconduct of the carrier's servant, the carrier is necessarily responsible. *Sherley v. Billings*, 8 Bush (Ky.) 147.—QUOTED IN *Winnegar v. Central Pass. R. Co.*, 34 Am. & Eng. R. Cas. 462, 85 Ky. 547, 4 S. W. Rep. 237.

In every contract of carriage there is an implied stipulation that the passenger shall be humanely treated, and that the servants

* See also AGENCY, 96; ASSAULT, CIVIL ACTION FOR, 2-8; CONDUCTOR, 10; also post, 315, 326.

Liability for assaults on passengers by servants, see notes, 32 AM. ST. REP. 95; 34 AM. & ENG. R. CAS. 380; 18 Id. 382; 15 Id. 149; 13 Id. 4; 14 L. R. A. 737.

of the carrier engaged in the performance of their master's contract shall not unjustifiably assault, beat, or otherwise maltreat the passenger while the carrier sustains such contract relations to him; and the carrier is liable for any breach of such contract, regardless of the servant's motive. *Chicago, R. I. & P. R. Co. v. Barrett*, 16 Ill. App. 17.

308. — assaults on female passengers.*—A company is liable in compensatory damages for an indecent approach or assault by a conductor upon a female passenger. *Craker v. Chicago & N. W. R. Co.*, 36 Wis. 657, 9 Am. Ry. Rep. 118.—QUOTED IN *Randolph v. Hannibal & St. J. R. Co.*, 18 Mo. App. 609; *McGinnis v. Missouri Pac. R. Co.*, 21 Mo. App. 399. REVIEWED IN *Brabbitt v. Chicago & N. W. R. Co.*, 38 Wis. 289.

With respect to female passengers, the carrier contracts by implication that they shall be protected against obscene conduct, lascivious behavior, and every immodest and libidinous approach. *Nieto v. Clark*, 1 Cliff. (U. S.) 145. And see also *Louisville & N. R. Co. v. Ballard*, 85 Ky. 307, 7 Am. St. Rep. 600. *Campbell v. Pullman Palace Car Co.*, 42 Fed. Rep. 484. *Sira v. Wabash R. Co.*, 115 Mo. 127, 21 S. W. Rep. 905. *Batton v. South & N. Ala. R. Co.*, 23 Am. & Eng. R. Cas. 514, 77 Ala. 591, 54 Am. Rep. 80.

309. Insults.†—The compensation the carrier receives from the passenger is not only in consideration that he will transport him from one point to another, as may be agreed upon, but that during the time he is so transporting him reasonable diligence will be used to protect him from insult and injury from company's servants. *Sherley v. Billings*, 8 Bush (Ky.) 147. *Eads v. Metropolitan St. R. Co.*, 43 Mo. App. 536. *Winnegar v. Central Pass. R. Co.*, 34 Am. & Eng. R. Cas. 462, 85 Ky. 547, 4 S. W. Rep. 237.

A carrier is bound to protect its passengers from violence and insults by strangers and fellow-passengers, and *a fortiori* against the violence and insults of its own servants. *Farber v. Missouri Pac. R. Co.*, 116 Mo. 81, 22 S. W. Rep. 631.

* Liability for assault by servant on female passenger, see note, 32 AM. ST. REP. 101.

† See also *post*, 314, 327.

Company liable to passengers for insulting or injurious acts of employés, see note, 21 AM. & ENG. R. CAS. 336.

If the conductor, without sufficient excuse, refuses the demand of a ticket-holder to be provided with a seat, and accompanies the refusal with insulting remarks, the company will be liable therefor in tort. *Louisville, N. O. & T. R. Co. v. Patterson*, 69 Miss. 421, 13 So. Rep. 697.

A passenger is entitled to recover damages from the company for insolent, abusive, and offensive words spoken to her by the conductor, unless the company can show justification or other defense. The burden is upon the defendant to establish such defense. *Bryan v. Chicago, R. I. & P. R. Co.*, 16 Am. & Eng. R. Cas. 335, 63 Iowa 464, 19 N. W. Rep. 295.—FOLLOWED IN *Lindsay v. Des Moines*, 68 Iowa 368.

Plaintiff, a colored passenger, sued to recover damages for being removed from a first-class car by two other passengers, who seemed to be incited to do so by the news-vender of the train. *Held*, that if the conductor and brakeman conspired with the passengers to remove plaintiff, or if they saw that the passengers were removing him, and made no effort to prevent it, gave no discountenance to the insults and violence offered, or made no attempt to repair the mischief by restoring plaintiff to his seat, the company was liable. *Murphy v. Western & A. R. Co.*, 21 Am. & Eng. R. Cas. 258, 23 Fed. Rep. 637.

310. — where passenger refuses to pay fare.—By refusal to pay his fare the passenger deprives himself of the right to insist upon courteous treatment from the company's employés and cannot complain of their misconduct. *Stone v. Chicago & N. W. R. Co.*, 47 Iowa 82, 17 Am. Ry. Rep. 461.—DISTINGUISHING *McKinley v. Chicago & N. W. R. Co.*, 44 Iowa 314.

A husband and wife sued to recover damages for the discourteous language and manner of a conductor in removing them from a train for the non-payment of fare. No question was raised as to the right of the conductor to expel them, or that any force was used. The complaint charged that the conductor spoke "in a brusque, decided manner," and "very decidedly, rudely, and quickly" ordered them off the train, the wife at the time seeming to be in delicate health and resting her head on a pillow. *Held*, not such mistreatment as to render the company liable. *Rose v. Wilmington & W. R. Co.*, 106 N. Car. 168, 11 S. E. Rep. 526.—DISTINGUISHING Common-

wealth v. Power, 7 Metc. (Mass.) 596; *Craker v. Chicago & N. W. R. Co.*, 36 Wis. 657.—**DISTINGUISHED IN** *Browne v. Raleigh & G. R. Co.*, 108 N. Car. 34.

311. From servant who has contagious disease.*—Where a company has in its employ an agent at a station authorized to sell tickets upon its line of road, and he happens at the time to be afflicted with a contagious disease, and another person comes in contact with such agent in purchasing a ticket and thereby contracts from the agent the disease, the company is not liable in damages therefor if neither the company nor any of its superior officers had any knowledge that the agent was afflicted with such a disease. In such a case, knowledge on the part of the company is an element essential to liability. *Long v. Chicago, K. & W. R. Co.*, 53 Am. & Eng. R. Cas. 45, 48 Kan. 28, 28 Pac. Rep. 977, 15 L. R. A. 319.

312. Protection of intoxicated passenger.†—Rudeness and intoxication on the part of a passenger may justify his exclusion from the train; but they do not justify those in charge of the train in inflicting personal violence upon him because of such rudeness or because of his intoxication. *Illinois C. R. Co. v. Sheehan*, 29 Ill. App. 90.

Where a passenger becomes drunk and fails to leave the train at his destination, and is lawfully removed therefrom and placed a short distance from the track, the company is not thereafter chargeable with notice of his condition or whereabouts, and is not liable if he is accidentally run over and killed by another train. *McClelland v. Louisville, N. A. & C. R. Co.*, 18 Am. & Eng. R. Cas. 260, 94 Ind. 276.

Where an unattended passenger, after entering upon a journey, becomes sick and unconscious from excessive drinking, it is the duty of the company to remove him from the train and leave him until he is in a fit condition to resume his journey, or until he has obtained the necessary assistance to take care of him to the end of the journey. *Atchison, T. & S. F. R. Co. v. Weber*, 21 Am. & Eng. R. Cas. 418, 33 Kan. 543, 6 Pac. Rep. 877.

The duty of the company to such a pas-

senger does not end with removing him from the train, but it is bound to the exercise of reasonable and ordinary care in temporarily providing for his protection and comfort. *Atchison, T. & S. F. R. Co. v. Weber*, 21 Am. & Eng. R. Cas. 418, 33 Kan. 543, 6 Pac. Rep. 877.

b. From Other Passengers.

313. Generally.—The duty of protection which a carrier owes to a passenger includes a responsibility for the unlawful acts and annoyances of fellow-passengers, when by the exercise of the highest degree of care those acts might have been foreseen and prevented. *Texas & P. R. Co. v. Johnson*, 2 Tex. App. (Civ. Cas.) 154.

Where the conduct of a passenger is such as to render his presence dangerous to fellow-passengers, or such as will occasion them serious annoyance or discomfort, it is not only the right but the duty of a company to exclude such passenger from its train. *Atchison, T. & S. F. R. Co. v. Weber*, 21 Am. & Eng. R. Cas. 418, 33 Kan. 543, 6 Pac. Rep. 877.

314. Violence, insult, and injury, generally.*—It is everywhere agreed that carriers must treat their passengers with respect and must endeavor to protect them from danger or insult from strangers and passengers. *Eads v. Metropolitan St. R. Co.*, 43 Mo. App. 536. *New Orleans, St. L. & C. R. Co. v. Burke*, 53 Miss. 200, 9 Am. Ry. Rep. 308.

The law implies a contract upon the part of a carrier of passengers for the protection of the party carried from the insults and wanton interference of strangers and fellow-passengers; and for any violation of the implied contract by force or negligence, the carrier is liable in an action of contract or tort. *Winnegar v. Central Pass. R. Co.*, 34 Am. & Eng. R. Cas. 462, 85 Ky. 547, 4 S. W. Rep. 237.—**QUOTING** *Sherley v. Billings*, 8 Bush (Ky.) 147. **REVIEWING** *Goddard v. Grand Trunk R. Co.*, 57 Me. 202; *Milwaukee & M. R. Co. v. Finney*, 10 Wis. 388.

He is bound to use the utmost practicable care to protect them in transit from violence and insults from those on the train, including fellow-passengers. A failure to do so will render the carrier liable for any damage naturally and directly resulting

* See also *post*, 320.

† See also *ante*, 37, 101, 115, 147; *post*, 353, 400, 434.

* See also *ante*, 306, 309; *post*, 327.

therefrom. *Spohn v. Missouri Pac. R. Co.*, 101 Mo. 417, 14 S. W. Rep. 880.

And if it be necessary to enable the carrier to discharge his duty, the conductor should stop the train and summon his fellow-employees on it and passengers who are willing to assist, and eject from the train any person or passenger guilty of disorderly, insulting, or threatening conduct; and a failure to discharge this duty, so far as he has the means and power, renders the railway company liable in damages to the insulted or injured passenger. *New Orleans, St. L. & C. R. Co. v. Burke*, 53 Miss. 200, 9 Am. Ry. Rep. 308.—APPROVING *Vinton v. Middlesex R. Co.*, 11 Allen (Mass.) 304.—REVIEWED IN *Royston v. Illinois C. R. Co.*, 67 Miss. 376, 7 So. Rep. 320.

315. Assaults.—It is the duty of the carrier to protect its passengers, particularly females, from insults and assaults from their fellow-passengers, and from annoyance and injuries of disorderly persons. *Sira v. Wabash R. Co.*, 115 Mo. 127, 21 S. W. Rep. 905.

A company is not liable for the death of a passenger where he was killed by being thrown from a platform-car by other passengers, and there was nothing in the conduct of such passengers at the time the train left the last station from which the company could reasonably anticipate that an assault would be committed on the deceased by reason of furnishing such a car for transportation. *Fellon v. Chicago, R. I. & P. R. Co.*, 27 Am. & Eng. R. Cas. 229, 69 Iowa 577, 29 N. W. Rep. 618.

316. Rape.—Though the conductor was guilty of a wrongful act in requiring plaintiff, a young woman sixteen or seventeen years of age, to get off the train before reaching her destination, a rape committed on her by a male passenger who also left the train at the station at which plaintiff was compelled to alight, and who decoyed her into a saloon under the pretense of conducting her to a hotel, is not the direct and immediate consequence of the conductor's wrongful act, where it appears that such station was not an inappropriate or unsafe

place for a youthful and inexperienced female traveling alone to remain between trains. *Sira v. Wabash R. Co.*, 115 Mo. 127, 21 S. W. Rep. 905.

The mere fact that such male passenger in the hearing of the conductor offered to conduct the plaintiff to the hotel is not sufficient to suggest to the conductor plaintiff's assault and ravishment, so as to render the company liable therefor. *Sira v. Wabash R. Co.*, 115 Mo. 127, 21 S. W. Rep. 905. See also *Nieto v. Clark*, 1 Cliff. (U. S.) 145.

317. Acts of disorderly passengers.—Where a company negligently fails in its duty to preserve order and protect a peaceable passenger on one of its trains against riotous and disorderly fellow-passengers, and such passenger is wounded by the careless discharge of a pistol in the hands of one of the turbulent fellow-passengers, it is liable for the injury. *Illinois C. R. Co. v. Minor*, 52 Am. & Eng. R. Cas. 441, 69 Miss. 710, 16 L. R. A. 527, 11 So. Rep. 101.

Where, through the mistake of the ticket agent, plaintiff and his wife had been compelled to travel in a second-class instead of in a first-class carriage, the plaintiff is entitled to recover damages for injuries sustained by his wife in consequence of the discomforts of the carriage and the disorderly conduct of the other passengers. *St. Louis, A. & T. R. Co. v. Mackie*, 37 Am. & Eng. R. Cas. 94, 71 Tex. 491, 1 L. R. A. 667, 9 S. W. Rep. 451.

There is no such privity between a company and a disorderly passenger as to make the former liable for the acts of the latter, on the principle of *respondet superior*. *Pittsburgh, Ft. W. & C. R. Co. v. Hinds*, 53 Pa. St. 512.—APPLIED IN *Putnam v. Broadway & S. A. R. Co.*, 55 N. Y. 108.

318. —of intoxicated passengers.—A railroad is liable to a passenger for an injury received at the hands of drunken and disorderly passengers, when nothing was done by the conductor in charge to prevent it. *Pittsburgh & C. R. Co. v. Pillow*, 76 Pa. St. 510.

Where a passenger enters a car armed with a pistol, and it is clear that for the time being he is insane, either from excessive drinking or otherwise, it is the duty of the conductor to restrain and disarm him, or to remove him from the train. *King v. Ohio & M. R. Co.*, 18 Am. & Eng. R. Cas. 386, 22 Fed. Rep. 413.

* See also *ante*, 307, 308; *post*, 326; and ASSAULT, CIVIL ACTION FOR, §.

Duty to protect passenger from assault of fellow-passenger, see note, 16 L. R. A. 627.

Liability for assault upon passenger by a fellow-passenger, see notes, 52 A. & Eng. R. Cas. 446; 32 Am. St. Rep. 90.

A conductor is not authorized to remove a passenger merely because he is intoxicated, unless there be reason to believe that he will become dangerous to fellow-passengers. *Putnam v. Broadway & S. A. R. Co.*, 15 *Abb. Pr. N. S. (N. Y.)* 383.

By reason of a mistake in giving plaintiff and his wife second-class tickets when they had paid for first-class, they were forced to ride in a second-class car. In a suit for damages they claimed, as an item of damages, for the indignities and discomforts, especially to the wife, by reason of the rough, profane, and obscene language of drunken persons that was permitted in the car. *Held*, that such damages were recoverable. The company was bound to protect them against discomforts which were not incident to that mode of travel. *St. Louis, A. & T. R. Co. v. Mackie*, 37 *Am. & Eng. R. Cas.* 94, 71 *Tex.* 491, 1 *L. R. A.* 667, 9 *S. W. Rep.* 451.

319. Insane passengers.*—The degree of care imposed upon a company which has accepted an insane person as a passenger is of the highest character; if the safety and comfort of the other passengers will not be imperiled, the insane person may be taken to the end of his journey or he may be removed from the train at the first station where he may be properly cared for; but so long as he is on the train the company is bound to do whatever in the way of restraint or isolation is reasonably demanded for the safety and comfort of the other passengers. *Meyer v. St. Louis, I. M. & S. R. Co.*, 58 *Am. & Eng. R. Cas.* 111, 54 *Fed. Rep.* 116, 10 *U. S. App.* 677, 4 *C. C. A.* 221.

So soon as a company acquires knowledge of the insane condition of a passenger, whether such knowledge is acquired before or at the time he becomes a passenger or from his acts subsequent to the beginning of the journey, it is charged with the duty of exercising proper care for the protection of the other passengers upon the train. *Meyer v. St. Louis, I. M. & S. R. Co.*, 58 *Am. & Eng. R. Cas.* 111, 54 *Fed. Rep.* 116, 10 *U. S. App.* 677, 4 *C. C. A.* 221.

If the employes of the company in the exercise of the high degree of care demanded of them could not have reasonably anticipated that a failure to eject or restrain the insane passenger might result in doing in-

jury to his fellow-passengers, their non-action would not constitute negligence. *Meyer v. St. Louis, I. M. & S. R. Co.*, 58 *Am. & Eng. R. Cas.* 111, 54 *Fed. Rep.* 116, 10 *U. S. App.* 677, 4 *C. C. A.* 221.

If there is reasonable ground to believe that an insane passenger is dangerous, it is the duty of the conductor to restrain him, even though he may be quiet at the time; and it is error to instruct the jury that the law does not justify restraint if the insane person is violent in neither word nor act and gives no indication of insanity except by expressing fear of violence from others. *Meyer v. St. Louis, I. M. & S. R. Co.*, 58 *Am. & Eng. R. Cas.* 111, 54 *Fed. Rep.* 116, 10 *U. S. App.* 677, 4 *C. C. A.* 221.

320. Passengers with contagious diseases.*—Where a passenger breaks out with what is supposed to be a contagious disease, so that those in charge of the train are justified in removing him, it is their duty, in doing so, to put him off where he can find medical attendance and other accommodations, or at least where there is reasonable ground for believing that he can. *Paddock v. Atchison, T. & S. F. R. Co.*, 37 *Fed. Rep.* 841, 4 *L. R. A.* 231.

If a passenger breaks out with eruptions and the best medical advice that can be obtained is unable to disclose whether they proceed from small-pox or not, and if from any prior conduct of the party, or any statement that he has made, there is a well-grounded, clear, and honest belief that he is suffering from small-pox, then the officers of the company are justified in removing him from the train, although it may turn out afterward that they were mistaken. *Paddock v. Atchison, T. & S. F. R. Co.*, 37 *Fed. Rep.* 841, 4 *L. R. A.* 231.

321. Thefts committed.†—A company is not liable for a theft committed by one passenger upon another, where the train employes have used reasonable care. *Illinois C. R. Co. v. Handy*, 63 *Miss.* 609.

322. Necessity of carrier's knowledge of the threatened danger.—While it is the duty of a company to protect its passengers, especially female, from the wrongful acts of fellow-passengers, yet to render it liable it must be shown that its employes had knowledge or opportunity to

* See also *ante*, 114, 146.

2 D. R. D.—28.

* See also *ante*, 311.

† See also *post*, 329.

know of the threatened injury, and that by prompt intervention it could have been prevented or mitigated. *Sira v. Wabash R. Co.*, 58 Am. & Eng. R. Cas. 538, 115 Mo. 127, 21 S. W. Rep. 905.

A company is not liable because a drunken passenger makes a wanton and unprovoked assault upon another, where there is no reason for believing that he would injure others, and the company had no knowledge that he was an unsafe and dangerous man. Mere drunkenness in itself will not justify such belief. *Putnam v. Broadway & S. A. R. Co.*, 15 Abb. Pr. N. S. (N. Y.) 383.—EXPLAINING *Pittsburgh, Ft. W. & C. R. Co. v. Hinds*, 53 Pa. St. 512. QUOTING *Flint v. Norwich & N. Y. Transp. Co.*, 34 Conn. 554, 6 Blatchf. (U. S.) 158.

Where the injury is committed by one passenger on another, or is so threatened, it is necessary for the passenger suing therefor to show that the conductor knew of the threatened injury, or that, from the character and number of persons on the train and the surrounding circumstances, he might reasonably have anticipated it. He must, when the occasion arises for his interference, bring to his aid all the force at his command. *Spohn v. Missouri Pac. R. Co.*, 26 Am. & Eng. R. Cas. 252, 87 Mo. 74.—QUOTED IN *Blair v. Mound City R. Co.*, 31 Mo. App. 224.

To render the company liable, it must be shown that the conductor had knowledge, or opportunity of knowing, that the injury was threatened, and also that, by his prompt interposition, he could have prevented or mitigated it; and it must be shown also, that with the power at his disposal, namely, his own exertions, and the assistance of the other employes on the train, and willing passengers, he could have prevented or mitigated it; for all that is required of him is a fair and honest effort, with the best means in his power, to prevent the wrong. *New Orleans, St. L. & C. R. Co. v. Burke*, 53 Miss. 200, 9 Am. Ry. Rep. 308.

323. Implied police power of carrier.—It is the duty of a carrier of passengers to exercise the highest diligence reasonably practicable to preserve order on its trains, and protect passengers against violence, abuse, or injury from fellow-passengers. *Spohn v. Missouri Pac. R. Co.*, 26 Am. & Eng. R. Cas. 252, 87 Mo. 74. *New Orleans, St. L. & C. R. Co. v. Burke*, 53 Miss. 200, 9 Am. Ry. Rep. 308. *Sira v.*

Wabash R. Co., 58 Am. & Eng. R. Cas. 538, 115 Mo. 127, 21 S. W. Rep. 905.

This duty is exercised under an implied police power to prevent an abuse of their privileges by passengers. *Mullan v. Wisconsin C. R. Co.*, 47 Am. & Eng. R. Cas. 649, 46 Minn. 474, 49 N. W. Rep. 249.

324. Removal of disorderly passenger from ladies' car.*—A passenger on a train may, for improper conduct, be removed from one car to another, provided the removal is not made in an unreasonable or improper manner, or by the employment of unnecessary force. *Marquette v. Chicago & N. W. R. Co.*, 33 Iowa 562.

The removal of a passenger, for alleged misconduct, from the ladies' car to another, by officers of the train, while the train was moving at twenty miles an hour—held, not to be negligent or wrongful, *per se*, but a question to be left to the jury under all the facts of the case. *Marquette v. Chicago & N. W. R. Co.*, 33 Iowa 562.

c. From Third Persons.

325. Generally.—A carrier is not bound to protect its passengers from rudeness or bad manners on the part of strangers or other passengers, unless such conduct amounts to a breach of the peace. *Ellinger v. Philadelphia, W. & B. R. Co.*, 153 Pa. St. 213, 25 Atl. Rep. 1132.

A carrier is not liable for an injury which results from the deliberate, intended, wilful, affirmative, positive act of a criminal trespasser. *Fredericks v. Northern C. R. Co.*, 58 Am. & Eng. R. Cas. 91, 157 Pa. St. 103, 27 Atl. Rep. 689.

If the conductor does not do all that he can to quell a disturbance of the peace by strangers upon cars, and injury results from such disturbance, he is guilty of negligence, for which the company will be responsible. *Pittsburgh, Ft. W. & C. R. Co. v. Hinds*, 53 Pa. St. 512.—REVIEWED IN *Goddard v. Grand Trunk R. Co.*, 57 Me. 202.

While a carrier of passengers is bound to exercise the utmost vigilance in protecting his passengers from violence of strangers, yet for a neglect to perform this duty his liability is no more extensive than in cases of negligence by which injury comes to the person or property of the passenger from other causes. The liability in such case arises on contract, and is limited to such

* See also *ante*, 208.

damage as is within the contemplation of the contract between the carrier and the passenger, or within the scope of the duty of the former. *Weeks v. New York, N. H. & H. R. Co.*, 72 N. Y. 50, 28 Am. Rep. 104; *affirming 9 Hun* 669.—FOLLOWING *Putnam v. Broadway & S. A. R. Co.*, 55 N. Y. 108. REFERRING to *Magnin v. Dinsmore*, 62 N. Y. 35.

Although it is the duty of a company as carrier to protect its passengers, and especially female passengers, against violence or disorderly conduct on the part of its own agents and servants, other passengers, and strangers, when such violence or misconduct may be reasonably anticipated and prevented, yet it is not liable to an action for damages at the suit of a female passenger, on account of obscene and profane language, indecent exposure of the person, and other disorderly conduct by two or three intruders who came into the waiting-room at the station while plaintiff was awaiting the arrival of the train, when it is not shown that the company had notice of any facts which justified the expectation of such an outrage. *Batton v. South & N. Ala. R. Co.*, 23 Am. & Eng. R. Cas. 514, 77 Ala. 591, 54 Am. Rep. 80.—QUOTING *Britton v. Atlanta & C. A. L. R. Co.*, 18 Am. & Eng. R. Cas. 391, 88 N. Car. 536, 43 Am. Rep. 749. REVIEWING *Pittsburgh, Ft. W. & C. R. Co. v. Hinds*, 53 Pa. St. 512.

326. Assaults.*—The company owes to every passenger the duty of protecting him from the violence and assaults of his fellow-passengers or intruders, and will be held responsible for its own or its servants' neglect in the premises, when the same might have been foreseen and prevented by the exercise of proper care. *Britton v. Atlanta & C. A. L. R. Co.*, 18 Am. & Eng. R. Cas. 391, 88 N. Car. 536, 43 Am. Rep. 749.—QUOTED IN *Batton v. South & N. Ala. R. Co.*, 23 Am. & Eng. R. Cas. 514, 77 Ala. 591, 54 Am. Rep. 80.

327. Violence and insults.†—A special duty rests upon the carrier to protect its passengers against the violence and insults of strangers and co-passengers, and for

a stronger reason, against the violence and insults of its own servants; and for a breach of that duty a carrier ought to be compelled to make the amplest reparation. *Southern Kan. R. Co. v. Rice*, 34 Am. & Eng. R. Cas. 316, 38 Kan. 398, 16 Pac. Rep. 817.

328. Acts of a mob.*—It is not the duty of a company to provide a police force sufficient to quell a large wayside mob. Passengers must take the risk of injury in such cases. *Pittsburgh, Ft. W. & C. R. Co. v. Hinds*, 53 Pa. St. 512.—REVIEWED IN *Batton v. South & N. Ala. R. Co.*, 23 Am. & Eng. R. Cas. 514, 77 Ala. 591, 54 Am. Rep. 80.

Where, by the exercise of ordinary care, danger to passengers on a train of cars may be anticipated from the attack of a mob of striking laborers upon laborers of another class, taken on board the train, it will be negligence to stop the train at a place not a regular station for stopping, and there take on such objectionable laborers, and thus expose other passengers to a great peril from a threatened attack, without taking the utmost care and vigilance to prevent injury to passengers. In such case the offensive persons, against whom an attack was reasonably to be expected, should at least be placed in a car by themselves, where they might protect themselves without danger to the regular passengers, having no notice of the danger, or extraordinary precautionary measures should be taken to prevent the assault of the mob. *Chicago & A. R. Co. v. Pillsbury*, 31 Am. & Eng. R. Cas. 24, 123 Ill. 9, 14 N. E. Rep. 22, 11 West. Rep. 757.

In an action by a passenger to recover for an injury caused by a wound from a pistol-shot fired by some of the mob attacking the car, which attack might, by ordinary care, have been expected, the court, on behalf of the plaintiff, instructed the jury that it was the duty of the defendant, as common carrier of passengers, "to exercise the utmost care, skill, and vigilance to carry plaintiff safely and to protect him from any and all danger, from whatever source arising, so far as the same could, by the exercise of such a degree of care and vigilance, have been reasonably foreseen and prevented." *Held*, that, as applicable to the facts of the case, the instruction stated the law with sufficient accuracy. *Chicago & A. R. Co. v. Pillsbury*, 31 Am. & Eng. R. Cas. 24, 123 Ill. 9, 14 N. E. Rep. 22, 11 West. Rep. 757.

* See also ASSAULT, CIVIL ACTION FOR, 10; STRIKES, 4; and *ante*, 307, 308, 315.

Liability for assaults on passengers by third persons, see note, 28 AM. REP. 112.

Assaults by fellow-passengers and strangers, see note, 34 AM. & ENG. R. CAS. 386.

† See also *ante*, 306, 309, 314.

* See also *ante*, 158, 177.

A train having stopped at a regular station, a riotous crowd rushed upon the cars in such numbers as to defy the power of the conductor to resist. They commenced a fight in the cars, in which plaintiff was injured. *Held*, that the fact that the conductor knew that the crowd were improper persons was immaterial. *Pittsburgh, Ft. W. & C. R. Co. v. Hinds*, 53 Pa. St. 512.—EXPLAINED IN *Putnam v. Broadway & S. A. R. Co.*, 15 Abb. Pr. N. S. (N. Y.) 383. QUOTED IN *Chicago & A. R. Co. v. Pillsbury*, 26 Am. & Eng. R. Cas. 241, 8 N. E. Rep. 803.

320. Robbery.*—Plaintiff was a passenger on one of defendant's trains going to New York city. On arrival at Forty-second Street, the cars were disconnected and drawn down by horses. The car in which plaintiff was was left standing alone, without any employé of the road upon it. Plaintiff stepped to the door of the car, where several persons, not passengers, attacked and robbed him of a package of bonds of the value of \$16,000 which he had upon his person. *Held*, that the bonds were not a part of the property which plaintiff could, in his ordinary relation as passenger, bear about his person at defendant's risk; and in the absence of notice to it or knowledge on its part that he was carrying them, the loss of the bonds could not be taken into consideration in fixing the damages with which defendant was chargeable for a breach of its duty to protect plaintiff from violence. *Weeks v. New York, N. H. & H. R. Co.*, 72 N. Y. 50, 28 Am. Rep. 104; *affirming* 9 Hun 669.

A statement of claim stated, in substance, that the plaintiff, while a passenger in one of the defendant's trains, which was then stopping at a railway station, was robbed by a gang of men who entered the carriage in which he was seated; that there was a force of police at the station at the time; that the plaintiff complained to the station-master of the robbery, but he refused to detain the train to permit the plaintiff to give the said men into custody and have them searched; that, upon the plaintiff's complaint being made to him, the station-master gave the signal to start the train, which was accordingly started; that the plaintiff was thereby prevented from having the said men searched and his property

recovered; and that the stolen property was in the carriage when the plaintiff complained to the station-master and might and would have been recovered if he had afforded time for the necessary search. *Held*, that the statement of claim disclosed no cause of action. *Cobb v. Great Western R. Co.*, 58 Am. & Eng. R. Cas. 169, [1893], 1 Q. B. 459.

5. Limitation of Liability.*

330. Power to limit liability, generally.—A carrier may limit its liability to its own line in carrying passengers and freight. *Gulf, C. & S. F. R. Co. v. Looney*, 52 Am. & Eng. R. Cas. 197, 85 Tex. 158, 19 S. W. Rep. 1039.

In allowing passengers to travel on freight trains a company may impose reasonable limitations. *South & N. Ala. R. Co. v. Huffman*, 76 Ala. 492, 52 Am. Rep. 349.

331. By printed notices, etc.†—Common carriers of passengers cannot affect or limit their responsibility by putting up notices. *Macklin v. New Jersey Steamboat Co.*, 7 Abb. Pr. N. S. (N. Y.) 229.

Posted notices may be employed by carriers as a means of bringing to the passenger's knowledge any reasonable regulation; but it does not follow from this that it is obligatory upon him to read all such notices. *Macklin v. New Jersey Steamboat Co.*, 7 Abb. Pr. N. S. (N. Y.) 229.

Though in Pennsylvania a common carrier may limit his responsibility by a general notice, yet the terms of the notice must be clear and explicit, and the person with whom the carrier deals must be fully informed of the terms and effect of the notice.

* See also LIMITATION OF LIABILITY; TICKETS AND FARES, 14-21.

Right to limit common-law liability in the absence of negligence, see note, 18 L. R. A. 527.

† Power to limit liability by notice or special contract, see note, 42 AM. DEC. 498.

Right to limit liability by printed words or notices on tickets, checks, etc., see note, 5 AM. ST. REP. 719.

Effect of actual knowledge of terms of printed notices in tickets, etc., by passenger or shipper, see note, 5 AM. ST. REP. 723.

Exemption from liability for negligence by printed notices, etc., see note, 5 AM. ST. REP. 726.

Printed notices, etc., as making contract in favor of carriers of passengers, see note, 5 AM. ST. REP. 726.

Notice, etc., restricting liability of carriers of passengers for tort or negligence, see note, 5 AM. ST. REP. 726.

* See also *ante*, 321; and BAGGAGE, 85.

Where the notice is in the English language and the passenger a German who did not understand the English language, it is incumbent on the carrier to prove the knowledge by the passenger of the limitation in the notice. *Camden & A. R. Co. v. Baldauf*, 16 Pa. St. 67. — DISAPPROVED IN *Indianapolis, P. & C. R. Co. v. Allen*, 31 Ind. 394. FOLLOWED IN *Kent v. Baltimore & O. R. Co.*, 31 Am. & Eng. R. Cas. 125, 45 Ohio St. 284, 10 West. Rep. 459, 12 N. E. Rep. 798.

A passenger by vessel is not charged with knowledge of the contents of a printed notice posted up in a conspicuous manner in the vessel, but which he did not read. *Macklin v. New Jersey Steamboat Co.*, 7 Abb. Pr. N. S. (N. Y.) 229.

332. By contract to that effect.*—The object of New York act of 1850, ch. 140, § 36, providing that if a passenger offers the fare prescribed by law, the company is bound to transport him, and to assume all the risks, was only intended to make railroads liable as common carriers, and does not prevent them limiting their common-law liability by special contract. *Bissell v. New York C. R. Co.*, 25 N. Y. 442; *reversing* 29 Barb. 602.

A company being under no legal liability to carry passengers upon its freight trains, may contract for exemption from responsibility for injuries to passengers riding on such trains, and such contract must be governed by its own terms, subject only to the qualification that the same terms shall be impartially extended to all who may desire to avail themselves of them. *Arnold v. Illinois C. R. Co.*, 83 Ill. 273.

333. Cannot limit liability for negligence.—A public carrier of passengers cannot so contract as to relieve itself from liability for an injury to a passenger from the negligence of the carrier or its servants in the course of their employment. *Gulf,*

C. & S. F. R. Co. v. McGown, 26 Am. & Eng. R. Cas. 274, 65 Tex. 640.

334. — for gross negligence or wilful misconduct—Pass.*—A common carrier of passengers cannot by contract, even with a passenger whom it carries gratuitously, exonerate itself from liability for gross negligence.—*Jacobus v. St. Paul & C. R. Co.*, 20 Minn. 125 (Gil. 110).—FOLLOWING *Illinois C. R. Co. v. Read*, 37 Ill. 484; *Illinois C. R. Co. v. Morrison*, 19 Ill. 136; *Indiana C. R. Co. v. Mundy*, 21 Ind. 48; *Pennsylvania R. Co. v. McCloskey*, 23 Pa. St. 532; *Mobile & O. R. Co. v. Hopkins*, 41 Ala. 489. NOT FOLLOWING *Wells v. New York C. R. Co.*, 24 N. Y. 181; *Perkins v. New York C. R. Co.*, 24 N. Y. 196; *Bissell v. New York C. R. Co.*, 25 N. Y. 442; *Kinney v. Central R. Co.*, 34 N. J. L. 513.—DISTINGUISHED IN *Way v. Chicago, R. I. & P. R. Co.*, 64 Iowa 48, 52 Am. Rep. 431. REVIEWED IN *Annas v. Milwaukee & N. R. Co.*, 27 Am. & Eng. R. Cas. 102, 67 Wis. 46, 57 Am. Rep. 388, n.

A company may contract for exemption from liability to a gratuitous passenger for any degree of negligence on the part of its ordinary employés; but it cannot exempt itself from liability for wilful or reckless acts. *Perkins v. New York C. R. Co.*, 24 N. Y. 196.—DISTINGUISHING *New Jersey S. Nav. Co. v. Merchants' Bank*, 6 How. (U. S.) 383. NOT FOLLOWING *Bissell v. New York C. R. Co.*, 29 Barb. 602.—DISAPPROVED IN *New York C. R. Co. v. Lockwood*, 17 Wall. (U. S.) 357; *Rose v. Des Moines Valley R. Co.*, 39 Iowa 246; *Pennsylvania R. Co. v. Henderson*, 51 Pa. St. 315. FOLLOWED IN *Bissell v. New York C. R. Co.*, 25 N. Y. 442. NOT FOLLOWED IN *Jacobus v. St. Paul & C. R. Co.*, 20 Minn. 125 (Gil. 110). REVIEWED IN *Gulf, C. & S. F. R. Co. v. McGown*, 26 Am. & Eng. R. Cas. 274, 65 Tex. 640.

Plaintiff's intestate was riding on a pass containing the following provision: "A person accepting this free ticket assumes all risks of accidents, and expressly agrees that the company shall not be liable under any circumstances, whether of negligence by their agents or otherwise, for any injury to the person, or for any loss or injury to the property of the passenger." He was killed by the breaking down of a defective bridge. *Held*, that the contract was valid, and no

* As to right to limit liability by notice or special contract, see notes, 32 AM. DEC. 468, 12 L. R. A. 799, 13 *Id.* 518.

Liability of carriers of passengers as affected by contract, see note, 43 AM. DEC. 367.

Carrier's liability may be limited by express contract, see notes, 5 AM. ST. REP. 725, 3 L. R. A. 343.

Carriers may provide by contract for reasonable exemptions, see note, 13 L. R. A. 362.

Carriers of passengers not exempt from liability by stipulations in passes, see note, 1 L. R. A. 501.

* See also PASSES, III.

recovery could be had against the company. *Perkins v. New York C. R. Co.*, 24 N. Y. 196.

335. Form and validity of the contract, generally.—(1) *Necessity of writing.*—The contract between the carrier and the passenger need not be written. Where, however, the contract is not in writing, the proof must be clear of assent to the terms proposed by the carrier; for the law having imposed an important duty upon the carrier, upon grounds of public policy, will not permit it to divest itself of its responsibilities and throw the loss upon the other party, where the proof that the latter has so agreed is doubtful. *Louisville, N. A. & C. R. Co. v. Nicholai*, 4 Ind. App. 119, 30 N. E. Rep. 424.

Under an oral agreement between the owner of horses shipped and the carrier's local agent, the former had a right to send a man in the same car to look after the horses. During the journey such man was killed through gross carelessness. It was usual in such cases for the owner of the stock to enter into a written agreement, providing, among other things, that the person so riding should assume all risks, the contract to be indorsed by such person; but in this case such contract was not made until after the accident, but before death, and either the agent or the owner of the stock signed the injured party's name. *Held*, that such contract was not effectual to relieve the company from liability. *Lawson v. Chicago, St. P., M. & O. R. Co.*, 21 Am. & Eng. R. Cas. 249, 64 Wis. 447, 24 N. W. Rep. 618, 54 Am. Rep. 634.

Carriers are bound by the contracts entered into by their general agents as to the terms and conditions of carrying passengers, although such contracts should, within the means of knowledge of the agent, be beyond the regulations made by the railway company in relation to such matters. *Childs v. Great Western R. Co.*, 6 U. C. C. P. 284.

(2) *Conflict of laws.*—Where a contract is made between a carrier and a passenger, exempting the former from liability for negligence, in New York, where such a contract is valid, and where it is to be performed,

and it is afterward sued on in Ohio, where such a contract is not valid if made there, by reason of the party subsequently coming within the jurisdiction of the Ohio courts, the validity of the contract will be determined according to the laws of New York. *Knowlton v. Erie R. Co.*, 19 Ohio St. 260.—FOLLOWED IN *Alexander v. Pennsylvania Co.*, 48 Ohio St. 623.

336. Sufficiency of consideration—Reduced rates.—In consideration of carrying a passenger free, or at a reduced rate, it is competent for the carrier to stipulate that the passenger shall travel at his own risk of accidents, resulting from the negligence of the carrier's employes, for which the carrier would otherwise be liable. *Bissell v. New York C. R. Co.*, 25 N. Y. 442; reversing 29 Barb. 602.—FOLLOWING *Wells v. New York C. R. Co.*, 24 N. Y. 181; *Perkins v. New York C. R. Co.*, 24 N. Y. 196.—DISAPPROVED IN *New York C. R. Co. v. Lockwood*, 17 Wall. (U. S.) 357; *Rose v. Des Moines Valley R. Co.*, 39 Iowa 246; *Carroll v. Missouri Pac. R. Co.*, 88 Mo. 239; *Cleveland, P. & A. R. Co. v. Curran*, 19 Ohio St. 1; *Pennsylvania R. Co. v. Henderson*, 51 Pa. St. 315. DISTINGUISHED IN *Magnin v. Dinsmore*, 56 N. Y. 168. FOLLOWED IN *Stinson v. New York C. R. Co.*, 32 N. Y. 333; *Blossom v. Dodd*, 43 N. Y. 264. NOT FOLLOWED IN *Jacobus v. St. Paul & C. R. Co.*, 20 Minn. 125 (Gil. 110). QUOTED IN *Louisville & N. R. Co. v. Gilbert*, 42 Am. & Eng. R. Cas. 372, 88 Tenn. 430, 12 S. W. Rep. 1018, 7 L. R. A. 16. REVIEWED IN *Hartwell v. Northern Pa. Exp. Co.*, 37 Am. & Eng. R. Cas. 635, 1 Dak. 463, 3 L. R. A. 342, 41 N. W. Rep. 732; *Blair v. Erie R. Co.*, 66 N. Y. 313.

Where a company carries cattle at reduced rates, and the owner free, a provision in a contract to the effect that "the persons riding free to take charge of stock do so at their own risk of personal injury, from whatever cause," is valid. *Bissell v. New York C. R. Co.*, 25 N. Y. 442; reversing 29 Barb. 602.

A stipulation in a special contract with an express messenger that in return for permission to ride in the baggage-car he should assume all risk of accident and injuries resulting therefrom, is supported by sufficient consideration. *Bates v. Old Colony R. Co.*, 34 Am. & Eng. R. Cas. 355, 147 Mass. 255, 17 N. E. Rep. 633.—FOLLOWED IN *Hosmer v. Old Colony R. Co.*, 156 Mass. 506.

* Validity of clause in pass exempting carrier from liability, see note, 21 AM. & ENG. R. CAS. 156.

Validity of contracts relieving carrier from liability for negligence, see note, 26 AM. & ENG. R. CAS. 286.

Where a passenger purchases a ticket for carriage upon a freight train, which contains stipulations exempting the railroad from liability for injuries, the consideration which supports this promise by the purchaser is the promise by the company to carry him by this particular mode of conveyance, to which, but for the promise, he would not be entitled. *Arnold v. Illinois C. R. Co.*, 83 Ill. 273.

337. Limitation must be reasonable.*—A carrier of passengers cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law. It is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or servants. *New York C. R. Co. v. Lockwood*, 17 Wall. (U. S.) 357, 3 Am. Ry. Rep. 495.—**APPROVING** *Smith v. New York C. R. Co.*, 29 Barb. 132; *Smith v. New York C. R. Co.*, 24 N. Y. 222; *Bissell v. New York C. R. Co.*, 29 Barb. 602; *Stoddard v. Long Island R. Co.*, 5 Sandf. (N. Y.) 180. **DISAPPROVING** *Welles v. New York C. R. Co.*, 26 Barb. 641; *Perkins v. New York C. R. Co.*, 24 N. Y. 196; *Bissell v. New York C. R. Co.*, 25 N. Y. 442.—**APPLIED IN MERCHANTS' D. & T. Co. v. Cornforth, 3 Colo. 280; *Magnin v. Dinsmore*, 62 N. Y. 35. **APPROVED IN** *Galt v. Adams Exp. Co.*, *MacArth. & M. (D. C.)* 124; *Atchison & N. R. Co. v. Washburn*, 5 Neb. 117; *Virginia & T. R. Co. v. Sayers*, 26 Gratt. (Va.) 328. **DISTINGUISHED IN** *Pacific Exp. Co. v. Foley*, 46 Kan. 457; *Piedmont Mfg. Co. v. Columbia & G. R. Co.*, 16 Am. & Eng. R. Cas. 194, 19 So. Car. 353. **FOLLOWED IN** *Phoenix Ins. Co. v. Erie & W. Transp. Co.*, 10 Biss. (U. S.) 18; *Rintoul v. New York C. & H. R. R. Co.*, 21 Blatchf. (U. S.) 439, 17 Fed. Rep. 905; *Eells v. St. Louis, K. & N. W. R. Co.*, 52 Fed. Rep. 903; *Kansas City, S. J. & C. B. R. Co. v. Simpson*, 16 Am. & Eng. R. Cas. 158, 30 Kan. 645, 46 Am. Rep. 104. **NOT FOLLOWED IN** *Alabama G. S. R. Co. v. Little*, 12 Am. & Eng. R. Cas. 37, 71 Ala. 611; *Mynard v. Syracuse, B. & N. Y. R. Co.*, 71 N. Y. 180. **QUOTED IN** *St. Louis, I. M. & S. R. Co. v. Lesser*, 46 Ark. 236; *Terre Haute & L. R. Co. v. Sherwood*, 132 Ind. 129; *Peters v. Marietta & C. R. Co.*,**

42 Ohio St. 275; *Honeyman v. Oregon & C. R. Co.*, 25 Am. & Eng. R. Cas. 380, 13 Oreg. 352, 57 Am. Rep. 20; *Dillard v. Louisville & N. R. Co.*, 2 Lea (Tenn.) 288; *Coward v. East Tenn., V. & G. R. Co.*, 16 Lea 225, 57 Am. Rep. 226; *West Virginia Transp. Co. v. Sweetzer*, 22 Am. & Eng. R. Cas. 469, 25 W. Va. 434. **REVIEWED IN** *St. Louis, I. M. & S. R. Co. v. Weakly*, 35 Am. & Eng. R. Cas. 635, 50 Ark. 397, 7 Am. St. Rep. 104, 8 S. W. Rep. 134; *United States Exp. Co. v. Backman*, 28 Ohio St. 144.

A company being under no obligation to allow express messengers to ride in the baggage-cars of its trains, it is entitled to protect itself against an increase of its liabilities upon giving permission to do so, and such a condition relieving it from liability for accidents and personal injuries is neither unreasonable nor against public policy. *Bates v. Old Colony R. Co.*, 34 Am. & Eng. R. Cas. 355, 147 Mass. 255, 17 N. E. Rep. 633.

338. Interpretation and effect of contract, generally.—A carrier of passengers may lawfully stipulate for exemption from liability for the negligence of itself or servants; but such contract must be strictly construed, the exemption must be expressed in terms, and, when general words of release may be made operative without including negligence of the carrier or its servants, such construction as will exclude exemption for negligence must obtain. *Elliott v. New York C. & H. R. R. Co.*, 33 N. Y. S. R. 861, 11 N. Y. Supp. 691.

Where a passenger is carried under an agreement that he travels at his own risk, this includes an injury caused by the gross and wilful negligence of the company. *McCawley v. Furness R. Co.*, L. R. 8 Q. B. 57, 42 L. J. Q. B. 4, 21 W. R. 140, 27 L. T. 485.

Whether a carrier is liable for an injury to a passenger carried on a free pass limiting company's liability for injury caused by its servants' negligence, due to the breaking down of a bridge caused by the truck-master knowingly using rotten timbers, but where there is no evidence showing that the superior officers of the company knew of such defects, see *Perkins v. New York C. R. Co.*, 24 N. Y. 196.

339. Transportation of newsboys.—A company is not liable for the death of a newsboy killed on one of its station platforms, when it has a contract with the news company that employed deceased, expressly

*Limitation of carrier's liability must be reasonable, see note, 5 AM. ST. REP. 725.

exempting it from all liability to its news agents, newsboys, and their property, whether occasioned by the railroad's negligence or not. *Alexander v. Toronto & N. R. Co.*, 33 U. C. Q. B. 474. *Alexander v. Toronto & N. R. Co.*, 35 U. C. Q. B. 453.—REVIEWING *Martin v. Great Indian Peninsula R. Co.*, L. R. 3 Ex. 9.

340. — of express messengers.*—If an express messenger, holding a season ticket from a company, and desiring to ride for the conduct of his business in a baggage car in contravention of its rules, agrees to assume all risk of injury therefrom and to hold the company harmless therefor, he takes the risk of all injuries received by him while riding in the baggage car. *Hosmer v. Old Colony R. Co.*, 156 Mass. 506, 31 N. E. Rep. 652.—FOLLOWING *Bates v. Old Colony R. Co.*, 147 Mass. 255.

341. — of employees of telegraph company.—Defendant railroad company was sued for a personal injury to an employé of a telegraph company. The proof showed a special contract between the two companies containing a provision that such employés should exhibit passes, in which "all responsibility of the railroad company for any loss or damage or injury shall be waived and released in the form usual in such cases." There was no proof as to the contents of plaintiff's pass. Held, that the contract proven was only for a release to be contained in the passes, and did not constitute a release in itself, which would relieve the company. *Elliott v. New York C. & H. R. Co.*, 33 N. Y. S. R. 861, 11 N. Y. Supp. 691.

III. PASSENGER'S CONTRIBUTORY NEGLIGENCE.†

1. In General.

342. Statement of the rule.—The passenger must not be guilty of contributory negligence. *Fisher v. West Virginia & P. R. Co.*, (W. Va.) 58 Am. & Eng. R. Cas. 337, 19 S. E. Rep. 578.

* See also *ante*, 53; and EXPRESS COMPANIES, 12, 13.

† See also CHILDREN, INJURIES TO, 79-113; CONTRIBUTORY NEGLIGENCE; DEATH BY WRONGFUL ACT, 182-191; EJECTION OF PASSENGERS, 81; ELECTRIC RAILWAYS, 30; ELEVATED RAILWAYS, 201, 204, 211, 213; SLEEPING AND PALACE CAR COMPANIES, 23; STATIONS AND DEPOTS, 110-127.

Contributory negligence as a defense in suits for injuries to passengers, see notes, 1 AM. ST. REP. 200; 43 AM. DISC. 364; 11 L. R. A. 130.

To recover for an injury it is necessary that the passenger should not have been guilty of any want of ordinary care which contributed to the injury. *George v. St. Louis, I. M. & S. R. Co.*, 1 Am. & Eng. R. Cas. 294, 34 Ark. 613.

Negligence of a passenger amounting to absence of ordinary care which, concurrently with the negligence of a railroad company, proximately contributes to the injury complained of is a good defense, whether the party could or could not with ordinary or even extraordinary care have guarded against it. *Tobin v. Omnibus Cable Co.*, (Cal.) 58 Am. & Eng. R. Cas. 223, 34 Pac. Rep. 124.

Though the company may have been negligent, it could defend itself and defeat a recovery of damages by showing that, when the passenger was endangered by its negligence, he could have avoided the consequences of it by the use of ordinary care. *Central R. Co. v. Thompson*, 76 Ga. 770. *Macon & W. R. Co. v. Johnson*, 38 Ga. 409.—FOLLOWED IN *Atlanta & R. A. L. R. Co. v. Ayres*, 53 Ga. 12. REVIEWED IN *Southwestern R. Co. v. Johnson*, 60 Ga. 667.

Carriers are not liable for perils to which a passenger exposes himself by his own rashness or folly. *Pennsylvania R. Co. v. Aspell*, 23 Pa. St. 47.—DISTINGUISHED IN *Memphis & C. R. Co. v. Whittfield*, 44 Miss. 466; *Filer v. New York C. R. Co.*, 49 N. Y. 47; *Lackawanna & B. R. Co. v. Chenewith*, 52 Pa. St. 382. QUOTED IN *St. Louis, I. M. & S. R. Co. v. Rosenberry*, 45 Ark. 256; *Richmond & D. R. Co. v. Morris*, 31 Gratt. (Va.) 200; *Richmond & D. R. Co. v. Anderson*, 31 Gratt. (Va.) 812.

343. Extent and limits of the rule.*—The fact that an employé of a company invites one desiring transportation on its cars to come aboard the train before it is made up, will not excuse the passenger from the charge of negligence in rushing into danger plainly seen; but even then, if no injury follows the act of entering the cars on the invitation, such conduct on the part of the passenger will not defeat his remedy against the company for subsequent acts of negligence resulting in his injury, when he is not also guilty of negligence conducing to the same. *Hannibal & St. J.*

* Liability for negligence notwithstanding contributory negligence of passenger, see notes, 22 AM. & ENG. R. CAS. 537; 19 Id. 36.

R. Co. v. Martin, 111 Ill. 219; affirming 11 Ill App. 386.

Where the conduct of a passenger has contributed to the casualty, but such conduct has not been, in a legal sense, imprudent or negligent, he may recover if the defendant were in fault. *Hanson v. Mansfield R. & T. Co.*, 38 La. Ann. 111, 58 Am. Rep. 162.

A company is not liable to a passenger for an accident which he might have prevented by ordinary attention to his safety, even though the agents in charge of the train are also remiss in their duty. *Woods v. Jones*, 34 La. Ann. 1086.

If an injury results solely from the negligence of the passenger himself, or if it is the combined result of negligence of both sides, no recovery can be had unless the carrier's agents saw his perilous condition, and might have prevented the injury by ordinary diligence. *Kentucky C. R. Co. v. Dills*, 4 Bush (Ky.) 593.—REVIEWED IN *Louisville & N. R. Co. v. Greene*, (Ky.) 19 Am. & Eng. R. Cas. 95.

344. Proximate cause.—(1) *Rule stated.*—The negligence of a passenger is not a defense to an action against the company, unless it contributes to the injury complained of. *Central R. Co. v. Van Horn*, 38 N. J. L. 133, 13 Am. Ry. Rep. 36. *McQuilken v. Central Pac. R. Co.*, 16 Am. & Eng. R. Cas. 353, 64 Cal. 463, 2 Pac. Rep. 46.

If the negligence of the passenger contributed directly or proximately to the injury complained of, no recovery can be had against the carrier, whatever may have been his negligence. It is not giving the defendant the benefit of this rule as to contributory negligence, to charge the jury that the negligence of the plaintiff which contributed as a proximate cause to the injury will prevent a recovery provided the defendant has not been guilty of negligence. *McQuilken v. Central Pac. R. Co.*, 16 Am. & Eng. R. Cas. 353, 64 Cal. 463, 2 Pac. Rep. 46.

Although a passenger injured by a train was guilty of some negligence which contributed to the injury, yet if those in charge of the train might have avoided the injury by the exercise of ordinary care and prudence, the company would be liable, provided that the negligence of the one injured was the remote or incidental, and that of the road the direct, cause of the accident. *Whalen v. St. Louis, K. C. & N. R. Co.*, 60 Mo. 323, 9 Am. Ry. Rep. 224.

The fact that a passenger, who was injured by the proximate negligence of a company, was himself guilty of want of care, will not prevent his recovering damages against the company, provided his carelessness did not contribute to the accident, or only remotely contributed thereto. *Thirteenth & F. St. Pass. R. Co. v. Boudrov*, 2 Am. & Eng. R. Cas. 30, 92 Pa. St. 475, 37 Am. Rep. 707.—QUOTING *Creed v. Pennsylvania R. Co.*, 86 Pa. St. 139.—APPROVED IN *Alabama G. S. R. Co. v. Hawk*, 18 Am. & Eng. R. Cas. 194, 72 Ala. 112, 47 Am. Rep. 403. QUOTED IN *Shenandoah Valley R. Co. v. Moose*, 83 Va. 827.

Where it can be shown that an injury would not have happened except for the culpable negligence of the passenger injured concurring with that of the other party, no action can be maintained. *Conroy v. Pennsylvania R. Co.*, 1 Pittsb. (Pa.) 440.

(2) *Illustrations.*—Where a passenger sues a carrier for an injury resulting from negligence, mere proof that plaintiff, at the time, was acting in disobedience of a reasonable order for his safety, does not constitute a defense, unless it appears that such disobedience contributed to the injury. *Lawrenceburgh & U. M. R. Co. v. Montgomery*, 7 Ind. 474.—REVIEWING *Laing v. Colder*, 8 Pa. St. 479; *Galena & C. U. R. Co. v. Yarwood*, 15 Ill. 468.—DISTINGUISHED IN *Whitehead v. St. Louis, I. M. & S. R. Co.*, 22 Mo. App. 60.

A passenger's negligence in going to the platform of a car while it is still moving does not affect his right to recover for an injury suffered in properly alighting after the train has stopped. *Wood v. Lake Shore & M. S. R. Co.*, 8 Am. & Eng. R. Cas. 478, 49 Mich. 370, 13 N. W. Rep. 779.

At the request of the owner of a freight car agents of the company attached his car to a passenger train, which was contrary to the rules of the company, the owner of the car agreeing to run all risks. *Held*, that the owner of the car could recover for any injuries received to which his own negligence did not contribute. By such contract he assumed the risk of running his car in that manner, but not the risk resulting from the negligence of the company's employes. *Lackawanna & B. R. Co. v. Chenevith*, 52 Pa. St. 382.—FOLLOWED IN *Creed v. Pennsylvania R. Co.*, 86 Pa. St. 139.

Contributory negligence is not a defense unless it contributed to the injury com-

plained of. So where a company is sued by a female passenger to recover for injuries received by a brakeman pushing her violently from the car platform, the fact that she was negligent in undertaking to get on a moving train is no defense, where such negligence in no wise contributes to her injuries. *Reed v. Pennsylvania R. Co.*, 56 *Fed. Rep.* 184.—NOT FOLLOWING Solomon *v. Manhattan R. Co.*, 103 N. Y. 437, 9 N. E. Rep. 430.

345. Conduct in sudden emergency or peril.*—Where a passenger is in imminent peril he is not required to exercise all the presence of mind and care of a prudent and careful man under impending danger. The law makes allowance and leaves the circumstances to the jury whether the party acted rashly and under an undue apprehension of danger. *Galena & C. U. R. Co. v. Yarwood*, 17 Ill. 509.—CRITICISING Camden & A. R. & T. Co. *v. Burke*, 13 Wend. (N. Y.) 626.—FOLLOWED IN North Chicago St. R. Co. *v. Cotton*, 140 Ill. 486, QUOTED IN Chicago & N. W. R. Co. *v. Traves*, 33 Ill. App. 307.

The liability of a carrier of passengers is the same, although the injury resulting to the passenger is occasioned by his own act, where the state of peril will justify it. So a person losing his own life in rescuing a child on the track before a moving train is not guilty of such rashness or negligence as to defeat a recovery, though the company would not have been liable if the child had been killed. *Eckert v. Long Island R. Co.*, 57 Barb. (N. Y.) 555; *affirmed in* 43 N. Y. 502.—DISTINGUISHED IN *Rexter v. Starin*, 73 N. Y. 601. FOLLOWED IN *Roll v. Northern C. R. Co.*, 15 Hun 496.

Where a passenger is injured by the negligence of a carrier, an act done by the former in the face of impending danger, for the purpose of avoiding the same, does not constitute "contributory negligence," although it may in fact have helped to produce the injury complained of. *Ladd v. Foster*, 12 Sawy. (U. S.) 547, 31 *Fed. Rep.* 827.

346. Choosing between two hazards.†—If a man unlawfully places another in a situation which compels him to under-

go one of two hazards, and forces him to choose upon the instant between them, he necessarily gives him the right of selection, and must be responsible for the consequence, although it may turn out that the most fortunate alternative was not adopted; and this principle applies to a passenger who may not, under the excitement of the moment, take the safest way of avoiding danger. *Saltonstall v. Stockton, Taney (U. S.)* 11.

347. Where carrier is guilty of wilful misconduct.—Where a passenger has been injured because of the want of ordinary care upon his part, no action will lie unless the injury was wilfully inflicted. *Chicago & N. W. R. Co. v. Rielly*, 40 Ill. App. 416.—QUOTING *Peoria & R. I. R. Co. v. Lane*, 83 Ill. 448; *Quinn v. Illinois C. R. Co.*, 51 Ill. 495.—See also *Kentucky C. R. Co. v. Dills*, 4 Bush (Ky.) 593.

348. Care required of passenger.*—(1) *Generally.*—It is not more the duty of companies to transport their passengers safely than it is of the passengers to behave in a quiet and orderly manner. *Pittsburgh, Ft. W. & C. R. Co. v. Hinds*, 53 Pa. St. 512.

While carriers of passengers are held to a very high degree of care, there is a corresponding obligation on the part of the passenger to act with prudence, and if his negligent act contributes to bringing about the injury he cannot recover. *Weber v. Kansas City Cable R. Co.*, 41 Am. & Eng. R. Cas. 117, 100 Mo. 194, 12 S. W. Rep. 804, 13 S. W. Rep. 587, 7 L. R. A. 819.

A carrier is not liable for any neglect on the part of a passenger, injured by its negligence, occurring after the injury sustained, and causing additional damage; but the burden of proving such additional damage rests upon the company. *Secord v. St. Paul, M. & M. R. Co.*, 5 McCrary (U. S.) 515, 18 *Fed. Rep.* 221.

A passenger may safely rely upon the judgment of those placed in charge of the train, where it is not plainly open to his observation that reliance will expose him to danger that a prudent man will not incur, but he cannot rely on their judgment where it would expose him to a risk that a reasonably prudent man would not assume. *Kentucky & I. Bridge Co. v. Quinkert*, 2 Ind.

* See also *ante*, 207; *post*, 435-440, 457-498; and CONTRIBUTORY NEGLIGENCE, 42-44; ELECTRIC RAILWAYS, 31.

† See also *post*, 398; and CONTRIBUTORY NEGLIGENCE, 41.

* "Ordinary care" defined, as applied to duty of passenger to avoid injury, see note, 6 L. R. A. 242.

App. 244, 28 *N. E. Rep.* 338.—QUOTING Cincinnati, H. & I. R. Co. v. Carper, 112 Ind. 26; Louisville & N. R. Co. v. Bisch, 120 Ind. 549.

(2) *Degree—Ordinary prudence.*—A passenger must have that care and regard for his own safety and security which devolves on a prudent man under the circumstances. *Hazard v. Chicago, B. & Q. R. Co.*, 1 *Biss. (U. S.)* 503.

His duty while on the train is to exercise ordinary care and prudence, such as a prudent man would himself observe to save himself from injury. *Mackoy v. Missouri Pac. R. Co.*, 5 *McCrary (U. S.)* 538.

He must exercise ordinary care and prudence in taking care of himself and avoiding injury; and although the carrier be guilty of negligence, still, if the passenger, by failing to exercise ordinary prudence, directly contribute to the injury, he cannot recover. *Little Rock & Ft. S. R. Co. v. Cavennesse*, 48 Ark. 106, 2 *S. W. Rep.* 505. *Jeffersonville R. Co. v. Hendricks*, 26 Ind. 228.

He is only required to exercise ordinary capacity and care to protect himself from injury, and not all the skill and care of the most capable and ready-witted persons; but he is required to use ordinary care, regardless of age or condition. *Sheridan v. Brooklyn City & N. R. Co.*, 36 *N. Y.* 39, 34 *How. Pr.* 217.—REVIEWED IN *Ward v. Central Park, N. & E. R. R. Co.*, 42 *How. Pr. (N. Y.)* 289.

A passenger while passing from the cars to an eating station of the company is not required to exercise that degree of care in crossing the tracks of the company which is imposed upon other persons, as he has the right to assume that the company will discharge its duty in making the way safe; and relying upon this assumption he may neglect precautions that are ordinarily imposed upon a person not holding that relation. *Atchison, T. & S. F. R. Co. v. Shean*, 58 *Am. & Eng. R. Cas.* 360, 18 *Colo.* 368, 33 *Pac. Rep.* 108.

340. What amounts to contributory negligence, generally.—If injury is sustained by a person whilst wrongfully upon a special train, carrying provisions to employes, the fact of being on such train will be an element in determining his prudence and want of care, and the liability of the corporation. *Southwestern R. Co. v. Singleton*, 66 *Ga.* 252.

A passenger is guilty of negligence in

going from a coach to an engine for the purpose of getting water, which bars a recovery of damages on account of personal injuries sustained by falling between the engine and the coach on his return, although his fall may have been caused by a defective brake, which he caught hold of, or by the negligence of the engineer in applying the air-brakes suddenly. *McDaniel v. Highland Ave. & B. R. Co.*, 90 *Ala.* 64, 8 *So. Rep.* 41.

350. — and what does not.*—A passenger in a train injured through the falling of a bridge cannot be guilty of contributory negligence when at the time of the injury he was in his proper place in the car and did not expose himself to the danger. *Louisville, N. A. & C. R. Co. v. Snyder*, 37 *Am. & Eng. R. Cas.* 137, 117 *Ind.* 435, 20 *N. E. Rep.* 284, 3 *L. R. A.* 434.

A carrier cannot set up the act of the passenger as contributory negligence, as a matter of law, when its own negligence or wilful acts or omissions throw the passenger off his guard, or when the passenger has been induced to act under the direction or influence of the carrier. *Schultze v. Missouri Pac. R. Co.*, 32 *Mo. App.* 438.

A person who, by permission of the conductor, gets on a freight car while it is being loaded, is not guilty of contributory negligence in so doing, unless he knew that the conductor exceeded his authority in granting the permission. *Alabama G. S. R. Co. v. Yarbrough*, 83 *Ala.* 238, 3 *Am. St. Rep.* 715, 3 *So. Rep.* 447.

A passenger, entitled to safe transportation over railroad and ferry connecting therewith, upon invitation of the employes of the railroad company managing the ferry passed from a boat by a way upon the ferry-bridge provided for animals and vehicles. As he was so doing a runaway horse, belonging to the railroad company, careering at random about the ferry-house, bolted over a bow, which aided in the support of the ferry-bridge, into the way where the passenger was, and injured him. *Held*, that by being in the way indicated the passenger was not guilty of negligence which contributed to his injury. *Watson v. Camden & A. R. Co.*, 58 *Am. & Eng. R. Cas.* 377, 55 *N. J. L.* 125, 26 *Atl. Rep.* 136.—FOL-

* Not contributory negligence to take passage on a crowded car without warning of its crowded condition, see 58 *Am. & Eng. R. Cas.* 326, *abstr.*

LOWING New York, L. E. & W. R. Co. v. Bull, 47 Am. & Eng. R. Cas. 586, 53 N. J. L. 283.

A husband placed his wife on a train as a passenger, and notified the conductor that she was in feeble health, who promised to notify the next conductor, but this he failed to do. *Held*, that the notice to the first conductor was, under the circumstances, notice to the company, and a failure to repeat the notice to each conductor was not contributory negligence. *Foss v. Boston & M. R. Co.*, (N. H.) 21 Atl. Rep. 222.—*Following Bullard v. Boston & M. R. Co.*, 64 N. H. 27, 5 Atl. Rep. 838.

351. Disobedience to carrier's rules.*—The passenger is bound to observe the reasonable rules and regulations made by the carrier for insuring the safety of passengers, and, of course, cannot be relieved from the necessity of using ordinary care and prudence on his part to avoid danger. *Baltimore & Y. Turnpike Road v. Leonhardt*, 27 Am. & Eng. R. Cas. 194, 66 Md. 70, 5 Atl. Rep. 346.

If he would hold the company to the full measure of its responsibility for safe carriage, he must conform to all the reasonable rules the company makes looking to the safety of its passengers. *Downey v. Chesapeake & O. R. Co.*, 28 W. Va. 732.

He must comply with all reasonable rules and regulations of the company for entering, occupying, and leaving the cars; and if by reason of disregard of such rules he is injured, he cannot hold the company liable, although the negligence of its employes contributed to the injury. *Chicago & N. W. R. Co. v. Rielly*, 40 Ill. App. 416.—*QUOTING Rockford, R. I. & St. L. R. Co. v. Coultas*, 67 Ill. 393; *Blodgett v. Bartlett*, 50 Ga. 353. *REVIEWING Hickey v. Boston & L. R. Co.*, 14 Allen (Mass.) 429.—*DISTINGUISHED IN Ohio & M. R. Co. v. Allender*, 47 Ill. App. 484.

Where the company had a rule against persons entering the cars before a certain time on the return from an excursion trip, whether a person who entered a car in violation of their rule knew of the rule and was guilty of contributory negligence, is a question of fact for the jury. *Western Md. R. Co. v. Herold*, 74 Md. 510, 22 Atl. Rep. 323.

*See also *ante*, 70, 294; *post*, 360, 452, 470, 495; and also BAGGAGE, 11.

A party, against a rule providing for carriage of passengers and freight on separate trains, intruding himself upon a freight train, and suffering injury, cannot recover therefor; but if, notwithstanding such rule, the company habitually permits passengers on its freight trains, it would be liable. *Houston & T. C. R. Co. v. Moore*, 49 Tex. 31.

352. Passing from car to car.—(1) *Generally.*—It is not the duty of passengers to pass from one car to another, in search of seats, while the cars are in rapid motion. *Willis v. Long Island R. Co.*, 34 N. Y. 670; *affirming 32 Barb.* 398.

Ordinarily it may be considered an act of negligence for a passenger to attempt to pass from one car to another while the train is in motion; but not when he is acting under directions of the conductor. As to how far the party may be influenced by the orders or direction of the conductor in such case is for the jury. *Cleveland, C., C. & I. R. Co. v. Manson*, 30 Ohio St. 451.—*QUOTING McIntyre v. New York C. R. Co.*, 37 N. Y. 287.

Passengers must pass from one car to another for the purpose of finding seats when directed to do so, and they may assume that the company's employes, having knowledge of the operation of cars, will only give safe directions; hence it is not contributory negligence to attempt to obey such directions. So *held*, where a passenger was thrown from a car platform while passing from one car to another by being jostled by a brakeman. *Louisville & N. R. Co. v. Kelly*, 13 Am. & Eng. R. Cas. 1, 92 Ind. 371, 47 Am. Rep. 149.—*QUOTED IN Cincinnati, H. & I. R. Co. v. Carper*, 31 Am. & Eng. R. Cas. 36, 112 Ind. 26, 11 West. Rep. 223, 13 N. E. Rep. 122.

Although the agents and employes of a company may be guilty of gross negligence in the manner of operating its road, yet if a passenger, in passing from one train to another, recklessly, and without care, fails to pay heed to timely warnings, and attempts to cross in front of an approaching train that he in fact sees approaching, or which he knows to be approaching in dangerous proximity, and is killed or injured, such action is attributable, not to the negligence of the company, but to the reckless negligence of the injured party himself. *Baltimore & O. R. Co. v. State*, 12 Am. & Eng. R. Cas. 149, 60 Md. 449.

(2) *Illustrations.*—Where a passenger in a coach, which was overcrowded, was informed, by the announcement of the conductor in charge, that another car had been added in front, and the adding of the car had been felt when it was pushed back, and it was found in proper position for the reception of passengers, though in fact not securely coupled, so that just as such passenger was in the act of stepping from the platform of the rear coach to the forward one the latter moved forward suddenly, causing him to fall to the ground, whereby he received a serious injury—*held*, that the passenger had the right to assume that he could pass from one car to the other with safety, and in so attempting was not chargeable with want of ordinary care. *Hannibal & St. J. R. Co. v. Martin*, 111 Ill. 219; *affirming* 11 Ill. App. 386.

A passenger on an excursion train was unable to find a seat in the car which he entered, and after standing some time was directed by the conductor to go to the front car and there take a seat. In crossing the platform, in pursuance of this order, he was carelessly or purposely jostled by a brakeman and thrown from the train. In an action by him to recover damages for his injuries, the court instructed the jury that it was the duty of the passenger to follow the directions given by the conductor, and that he might assume that said conductor, being familiar with the operation of cars, had reasonable knowledge of what was required for safety and protection; but that if the passenger himself knew that the movement would be attended with danger, he was not bound to obey the order. *Held*, that this instruction was proper. *Louisville & N. R. Co. v. Kelly*, 13 Am. & Eng. R. Cas. 1, 92 Ind. 371, 47 Am. Rep. 149.

A passenger who has taken the wrong train by his own fault, and, on being informed by the conductor that by taking a rear car he could get off at a station beyond and return to his destination at a later hour, attempts to pass to such car, does so at his own risk as to all accidents not arising from the negligence of the company, and cannot recover for injuries sustained by being thrown from the platform by a lurch of the train such as is inevitably incident to any train moving at the same speed. *Stewart v. Boston & P. R. Co.*, 34 Am. & Eng. R. Cas. 499, 146 Mass. 605, 6 N. Eng. Rep. 273, 16 N. E. Rep. 466.

A woman who was lame entered a train as it stopped at a station by the front platform of the rear car, and, perceiving that car to be full, proceeded to go into the car next forward. The platforms were about six inches apart, and the intervening buffers, the tops of which were nearly level with the platforms, were in contact as the train stood still. The train, upon which she had often traveled, made a shorter stop than usual at the station, and started with a jerk just as, without looking down, she was about to step from one car to the other. She stepped upon the buffers as they separated with the movement of the train, and her foot slipped between them and was injured. *Held*, that she was guilty of contributory negligence, and could not recover against the company for her injuries. *Snowden v. Boston & M. R. Co.*, 151 Mass. 220, 24 N. E. Rep. 40.

It is not contributory negligence *per se* for a man accustomed to railway travel to attempt to pass from a passenger coach to the baggage car while the train is moving three or four miles an hour if, after the signal for his station is given, the conductor tells him that the train will not have time to stop, and directs him to hasten to the baggage car in order to get certain goods preparatory to getting off. *Davis v. Louisville, N. O. & T. R. Co.*, 69 Miss. 136, 10 So. Rep. 450.

The plaintiff boarded a train on the defendant road on which there were no vacant seats. She waited on the platform of one of the cars for another coach to be attached, and when it was backed up, attempted to pass from the platform of one car to that of the other, but fell through an open space between the two cars and was injured. The open space was caused by the fact that the drawheads of the two cars failed to catch when they came together, and the cars separated several feet. A passenger, who had stepped from one platform to the other immediately before plaintiff made the attempt, testified that the cars separated just as plaintiff stepped forward. There was other evidence that they separated immediately after the contact. Plaintiff received no warning, but just as she was about to take the step, the conductor cried, "all aboard." The accident happened about dusk, and there were other passengers on the platform in front of plaintiff who obstructed her view. *Held*, that whether plaintiff was guilty of contributory negligence was a question for

the jury, and a motion for a nonsuit was properly overruled. *Lent v. New York C. & H. R. R. Co.*, 44 Am. & Eng. R. Cas. 373, 120 N. Y. 467, 24 N. E. Rep. 653, 31 N. Y. S. R. 538; *affirming* 22 J. & S. 317, 8 N. Y. S. R. 93.

353. Intoxication.*—A carrier of passengers for hire is bound to provide for their safety, so far as is practicable, by the exercise of human care and foresight; and where one is drowned by reason of the carrier's failure to use such care, drunkenness, if it existed, was not contributory negligence. *Holmes v. Oregon & C. R. Co.*, 6 Sawy. (U. S.) 262, 5 Fed. Rep. 75.

If a passenger voluntarily becomes intoxicated, the law does not impose the duty on the carrier to place a guard over such passenger to prevent him from injuring himself or putting himself in a place of danger. *St. Louis, A. & T. H. R. Co. v. Carr*, 47 Ill. App. 353.

354. Failure to notify carrier of discovered danger.—A passenger who sees a train on an intersecting road approaching a crossing is not guilty of contributory negligence because he fails to pull the bell-rope and warn the engineer in charge of the train upon which he is riding. *Grand Rapids & I. R. Co. v. Ellison*, 39 Am. & Eng. R. Cas. 480, 117 Ind. 234, 20 N. E. Rep. 135.

355. Obedience to commands or directions of trainmen.†—A passenger is justified, as a general rule, in obeying the directions of the employes of the carrier; and if he receives injury in obeying them the carrier is liable, even if it appears that if the passenger had not obeyed he would have escaped injury. *Louisville & N. R. Co. v. Bisch*, 41 Am. & Eng. R. Cas. 89, 120 Ind. 549, 22 N. E. Rep. 662.

And carriers cannot shield themselves from the consequences of their negligence by showing that passengers injured obeyed specific instructions of the conductor, instead of general directions of which they had been informed. *Pennsylvania R. Co. v. McCloskey*, 23 Pa. St. 526.—**FOLLOWED IN** *Jacobus v. St. Paul & C. R. Co.*, 20 Minn. 125 (Gil. 110).

* See also *ante*, 37, 101, 115, 147, 312; *post*, 400, 434.

Intoxication as contributory negligence, see notes, 21 AM. & ENG. R. CAS. 349; 19 *Id.* 325.

† See also *ante*, 135, 242; *post*, 370, 407, 429-431, 470.

Where the directions of the conductor are within the scope of his authority, and obedience to them will not expose a passenger to known or apparent danger which a prudent man would not incur, obedience by the passenger is not contributory negligence, although it may result in bringing injury upon him. *Cincinnati, H. & I. R. Co. v. Carper*, 31 Am. & Eng. R. Cas. 36, 112 Ind. 26, 11 West. Rep. 223, 13 N. E. Rep. 122, 14 N. E. Rep. 352.—**DOUBTING** *Hanson v. Mansfield R. & T. Co.*, 38 La. Ann. 111, 58 Am. Rep. 162. **QUOTING** *Pool v. Chicago, M. & St. P. R. Co.*, 53 Wis. 657; *Louisville & N. R. Co. v. Kelly*, 92 Ind. 371, 47 Am. Rep. 149; *Bass v. Chicago & N. W. R. Co.*, 36 Wis. 450; *Great Western R. Co. v. Miller*, 19 Mich. 305; *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377.—**FOLLOWED IN** *Lake Shore & M. S. R. Co. v. Pinchin*, 31 Am. & Eng. R. Cas. 428, 112 Ind. 592, 11 West. Rep. 247, 13 N. E. Rep. 677. **QUOTED IN** *Kentucky & I. Bridge Co. v. Quinkert*, 2 Ind. App. 244.

It was the custom to uncouple the engine and smoking-car from the rest of a passenger train over a railroad on approaching a certain station, so that the former might be switched off upon a side-track and the ordinary passenger cars might run slowly upon the main track to the station; and passengers in the smoking-cars were in the habit, just before the uncoupling, of passing from the smoking-car to the platform of the passenger car just behind it, and standing until the train stopped at the station. This was done by the express permission of the conductor and brakemen, and without objection from the superintendent and directors, who knew of the practice. *Held*, that a passenger who, in conformity to this custom, had passed from the smoking-car and was standing upon the platform of the passenger car just behind it, and who received a personal injury from a collision after the uncoupling had taken place, was guilty of such negligence that he could not maintain an action to recover damages therefor. *Hickey v. Boston & L. R. Co.*, 14 Allen (Mass.) 429.—**APPROVED IN** *Alabama G. S. R. Co. v. Hawk*, 18 Am. & Eng. R. Cas. 194, 72 Ala. 112, 47 Am. Rep. 403. **LIMITED IN** *Peverly v. Boston*, 136 Mass. 366.

356. Taking passage on freight train.*—One who boards a freight car

* See also *ante*, 43-49, 294, 295; *post*, 359.

being loaded, with permission of the conductor, is not a trespasser, nor is he guilty of contributory negligence, unless he does so with knowledge that the conductor is exceeding his authority. *Alabama G. S. R. Co. v. Yarbrough*, 83 Ala. 238, 3 Am. St. Rep. 715, 3 So. Rep. 447.

The going on a freight train, and even taking a seat in the cab of the locomotive, by the direction of the engineer in sole charge, is not contributory negligence *per se* on the part of the passenger, who has paid his fare, especially where persons are habitually or occasionally received on such trains and placed in the same or like places thereon. *Hanson v. Mansfield R. & T. Co.*, 38 La. Ann. 111, 58 Am. Rep. 162.—QUOTING *Dunn v. Grand Trunk R. Co.*, 58 Me. 187.—DISTINGUISHED IN *Ohio & M. R. Co. v. Allender*, 47 Ill. App. 484. DOUBTED IN *Cincinnati, H. & I. R. Co. v. Carper*, 31 Am. & Eng. R. Cas. 36, 112 Ind. 26, 11 West. Rep. 223, 13 N. E. Rep. 122.

357. Blind passenger without attendant.*—The fact that intestate was almost blind did not make him chargeable with contributory negligence in attempting to travel without an attendant, even if sight would have enabled him to escape injury, since his blindness was not the juridical cause of his injury, but only a condition that made it possible. *St. Louis, I. M. & S. R. Co. v. Maddry*, 58 Am. & Eng. R. Cas. 327, 57 Ark. 306, 21 S. W. Rep. 472.

358. Catching hold of brake.†—A passenger about to leave a train placed his hand on the brake-wheel, when it suddenly revolved and broke his arm. *Held*, that it was not contributory negligence to place a hand on the wheel, and if the facts showed that the wheel was dangerous, it would authorize a recovery. *Cleveland, C., C. & St. L. R. Co. v. McHenry*, 47 Ill. App. 301.

359. Riding on freight trains against rules.‡—A plaintiff who, in violation of the regulations of the company, of which she has notice, puts her child upon a freight train, cannot recover for injuries occasioned by the negligence of the employes who took the child in known violation of such rules. *Whitehead v. St. Louis, I. M. & S. R. Co.*, 22 Mo. App. 60.—Dis-

TINGUISHING *Lucas v. Milwaukee & St. P. R. Co.*, 33 Wis. 41; *Lawrenceburgh & U. M. R. Co. v. Montgomery*, 7 Ind. 474; *Dunn v. Grand Trunk R. Co.*, 58 Me. 187.

Discomforts and dangers are more incident to travel on freight than on passenger trains, and a passenger on the former is called upon to exercise a higher degree of care than on the latter; and where a passenger on the former, by the exercise of ordinary care, could have known that the train had stopped to do switching, and that a part of the train was likely to be backed against the part to which the caboose was attached, which would probably produce concussion in the caboose, and he, without thinking of these things, left his seat and stood up in the car and was thrown down and injured by the backing of the train, when he would not have been had he kept his seat, or resumed the same before the car struck, he is guilty of such contributory negligence as bars his recovery. *Harris v. Hannibal & St. J. R. Co.*, 27 Am. & Eng. R. Cas. 216, 89 Mo. 233, 1 S. W. Rep. 325.—QUOTED IN *Smotherman v. St. Louis, I. M. & S. R. Co.*, 29 Mo. App. 265. REVIEWED IN *Tuley v. Chicago, B. & Q. R. Co.*, 41 Mo. App. 432.

360. Effect upon degree of care of carrier.*—There are cases where contributory negligence on the part of a stranger or trespasser would entirely defeat a recovery, unless gross or wanton negligence were brought home to the defendant; but had such person stood in the relation of a passenger, his contributory negligence would relieve the company of the duty to exercise that extreme care ordinarily exacted, but would still leave it liable for the failure to use ordinary precautions for the safety of such passenger after his danger had been discovered or brought to its notice, if by its use the injury could have been avoided. *Carrico v. West Virginia C. & P. R. Co.*, 52 Am. & Eng. R. Cas. 393, 35 W. Va. 689, 14 S. E. Rep. 12.

361. Burden of proof.†—(1) *On plaintiff.*—Where a passenger sues for a personal injury, the burden of proof is on him to show negligence on the part of the carrier, and that he himself was free from contributory negligence. *Galena & C. U. R. Co. v.*

* See also *ante*, 113.

† See also *post*, 388, 396.

‡ See also *ante*, 40, 204, 295, 356.

* See also *ante*, 137-160, 162-164, 180, 266, 288, 348.

† See also *post*, 591-594.

Fay, 16 Ill. 558.—QUOTED IN *Galena & C. U. R. Co. v. Jacobs*, 20 Ill. 478.—*Illinois C. R. Co. v. Simmons*, 38 Ill. 242.—FOLLOWED IN *Chicago & A. R. Co. v. Gretzner*, 46 Ill. 74.—*Bonce v. Dubuque St. R. Co.*, 53 Iowa 278.

A passenger is not *prima facie* entitled to recover for an injury on mere proof that he was a passenger and was thrown from the train and injured. He must in addition show that he used ordinary care on his part. *Chamberlain v. Milwaukee & M. R. Co.*, 7 Wis. 425.—REVIEWED IN *Huelsenkamp v. Citizens' R. Co.*, 37 Mo. 537.

(2) — *to rebut presumption*.—The act of getting on or off a moving train is evidence of contributory negligence, and imposes upon one who is injured in doing so the burden of proving that the peculiar circumstances of the case justified him in such course. *Browne v. Raleigh & G. R. Co.*, 47 Am. & Eng. R. Cas. 544, 108 N. Car. 34, 12 S. E. Rep. 958.

(3) *On defendant*.—Contributory negligence of plaintiff, a passenger, is matter of defense. Plaintiff need not prove there was none in making out his case. *Wilson v. Northern Pac. R. Co.*, 26 Minn. 278, 37 Am. Rep. 410, 3 N. W. Rep. 333.—APPROVED IN *Gram v. Northern Pac. R. Co.*, 1 N. Dak. 252. FOLLOWED IN *Clark v. Chicago, M. & St. P. R. Co.*, 28 Minn. 69.

In an action for damages to the person, alleged to have been sustained by carelessness or negligence of the employes of a company to one while a passenger on a train, contributory negligence on the part of the plaintiff is a matter of defense to be proved by the defendant; but the above rule does not prevent the trial court from directing judgment, as in case of nonsuit, if the evidence introduced by the plaintiff conclusively establishes the defense of contributory negligence. *McQuilken v. Central Pac. R. Co.*, 50 Cal. 7, 12 Am. Ry. Rep. 166.

362. Questions of law for court.*—It is for the court on the undisputed facts to determine whether or not the passenger was guilty of negligence which contributed to the injury sustained by him. *Nagle v. California Southern R. Co.*, 88 Cal. 86, 25 Pac. Rep. 1106.

Where the conduct of the plaintiff, who was injured while riding in a car which was crossing a bridge, showed a reckless disre-

gard of his safety, it was the duty of the court to declare, as a matter of law, that it was such negligence as entitled the defendant to a verdict; but if this were not the case, it was proper to leave it to the jury to decide whether he used such a degree of prudence as the occasion required. *Baltimore & Y. Turnpike Road Co. v. Leonhardt*, 27 Am. & Eng. R. Cas. 194, 66 Md. 70, 5 Atl. Rep. 346.

363. Questions of fact for jury.*—Whether the act or omission on the part of a passenger, claimed to have contributed to the injury complained of, was negligence, and whether such negligence was to any extent an immediate concurring cause of the injury, are matters to be decided by the jury. *McQuilken v. Central Pac. R. Co.*, 16 Am. & Eng. R. Cas. 353, 64 Cal. 463, 2 Pac. Rep. 46.

It seems that if the act advised to be done is one in the doing of which the danger would not be apparent to a person of reasonable prudence, and the passenger acts under the influence of such advice, given by the conductor or manager in the line of his ordinary duties, it becomes the province of the jury to say how far the plaintiff's negligence may be excused. *South & N. Ala. R. Co. v. Schaeffer*, 21 Am. & Eng. R. Cas. 405, 75 Ala. 136.

Where contributory negligence is set up by a carrier as a defense to an action for personal injuries, and the facts relating thereto are disputed, the question should be submitted to the jury; and the court is not required in the exercise of judicial discretion to set aside a verdict for the plaintiff. *Washington & G. R. Co. v. Harmon*, 147 U. S. 571, 13 Sup. Ct. Rep. 557.

Where a passenger sues to recover for illness brought on by taking cold in a car that was insufficiently heated, and it appears that he is one unaccustomed to travel, a failure to call the attention of the company's employes to the condition of the car is not such contributory negligence as to defeat a recovery; but such failure may go to the jury to be considered as bearing on the question of contributory negligence. *Hastings v. Northern Pac. R. Co.*, 53 Fed. Rep. 224.

* See also *post*, 376, 390, 402, 414, 420, 455, 483, 493, 609.

When contributory negligence of passenger a question for jury, see note, 1 L. R. A. 542.

* See also *post*, 410, 493, 608.

The presiding judge is not required to anticipate every possible phase of disputed facts and determine in regard to each of them whether negligence on the one side or the other does or does not result therefrom as a legal conclusion, but may properly leave it to the jury to say, under the rules of law given, whether upon the facts, as they find them, any want of reasonable care on the passenger's part contributed to produce the injury. *Hobbs v. Eastern R. Co.*, 66 Me. 572, 19 Am. Ry. Rep. 210.

It is a question of fact, to be determined by the jury, whether plaintiff was guilty of contributory negligence in the following cases:

In leaving his seat and standing in the passageway inside the closed door, after the approach of the train to the station at which he was to alight had been announced and the car had actually entered the station, and for the purpose of hastening his departure from the car. *Barden v. Boston, C. & F. R. Co.*, 121 Mass. 426.—DISTINGUISHING *Hickey v. Boston & L. R. Co.*, 14 Allen (Mass.) 429; *Todd v. Old Colony & F. R. R. Co.*, 3 Allen (Mass.) 18, 7 Allen 207; *Pittsburg & C. R. Co. v. McClurg*, 56 Pa. St. 294.

Where he went from one car to another in attempting to find a seat, acting under directions from an employé of the company. *McIntyre v. New York C. R. Co.*, 37 N. Y. 287, 35 How. Pr. 36; *affirming 47 Barb.* 515.—APPLIED IN *Filer v. New York C. R. Co.*, 49 N. Y. 47. DISTINGUISHED IN *Solomon v. Manhattan R. Co.*, 103 N. Y. 437, 9 N. E. Rep. 430, 56 Am. Rep. 843; *Pittsburgh, C. & St. L. R. Co. v. Krouse*, 30 Ohio St. 222. FOLLOWED IN *Lent v. New York C. & H. R. R. Co.*, 44 Am. & Eng. R. Cas. 373, 120 N. Y. 467, 24 N. E. Rep. 653, 31 N. Y. S. R. 538. QUOTED IN *Cleveland, C., C. & I. R. Co. v. Manson*, 30 Ohio St. 451; *Missouri Pac. R. Co. v. Lehmberg*, 75 Tex. 61, 12 S. W. Rep. 838; *Pool v. Chicago, M. & St. P. R. Co.*, 8 Am. & Eng. R. Cas. 360, 56 Wis. 227; *St. Lawrence & O. R. Co. v. Lett*, 11 Can. Sup. Ct. 422. REVIEWED IN *Wyatt v. Citizens' R. Co.*, 55 Mo. 485; *Solomon v. Manhattan R. Co.*, 3 N. Y. S. R. 636.

On the part of a passenger in the caboose of a freight train by rising to look out upon approaching a station. *Lusby v. Atchison, T. & S. F. R. Co.*, 41 Am. & Eng. R. Cas. 93, 41 Fed. Rep. 181.—QUOTING *Norton v. Ittner*, 56 Mo. 352; *Sioux City & P. R. Co. v. Stout*, 17 Wall. (U. S.) 657;

2 D. R. D.—29.

Detroit & M. R. Co. v. Van Steinburg, 17 Mich. 120.

364. Comparative negligence.*—(1) *Illinois*.—The doctrine of what is called comparative negligence, or where there is mutual negligence producing an injury, applies where a passenger sues the carrier for a personal injury. *Galena & C. U. R. Co. v. Fay*, 16 Ill. 558.—MODIFIED IN *Chicago & A. R. Co. v. Gretzner*, 46 Ill. 74.

It does not necessarily follow that a passenger guilty of some negligence, slight in its character, cannot recover for a personal injury resulting from the gross negligence of the carrier. *Lake Shore & M. S. R. Co. v. Brown*, 31 Am. & Eng. R. Cas. 61, 123 Ill. 162, 14 N. E. Rep. 197.

(2) *Georgia*.—Mitigation of damages.†—Where a passenger could not have avoided the consequences to himself of the negligence of a railroad he is entitled to recover, but it is the duty of the jury to lessen the verdict in proportion to the want of ordinary care by the passenger contributing to such injury. (Ga. Code, §§ 2921, 2980.) *Macon & W. R. Co. v. Johnson*, 38 Ga. 409.

365. Imputed negligence.‡—Where a passenger is injured through the mutual negligence of those in charge of his train and another, belonging to different companies, the negligence of the persons on whose train plaintiff is cannot be imputed to him so as to prevent a recovery against the other. Both carriers being negligent, they may be sued as any other wrong-doer, either severally or jointly. *Union R. & T. Co. v. Shacklett*, 19 Ill. App. 145.—QUOTING *Wabash, St. L. & P. R. Co. v. Shacklett*, 105 Ill. 364.

Where a lady sues a company to recover for injuries received by its train colliding with the carriage in which she is driven, she is entitled to recover, if she is free from negligence herself, though the driver of her carriage may have been guilty of negligence contributing to the injury. *Robinson*

* See also title COMPARATIVE NEGLIGENCE, 7.

† See also *post*, 633.

‡ See also title IMPUTED NEGLIGENCE.

Injury to passenger by concurrent negligence of his carrier and another. Imputing negligence of passenger's carrier to him, see note, 23 AM. REP. 4.

When carrier's negligence is imputed to passenger, see notes, 37 AM. & ENG. R. CAS. 44; 22 Id. 355; 18 Id. 148.

Collision between two conveyances. Right of passenger to recover, see note, 2 AM. & ENG. R. CAS. 180.

v. *New York C. & H. R. R. Co.*, 66 N. Y. 11, 23 Am. Rep. 1.

Where plaintiff is injured by the joint collision of two trains, it must appear that the accident was due exclusively to the defendant's negligence. It is not enough to show that it is due to the joint negligence of the defendant company and those having charge of the train on which plaintiff was a passenger. *Bridge v. Grand Junction R. Co.*, 3 M. & W. 244.

2. While Getting on Cars.*

a. In General.

366. Care demanded.—While it is the duty of a company to provide safe and reasonably convenient means of ingress to its cars, it is equally the duty of the passenger to use the means provided, with reasonable circumspection and care. *Keller v. Hestonville, M. & F. Pass. R. Co.*, 149 Pa. St. 65, 24 Atl. Rep. 159; affirming 1 Pa. Dist. 197.

It is not such contributory negligence on the part of a pregnant female passenger to attempt to step from the ground to the car-step, some 30 to 36 inches high, in getting on the train at a regular stopping place, as to defeat a recovery for injuries received, where no other means of entering the car were furnished her. *Missouri Pac. R. Co. v. Watson*, 72 Tex. 631, 10 S. W. Rep. 731.

Negligence is always a relative term and is determined by comparing a given act with the conduct of other persons of ordinary prudence and intelligence under like circumstances. So an instruction that "if plaintiffs, in taking a train, acted as persons of common sense and ordinary prudence and intelligence usually act in like cases, then there was no negligence on their part such as would prevent a recovery" correctly states the law and is not open to the objection that it states the wrong criterion for determining what is negligence. *Curtis v. Detroit & M. R. Co.*, 27 Wis. 158, 5 Am. Ry. Rep. 368.

367. Voluntarily assuming risk.—Plaintiff sued for injuries from being thrown back from the car platform by persons on it when he attempted to enter the car and for being run over by a train. It appeared that the risk of attempting to enter the car was voluntarily assumed by plaintiff. *Held*, that his act was contribu-

tory negligence and the company was not liable. *Hollman v. Houston & T. C. R. Co.*, 2 Tex. Unrep. Cas. 557.

368. Failure to make inquiry.—It is not competent for the court to instruct the jury, as a matter of law, that it was the duty of the passenger who had been directed how to enter the cars, but failed to comprehend the directions, to return and ask further information of the employé, who was already aware of the passenger's inexperience and ignorance. *Allender v. Chicago, R. I. & P. R. Co.*, 43 Iowa 276, 14 Am. Ry. Rep. 443.

It is the duty of a passenger to make reasonable inquiry as to the time and manner of entering and taking his seat in cars. But if the company has no rules or regulations, published so they may be known, then the parties are to be governed by the common-law duties and obligations of the company. If the passenger is left without guidance he may assume that the custom of the company on prior occasions as to the time, place, and manner of receiving and discharging passengers are the rules of the company, and may act accordingly, provided he uses such care and prudence as a reasonable man is bound to exercise. *Phillips v. Rensselaer & S. R. Co.*, 57 Barb. (N. Y.) 644; reversed in 49 N. Y. 177, 3 Am. Ry. Rep. 477.

369. Disobeying carrier's rules.*—A passenger's consent to the reasonable regulations of a railroad company, in regard to entering and leaving its trains, is implied; and for an injury which results to him from his voluntary disregard thereof, the company is not liable. *Drake v. Pennsylvania R. Co.*, 137 Pa. St. 352, 20 Atl. Rep. 994.

370. Following conductor's directions.†—The direction of the conductor of a train to an intending passenger as to his method of getting upon such train is clearly within the scope of his authority as such conductor, and in complying with such direction the passenger is not guilty of negligence unless he exposes himself to open and apparent danger. *Irish v. Northern Pac. R. Co.*, 4 Wash. 48, 29 Pac. Rep. 845.

371. Getting on elsewhere than at platform.—(1) Generally.—It cannot be inferred as a conclusion of law that getting on

* See also *ante*, 70, 294, 351, 359; *post*, 452, 470, 495.

† See also *ante*, 135, 242, 355; *post*, 407, 429-431, 470, 496.

* See also *ante*, 213-224.

a passenger train at a place other than the platform is negligence of the passenger, contributing to an injury received while entering the car, in consequence of a violent and negligent starting of the train. *Stoner v. Pennsylvania Co.*, 21 *Am. & Eng. R. Cas.* 340, 98 *Ind.* 384, 49 *Am. Rep.* 764.—QUOTING *Lafayette & I. R. Co. v. Sims*, 27 *Ind.* 59.

The station platform and not the side-track is the proper place to enter or leave a train; and those who, for purposes of their own, use the latter, assume all the extra risks necessarily incident to such a practice, and are bound to exercise a degree of care corresponding to the increased risks. *De Kay v. Chicago, M. & St. P. R. Co.*, 39 *Am. & Eng. R. Cas.* 463, 41 *Minn.* 178, 4 *L. R. A.* 632, 43 *N. W. Rep.* 182.

A company is not liable for injuries to a person caused by an inadvertent starting of the train, where such person is attempting to get on away from a station, without a ticket, at a moment when the train is liable to start, and without any brakeman or conductor in sight. *Phillips v. Northern R. Co.*, 41 *N. Y. S. R.* 780, 16 *N. Y. Supp.* 909.

(2) *Rules of company.*—If a company designates and sets apart a platform as the place where it requires all passengers to enter the cars, and this is known to a passenger, and if he, in disregard of this regulation and in advance of time, and without justification for so doing, seeks to enter the cars at another place, and in so doing is injured, the company is not liable. *McDonald v. Chicago & N. W. R. Co.*, 26 *Iowa* 124.—APPROVED IN *Chance v. St. Louis, I. M. & S. R. Co.*, 10 *Mo. App.* 351.

In an action by a husband and wife against a company, to recover damages for injuries to the wife caused by defective steps to a platform to which a train had backed, and which was not the usual place for passengers to get on and off the cars, the jury should have been instructed to ascertain from the evidence whether the company had designated or set apart the platform in front of the depot as the place where it required all passengers to enter the cars; if so, and this was known to the plaintiffs, and they, in disregard of such requirement, in advance of time, and without any justification, sought to enter the cars at another place, and in so doing met with injury, then the company would not be liable as common carriers. *McDonald v. Chicago & N. W. R. Co.*, 26 *Iowa* 124.

If there was no such rule or regulation known to the plaintiffs, and they, in good faith and using reasonable care, were seeking to find and enter the cars, the company would be liable, as the plaintiffs would have a right to presume that the platform and its approaches were in a safe condition. *McDonald v. Chicago & N. W. R. Co.*, 26 *Iowa* 124.

A passenger is not guilty of contributory negligence in getting on a "mixed train" some 40 or 50 feet from the platform, where the rules of the company require persons to get on or off such trains whenever it is convenient for trains to stop. *Louisville & N. R. Co. v. Long*, (Ky.) 22 *S. W. Rep.* 747.

(3) *Custom.*—Where a company has been in the habit of receiving and discharging passengers at a point other than the regular station, it is not contributory negligence for a passenger to attempt to get on at such place, especially where doing so is not attended with any apparent danger. *Keating v. New York C. & H. R. R. Co.*, 49 *N. Y.* 673; affirming 3 *Lans.* 469.—REVIEWED IN *Plopper v. New York C. & H. R. R. Co.*, 13 *Hun* (N. Y.) 625.

A person who goes in the night-time in the midst of a car yard, and at a place where the company is not accustomed to receive passengers, and without the knowledge of those in charge of a freight train standing there attempts to enter the caboose attached to such freight train and is injured, is guilty of contributory negligence and cannot recover for such injury. *Haase v. Oregon R. & N. Co.*, 44 *Am. & Eng. R. Cas.* 360, 19 *Oreg.* 354, 24 *Pac. Rep.* 238.

372. Getting on after signal to start.*—Empty passenger cars were standing upon the siding opposite a station; the incoming train passed on the main track, and after reaching the switch was backed down upon the side-track and coupled to the stationary cars. *Held*, that it was not a rule of law that a passenger was guilty of contributory negligence if, after a signal had been given to start the train, he attempted to get on, the train being then at rest. *Dawson v. Boston & M. R. Co.*, 156 *Mass.* 127, 30 *N. E. Rep.* 466.

A party under the influence of liquor attempted to get on a train at a station after the conductor had called out "all aboard." While doing so the train started backwards

* See also *post*, 382, 304, 473.

and he was thrown to the ground and hurt. He recovered a verdict against the company, and a new trial was refused by the court. *Held*, that there was no evidence of negligence to sustain the verdict, and that the judgment entered thereon must be reversed. *Houston & T. C. R. Co. v. Schmidt*, 21 *Am. & Eng. R. Cas.* 345, 61 *Tex.* 282.

373. Getting on before the proper time.—A passenger who returns to a train which has stopped to allow passengers to dine, before the conductor has called upon the passengers to re-enter the cars, is not, in so doing, guilty of negligence contributing to personal injuries sustained before the other passengers had been required to board the train. *Lakin v. Oregon Pac. R. Co.*, 34 *Am. & Eng. R. Cas.* 500, 15 *Oreg.* 220, 15 *Pac. Rep.* 641.

It appeared, in an action for damages for injuries sustained by a passenger from a fall between defendant's cars and a platform, that she was attempting to get a seat before the cars were lighted and some time before it was the usual time to light them and to give the signals of warning and the preparation generally given; and without invitation from defendant's agents plaintiff attempted to get her seat in the dark, and was hurt while stepping from the platform to the cars. It was not made to appear that there was any defective construction. *Held*: (1) plaintiff was not entitled to recover; (2) her injury resulted wholly from her own negligence. *Hodges v. New Hanover Transit Co.*, 107 *N. Car.* 576, 12 *S. E. Rep.* 597.

374. Entering from wrong side.—A plaintiff who arrives at the depot before the cars, with plenty of time to go upon the platform, but who deliberately waits upon the ground on the opposite side of the track, and when the cars come along attempts to get aboard from that side, and especially after dark, and is thrown off by the cars starting before she is securely on, cannot be said to be free from negligence contributory to the result. *Michigan C. R. Co. v. Coleman*, 28 *Mich.* 440, 12 *Am. Ry. Rep.* 59.—DISTINGUISHED IN *McQuilken v. Central Pac. R. Co.*, 64 *Cal.* 463; *Van Osstran v. New York C. & H. R. R. Co.*, 35 *Hun* (N. Y.) 590.

Nor are conductors of night trains, when stopping or starting, required to be on the lookout for passengers to get aboard from both sides of the train, and are not at fault for not discovering a passenger attempting

to get on from the wrong side. *Michigan C. R. Co. v. Coleman*, 28 *Mich.* 440, 12 *Am. Ry. Rep.* 59.

In an action by a passenger for personal injuries, the company relied upon contributory negligence in the manner in which plaintiff entered the train. The evidence showed that there was no passenger platform to indicate the proper place for passengers to enter the cars; and though there was a narrow plank-walk on one side of the track, it was the custom of the company to receive and discharge passengers on both sides, and that plaintiff himself on former occasions had been received and discharged on the side opposite the walk, as had other passengers for a distance of over two hundred feet. *Held*, that the evidence showed that the company had permitted, if not adopted, this method of receiving passengers, and it must be held responsible for the safety of that method of getting on; and that it amounted to an invitation, at least, to persons to get on on either side. *Phillips v. Rensselaer & S. R. Co.*, 57 *Barb.* (N. Y.) 645; *reversed in* 49 *N. Y.* 177, 3 *Am. Ry. Rep.* 477.

375. Entering through wrong door.—Plaintiff was riding on a freight train in charge of horses. He was told at a certain point that the caboose would not go further, and that thereafter he must ride in the car with the horses. While entering the car from the side door the train suddenly started and injured him. *Held*, that it was not contributory negligence to attempt to enter the side door, where the evidence showed that the end door was only used in cases of emergency, when drovers had occasion to enter the car while the train was in motion. *Pitcher v. Lake Shore & M. S. R. Co.*, 16 *N. Y. Supp.* 62; *affirmed in* 33 *N. E. Rep.* 339.

376. Questions of fact for the jury.*—Whether or not the passenger was warned by the trainmen not to get on the train was, the evidence being conflicting, a question for the jury. *Fulks v. St. Louis & S. F. R. Co.*, 52 *Am. & Eng. R. Cas.* 280, 111 *Mo.* 335, 19 *S. W. Rep.* 818.

Ordinarily the place to board a train, and the sole place, is that provided by the company for the purpose. Whether, under the circumstances, pursuit, with the intention of boarding a moving train, could properly be

* See also *post*, 390.

undertaken at all, or could properly be continued until the injury was received, should be left for determination by the jury, in the light of all the evidence. *Central R. & B. Co. v. Perry*, 58 Ga. 461, 16 Am. Ry. Rep. 122.

The question of a passenger's contributory negligence is properly one of fact for the jury in the following cases:

Where a female passenger sued for injuries received by being thrown from the car steps as she was about to get on, caused by the sudden starting of the train, it appearing that the train extended entirely across the street, so as to completely cut off her approach to the platform, and that she undertook to get on where the car lay; that passengers were accustomed to get on trains in the same position without objection. *Keating v. New York C. & H. R. R. Co.*, 3 Lans. (N. Y.) 469; affirmed in 49 N. Y. 673, *mem.* — REVIEWING *O'Mara v. Hudson River R. Co.*, 38 N. Y. 445.—FOLLOWED IN *Gainard v. Rochester City & B. R. Co.*, 18 N. Y. S. R. 692, 2 N. Y. Supp. 470.

In an action for personal injuries to a passenger by being thrown down while in the act of getting on the train, by its suddenly starting, where there was evidence tending to show that the train had come to a full stop, and that the passengers had been directed to get on, and that the injury was caused by the sudden starting of the train, while there was other evidence tending to show that plaintiff was told to get on the hind car, and was injured while attempting to get on another car. *Detroit & M. R. Co. v. Curtis*, 23 Wis. 152.

In an action for personal injuries to a passenger received while getting on the train, there being a conflict of evidence, plaintiff's evidence tending to show that while he was in the act of getting on, the conductor gave the signal to start and the train was started with a violent jerk, throwing him down and injuring him; while the evidence for the company tended to show that plaintiff was knocked down and injured while attempting to cross in front of the engine. *Jones v. Brooklyn, B. & W. E. R. Co.*, 21 N. Y. S. R. 169, 3 N. Y. Supp. 253.

b. Getting on Moving Trains.*

377. Generally.—(1) *Statement of the rule.*—The general rule is, that passengers

* See also *ante*, 415-440.
Passengers getting on cars in motion, see note, 3 AM. & ENG. R. CAS. 431.

As to contributory negligence of persons

who are injured while getting on or off moving trains cannot recover for such injuries. *Frowne v. Raleigh & G. R. Co.*, 47 Am. & Eng. R. Cas. 544, 108 N. Car. 34, 12 S. E. Rep. 958.—DISTINGUISHING *Rose v. Wilmington & W. R. Co.*, 106 N. Car. 168; *Pickens v. Richmond & D. R. Co.*, 104 N. Car. 312.

A passenger who attempts to get on a train while in motion is so wanting in ordinary care that he cannot, in the absence of evidence of any circumstances to excuse his act, maintain an action for an injury thereby received. *Harvey v. Eastern R. Co.*, 116 Mass. 269.—DISTINGUISHED IN *Brooks v. Boston & M. R. Co.*, 16 Am. & Eng. R. Cas. 345, 135 Mass. 21.

Boarding or attempting to board a moving train is an improper and dangerous act. The company's invitation to its passengers to board its train is withdrawn the moment the train begins to move. *Chaffee v. Old Colony R. Co.*, 52 Am. & Eng. R. Cas. 366, 17 R. I. 658, 24 Atl. Rep. 141.—REVIEWING *Dublin, W. & W. R. Co. v. Slattery*, L. R. 3 App. Cas. 1155; *Weeks v. New Orleans, S. F. & L. R. Co.*, 40 La. Ann. 800.

There can be no recovery for injuries received in attempting to board a moving train, in the absence of anything to show that the conductor or other employé knew, or by the use of ordinary diligence would have known, before the train started that such person wished to take passage. *International & G. N. R. Co. v. Gorman*, 2 Tex. App. (Civ. Cas.) 679.

(2) *Its scope and extent.*—Attempting to mount a moving train, without the advice and direction of the company's agents, is negligence, and will defeat a recovery for an injury received thereby. *Missouri Pac. R. Co. v. Texas & P. R. Co.*, 36 Fed. Rep. 879.

jumping on or off moving trains, see note, 21 L. R. A. 356.

Injuries to passengers while attempting to board moving trains, see note, 52 AM. & ENG. R. CAS. 284.

Injury while attempting to board engine of freight train with consent of conductor. Conductor's authority, see 39 AM. & ENG. R. CAS. 417, *abstr.*

Attempting to board moving train. Failure to stop at station. Liability for suddenly starting while passenger is getting on, see note, 47 AM. & ENG. R. CAS. 541.

Company not liable to one injured while boarding a moving train, see 28 AM. & ENG. R. CAS. 553, *abstr.*

—FOLLOWING *Knight v. Pontchartrain R. Co.*, 23 La. Ann. 462.

Where announcement was made that the caboose would not stop at the platform sufficient time for passengers thereon to reach the caboose and board it before the train started, a passenger, who waited for the caboose to come up and in attempting to board it while passing was injured, cannot recover therefor, even though he did not hear the announcement by reason of his preoccupation. *Hays v. Wabash R. Co.*, 51 Mo. App. 438.

While a company may be guilty of negligence in not waiting five minutes at a station, such negligence would not justify the injured party in attempting to get aboard the cars while in motion, if such act, under the circumstances, was negligence and contributory to the injury. *Galveston, H. & S. A. R. Co. v. Le Gierse*, 51 Tex. 189.—FOLLOWED IN *Houston & T. C. R. Co. v. Nixon*, 52 Tex. 19.

(3) *Negligence per se**—*Gross negligence*.—It is gross negligence to attempt to get on a moving train. *Spannagle v. Chicago & A. R. Co.*, 31 Ill. App. 460.

The boarding or alighting from a moving train is presumably and generally a negligent act *per se*. *Solomon v. Manhattan R. Co.*, 27 Am. & Eng. R. Cas. 155, 103 N. Y. 437, 9 N. E. Rep. 430, 56 Am. Rep. 843, n.—DISTINGUISHED IN *Pullitro v. Delaware, L. & W. R. Co.*, 27 N. Y. S. R. 63, 7 N. Y. Supp. 510. FOLLOWED IN *Card v. Manhattan R. Co.*, 103 N. Y. 670. REVIEWED IN *Worthington v. Central Vt. R. Co.*, 64 Vt. 107.

Therefore when a passenger, while engaged in such an attempt, fell under the cars and was killed, no recovery could be had against the company for his death, even though his fall was occasioned by a defect in the station platform. *Bacon v. Delaware, L. & W. R. Co.*, 143 Pa. St. 14, 21 Atl. Rep. 1002.

But while it is *prima facie* negligent for a passenger to attempt to alight from or to board a moving train, it is not in all cases negligence *per se* to attempt to do so. *Cousins v. Lake Shore & M. S. R. Co.*, 96 Mich. 386, 56 N. W. Rep. 14.

378. At the invitation or by permission of carrier's servant.—(1) *When negligence.*—Neither the refusal to

stop a train nor the custom of those in charge of the train to slacken its speed at the particular station, in order to take on passengers without coming to a stop, will excuse the negligence of the party; nor will a mere permission from the company's servants to do a dangerous act relieve the injured person from the responsibility for its consequences. *Denver, S. P. & P. R. Co. v. Pickard*, 18 Am. & Eng. R. Cas. 284, 8 Colo. 163, 6 Pac. Rep. 149.

It is no part of the duty of a ticket agent to assist or tell passengers to get on a moving train, and in doing so he does not represent the company. So one who has arrived at the age of discretion cannot recover for an injury received while trying, on such agent's suggestion, to get on a moving train. *Chicago, R. I. & P. R. Co. v. Koehler*, 47 Ill. App. 147.

The mere fact that a party thinks it safe to board a moving train, and that he has been invited to do so by the conductor, does not justify the attempt, if a person of ordinary prudence would not have done so. But where a train had been flagged to stop, and slows at the station without stopping, and the conductor grabs the passenger's overcoat from his arm, and asks him to jump on, the court will not undertake to say that his conduct in getting on was so negligent as to reverse a verdict in his favor. *Kansas & G. S. L. R. Co. v. Dorrough*, 72 Tex. 108, 10 S. W. Rep. 711.

(2) — *and when not.*—If it can be said in any case to be negligence, as matter of law, for a person to attempt to get on a train of cars moving at a rate of speed of not more than two miles an hour, it cannot be affirmed of a person who, while waiting at a regular station for an approaching train, which ought to stop there, and which, recognizing his signal to stop, only checked its speed to not more than two miles an hour, attempts to get on board while it so moving, when the attendant circumstances show that there was no intention to make a full stop, and the conductor called out "all aboard." Under such circumstances, though the waiting passenger was not bound to attempt to get on the moving train, he is not guilty of negligence in accepting the invitation to do so, whether express or implied. *Montgomery & E. R. Co. v. Stewart*, 91 Ala. 421, 8 So. Rep. 708.

If it would, under other circumstances, have been negligence for defendant to at-

* See also *post*, 483.

tempt to board the moving train, it was not negligence for him to do so when directed by the conductor and others having charge of the train. *Rayburn v. Central Iowa R. Co.*, 74 Iowa 637, 35 N. W. Rep. 606, 38 N. W. Rep. 520.

A carrier is under no obligation to delay the departure of its trains or to look after the safety of persons who attempt to enter them after they have been stopped long enough to allow passengers to disembark and embark; but it may be liable for injuries incurred by one who, by the invitation or command of persons in charge of the trains, attempts to get on or off while the cars are in motion. *Browne v. Raleigh & G. R. Co.*, 47 Am. & Eng. R. Cas. 544, 108 N. Car. 34, 12 S. E. Rep. 958.

379. Before train has come to a standstill.—It is not negligence *per se* for a passenger to attempt to get on a sleeping-car at night before the car gets alongside of the platform, where there is no evidence to show that he knew the length of the train as compared with that of the platform, or that he had reason to expect that the car would be brought up to the platform before passengers were invited to enter. *Curtis v. Detroit & M. R. Co.*, 27 Wis. 158, 5 Am. Ky. Rep. 368.

Ordinarily it is not negligence *per se* for a person to get on or off a train in the ordinary manner while it is moving slowly; but it is culpable negligence *per se* for a person who expects to take passage on a freight train to wait for a considerable time while it is about the station for the purpose of switching cars, etc., and after the train has started, and the caboose is past him, to attempt to jump on a stock-car without any conveniences for doing so except the ordinary iron ladder on the side. *Warren v. Southern Kan. R. Co.*, 31 Am. & Eng. R. Cas. 10, 37 Kan. 408, 15 Pac. Rep. 601.

380. After train had stopped a reasonable time.—If a passenger is injured in getting on a moving train, the train being stopped a sufficient time for him to have boarded it in safety, the courts uniformly hold that such act is contributory negligence, and bars a recovery. Proof that others had frequently boarded trains with knowledge of servants of the railroad company operating the train, after the fact, without proof of encouragement so to do, would not prove custom or license. *Ohio & M. R. Co. v. Allender*, 47 Ill. App. 484.

The sale of a ticket before the arrival of a train, or when it is at the station, does not give the purchaser a specific right to take that particular train, so that it must be held long enough for him to go upon it. The ticket gives no right to delay the train, but simply a right to take any train to the passenger's destination, which stops at that station, provided he presents himself in time; and the duty is imposed upon the passenger of presenting himself in time or waiting for the next train. So held, where a passenger was injured by attempting to get on a train just as it started, and after all the other passengers were in, and when the brakeman and conductor had entered the car, and did not know of her presence, owing to her having entered the platform after the time for the departure of the train. *Paulitsch v. New York C. & H. R. R. Co.*, 26 Am. & Eng. R. Cas. 162, 102 N. Y. 280, 6 N. E. Rep. 577, 1 N. Y. S. R. 656; reversing 18 J. & S. 241.

After having ample opportunity to get on a train while it was standing at the platform, plaintiff undertook to get on after the train had started, and having got hold of the iron railing of the car held on until he was brought against a post on the platform and was injured. Held, that he was guilty of such negligence as to preclude a recovery. *Chicago & N. W. R. Co. v. Scates*, 90 Ill. 566.—QUOTING *Illinois C. R. Co. v. Slatton*, 54 Ill. 133; *Phillips v. Rensselaer & S. R. Co.*, 49 N. Y. 177.

381. Where the danger is plainly apparent.—A person who, when in a safe position and under no stress of circumstances, attempts to get upon a train in motion, while in such proximity to a known and prominent obstruction as would render the consequences of a misstep possibly if not certainly serious, no matter what motive or influence induced the act, is alone responsible for any injury which results to him, and cannot maintain an action against the company for negligence. *Hunter v. Cooperstown & S. V. R. Co.*, 47 Am. & Eng. R. Cas. 534, 126 N. Y. 18, 26 N. E. Rep. 958; former appeal, 112 N. Y. 371, 26 N. E. Rep. 958, 36 N. Y. S. R. 367; reversing 58 Hun 606, 34 N. Y. S. R. 1016, 13 N. Y. Supp. 953.

382. After being warned not to make the attempt.—An instruction is

* See also *ante*, 372; *post*, 304, 473.

proper that if he attempted to board the moving train after being warned by the men in charge thereof not to do so, he could not recover. *Fulks v. St. Louis & S. F. R. Co.*, 52 Am. & Eng. R. Cas. 280, 111 Mo. 335, 19 S. W. Rep. 818.

383. Train moving from four to eight miles per hour.—An attempt to get upon a train while in motion, moving at the rate of five or six miles per hour, without a necessity for doing so, induced by the conduct of the employes of the company, and without any invitation to do so from its agent acting in the line of his duty, precludes the passenger from the right to recover for the injury which may be thereby occasioned. *Denver, S. P. & P. R. Co. v. Pickard*, 18 Am. & Eng. R. Cas. 284, 8 Colo. 163, 6 Pac. Rep. 149.—**DISTINGUISHING** *Illinois C. R. Co. v. Able*, 59 Ill. 131; *Johnson v. West Chester & P. R. Co.*, 70 Pa. St. 357; *Filer v. New York C. R. Co.*, 49 N. Y. 47; *Phillips v. Rensselaer & S. R. Co.*, 49 N. Y. 177.

It is, as a matter of law, contributory negligence for a passenger to attempt to get on a train moving so fast as to render it exceedingly dangerous to make the attempt, and such is the case if the rate is six or eight miles an hour, and this even though the passenger is young, active, and unencumbered with baggage. *Murphy v. St. Louis, I. M. & S. R. Co.*, 43 Mo. App. 342.—**QUOTING** *Nelson v. Atlantic & P. R. Co.*, 68 Mo. 593.

A man who is *sui juris*, and in the full possession of his faculties, with nothing to disturb his judgment, who attempts to board a train moving at a rate of from four to six miles an hour, is chargeable, as matter of law, with negligence, and the question in such a case is not made one of fact by proof that the man was directed by the conductor of the train, if he was going on the train, to "jump on." *Hunter v. Coopers-town & S. V. R. Co.*, 37 Am. & Eng. R. Cas. 74, 112 N. Y. 371, 19 N. E. Rep. 820, 21 N. Y. S. R. 1; *reversing* 44 Hun 626, mem.—**DISTINGUISHING** *Filer v. New York C. R. Co.*, 49 N. Y. 47; *Morrison v. Erie R. Co.*, 56 N. Y. 302.—**DISTINGUISHED BUT NOT FOLLOWED IN** *Murphy v. St. Louis, I. M. & S. R. Co.*, 43 Mo. App. 342; *Weiler v. Manhattan R. Co.*, 53 Hun (N. Y.) 372, 25 N. Y. S. R. 543, 6 N. Y. Supp. 320; *Pullutro v. Delaware, L. & W. R. Co.*, 27 N. Y. S. R. 63, 7 N. Y. Supp. 510. **REVIEWED IN**

Worthington v. Central Vt. R. Co., 64 Vt. 107.

384. Slowly moving train.—Generally it is not negligence *per se* for a person to get on or off a train in the ordinary manner while it is only slightly in motion. *Warren v. Southern Kan. R. Co.*, 31 Am. & Eng. R. Cas. 10, 37 Kan. 408, 15 Pac. Rep. 601.

Especially at a platform. *Fulks v. St. Louis & S. F. R. Co.*, 52 Am. & Eng. R. Cas. 280, 111 Mo. 335, 19 S. W. Rep. 818.

Boarding a train slowly moving, or at place other than the platform, is not negligence *per se*, in the absence of prohibition against the same, especially when done at the direction of a person wearing the uniform of the company. *Baltimore & O. R. Co. v. Kane*, 69 Md. 11, 13 Atl. Rep. 387, 12 Cent. Rep. 95.

It is not negligence *per se* for a passenger, a youth active and unencumbered with baggage, to attempt to get on a slowly moving train. *Murphy v. St. Louis, I. M. & S. R. Co.*, 43 Mo. App. 342.—**NOT FOLLOWING** *McClintock v. Railroad*, 21 W. N. C. (Pa.) 133; *Pennsylvania R. Co. v. Appell*, 23 Pa. St. 147; *Hunter v. Cooperstown & S. V. R. Co.*, 112 N. Y. 371. **QUOTING** *Leslie v. Wabash, St. L. & P. R. Co.*, 88 Mo. 50; *Doss v. Missouri, K. & T. R. Co.*, 59 Mo. 27; *Wyatt v. Citizens' R. Co.*, 55 Mo. 485; *Straus v. Kansas City, St. J. & C. B. R. Co.*, 75 Mo. 185; *Swigert v. Hannibal & St. J. R. Co.*, 75 Mo. 475. **REVIEWING** *Meyer v. Pacific R. Co.*, 40 Mo. 151.

385. Train suddenly started without notice.—Where a plaintiff exercises care in attempting to get aboard a train, after he had alighted, he is guilty of no act of negligence which would prevent a recovery for injuries caused by defendant's servants in starting the train without notice. *Galveston, H. & S. A. R. Co. v. Cooper*, 2 Tex. Civ. App. 42, 20 S. W. Rep. 990.—**RECONCILING** *Missouri Pac. R. Co. v. Foreman*, 73 Tex. 344.

386. — or speed suddenly increased.—Even if a passenger could be held guilty of negligence in attempting to get on board of the moving train, the company would be responsible in damages for personal injuries sustained, on proof that the conductor, seeing his dangerous position while making the attempt, gave the signal

* See also *ante*, 220-223.

for the train to move on; and if the train moved forward with a "sudden jerk," whereby he was knocked down and seriously injured, it might show such gross negligence as would authorize punitive damages. *Montgomery & E. R. Co. v. Stewart*, 91 Ala. 421, 8 So. Rep. 708.

387. Attempting to get on in an improper manner.—Where the plaintiff, a young man 19 years and 4 months old, purchases a ticket to ride upon a freight train five or six miles, and no one instructs him when or where or how to get upon the train, or what car to get upon or into; and afterwards the train arrives at the station and stops with the caboose near enough and for a sufficient length of time for the plaintiff to walk to the caboose and get upon it, but he does not do so; and afterwards the conductor gives the signal for the train to start and leave the station, and the plaintiff understands it, and the train then approaches the station, moving slowly, and the engine passes the place where the plaintiff is standing on the station platform, and the first car, which is a stock-car, with no conveniences for getting upon it except an iron ladder on its side, comes immediately in front of the plaintiff, and the plaintiff, without waiting for the caboose-car to arrive, attempts to jump upon the stock-car while it is in motion, and falls between the stock-car and the station platform and is injured—*held*, that the company is not guilty of any such negligence causing the injury as will entitle the plaintiff to recover damages therefor from the company. *Warren v. Southern Kan. R. Co.*, 31 Am. & Eng. R. Cas. 10, 37 Kan. 423, 15 Pac. Rep. 601.

388. Clinging to the railing.*—On a dark night, while snow was falling, defendant's passenger train, signaled at a flag-station, either did not stop or failed to stop long enough, and while it was moving out plaintiff, an old man who was numb with cold, in attempting to get on seized the platform railing with his left hand, holding a valise in his right. By a sudden jerk of the train he lost his footing, but clung to the railing. The train porter, the only employé who saw him, took his valise and repeatedly urged him to let loose, but he held on, the speed constantly increasing, and was dragged 150 yards, when he fell and was injured. No effort was made to

stop the train. Plaintiff testified that he held tenaciously to the railing because he thought he would be crushed to death if he fell. *Held*, that he was guilty of such contributory negligence as debarred a recovery for the injury, and that an instruction to find for the defendant was proper. *McMurtry v. Louisville, N. O. & T. R. Co.*, 67 Miss. 601, 7 So. Rep. 401.

389. — and running by side of train.—It is such contributory negligence for a passenger to attempt to get on a slowly moving train, but which is passing without stopping at that station, and after being thrown down by a jerk of the cars to hold on to the iron rod trying to recover his position until he is struck by a part of the platform that projects near the track, as to prevent a recovery for injuries received; and this is so though plaintiff and others have been in the habit of getting on and off at the station while the train was in motion, and though some one upon the train called out the station. *Phillips v. Rensselaer & S. R. Co.*, 49 N. Y. 177, 3 Am. Ry. Rep. 477; *reversing* 57 Barb. 644.—**DISTINGUISHING** *Whittaker v. Manchester & S. R. Co.*, L. R. 5 C. P. 464, *n.*—**APPLIED IN** *Morrison v. Erie R. Co.*, 56 N. Y. 302. **DISTINGUISHED** *in* *Denver, S. P. & P. R. Co. v. Pickard*, 18 Am. & Eng. R. Cas. 284, 8 Colo. 163; *Nolan v. Brooklyn City & N. R. Co.*, 3 Am. & Eng. R. Cas. 463, 87 N. Y. 63, 41 Am. Rep. 345; *Solomon v. Manhattan R. Co.*, 103 N. Y. 437, 9 N. E. Rep. 430, 56 Am. Rep. 843, *n.*; *Dale v. Brooklyn City, H. P. & P. R. Co.*, 1 Hun (N. Y.) 146, 3 T. & C. 686. **QUOTED IN** *Chicago & N. W. R. Co. v. Scates*, 90 Ill. 586. **REVIEWED IN** *Gonzales v. New York & H. R. Co.*, 50 How. Pr. (N. Y.) 126; *Solomon v. Manhattan R. Co.*, 3 N. Y. S. R. 636.

Plaintiff, an intending passenger by a way-train on defendants' railway, arrived at the station just as the train, which was some minutes late, was moving out of the station, whereupon he ran quickly to the train and, seizing hold of the iron railing of one of the cars, and holding thereon, ran along the platform at the speed of the train with his face towards the car, and, after the train had moved a certain distance, in attempting to jump thereon he struck against a baggage-truck which was close to the edge of the platform, and which had been used in taking baggage to the baggage-car, and was left for a couple of minutes to bring back

* See also *post*, 390.

the baggage therefrom. By the concussion he was thrown under the wheels of the train and received an injury to one of his legs which rendered amputation necessary. *Held*, the leaving of the truck on the platform did not constitute negligence on the part of defendants; but even if it did, plaintiff in attempting to get on the train as he did was guilty of such contributory negligence as would prevent his recovering. *Haldan v. Great Western R. Co.*, 30 U. C. C. P. 89.

300. Question of fact for jury.*—

Where there is a conflict of testimony, the question of whether a passenger is guilty of negligence in attempting to get on a moving train is for the jury; but evidence of whether the train stopped long enough to allow passengers to get on is proper to go to the jury as affecting the question of negligence. *Swigert v. Hannibal & St. J. R. Co.*, 9 Am. & Eng. R. Cas. 322, 75 Mo. 475.—QUOTED IN *Murphy v. St. Louis, I. M. & S. R. Co.*, 43 Mo. App. 342.

Where a person sues for an injury received in getting on a moving street-car, if the evidence leaves it so uncertain whether the motion was not so great as to make it unsafe for a man of common prudence to get on the car while in motion, the question should be left to the jury. *Maher v. Central, N. & E. R. Co.*, 7 J. & S. (N. Y.) 155.

301. Recovery notwithstanding contributory negligence.—A female passenger encumbered with luggage and parcels while on the car steps boarding a train in motion was so violently pushed by a train-hand apparently intending to assist her as to cause her to fall and to sustain the injuries for which she sought to recover. *Held*, that the negligent act of the passenger in attempting to board the train did not preclude a recovery by her for the injury sustained by the unnecessary violence of the train-hand. *Pennsylvania R. Co. v. Reed*, 58 Am. & Eng. R. Cas. 422, 60 Fed. Rep. 694. And see also *Montgomery & E. R. Co. v. Stewart*, 91 Ala. 421, 8 So. Rep. 708.

3. While Getting off Cars.†

a. In General.

302. Failure to use ordinary care.

—A passenger who delays leaving a train after it has reached the end of its route because she is encumbered with packages un-

til the brakeman, who assisted the other passengers to alight, has left, supposing all the passengers have gotten off, and thereupon, without waiting for assistance, unnecessarily attempts to descend the steps, which is obviously dangerous because of the distance of the car steps from the platform, cannot be held, as a matter of law, not to be wanting in the use of ordinary care. *McDermott v. Chicago & N. W. R. Co.*, 82 Wis. 246, 52 N. W. Rep. 85.

303. Failure to look and listen.*—

It is the duty of a passenger whose vision is so impaired that he cannot see more than 100 feet upon alighting from a train, while another is approaching with such noise as to be heard a mile, to remain in a safe position until he can see that the track on which the train is approaching is safe, before attempting to cross it. *Gonzales v. New York & H. R. Co.*, 1 J. & S. (N. Y.) 57.

304. Failure to heed warning of employee.†—

A passenger train ran onto a side-track and stopped to allow a freight train to pass. Plaintiff, a passenger, was warned not to try to get off at that place, the conductor even taking hold of him to try to restrain him; but he persisted in getting off and was injured. The train was some little distance from the station, and not at a place where it was customary for passengers to alight, but where it was customary for the train to stop under the same circumstances. *Held*, that plaintiff was guilty of such contributory negligence as to bar a recovery. *Ohio & M. R. Co. v. Schiebe*, 44 Ill. 460. See also *Brockway v. Lascala*, 1 Edm. Sel. Cas. (N. Y.) 135.

A passenger has no right to presume that a ferry-boat has landed on account of the chain-guard and barriers across the bow of the boat being down, when warned and personally notified at the time by those in charge that a landing had not been made. *Davis v. Oregon & C. R. Co.*, 8 Oreg. 172.

Where a passenger in the caboose of a freight train, upon its stopping at a station, stepped upon the front platform and was warned by an employé of the approach of a train about to collide behind, but not understanding English, resisted his effort to drag him away—*held*, not to be such contributory negligence as to preclude a

* See also *ante*, 376, 377 (3).

† See also *ante*, 225-264.

* See also *post*, 453.

† See also *ante*, 372, 382; *post*, 473.

recovery by his administrator for the company's negligence. *Walter v. Chicago, D. & M. R. Co.*, 39 *Iowa* 33, 39 *Am. Ry. Rep.* 78, 20 *Am. Ry. Rep.* 319.

395. — of fellow-passenger.*—While not bound to obey a warning of a fellow-passenger as to the danger of alighting from cars, the person warned disregards it at his peril, from whatever source it comes. It is enough that his attention is drawn to his danger; it then becomes his duty to avoid it, and not to do so is negligence. *Kilpatrick v. Pennsylvania R. Co.*, 140 *Pa. St.* 502, 21 *Atl. Rep.* 408.

396. Failure to retain hold of railing.†—A passenger has a right to assume that he will be allowed a reasonable opportunity to get off before the train starts; and it is not necessarily contributory negligence to fail to hold on to the car railing on the platform until he is fully off. *McDonald v. Long Island R. Co.*, 116 *N. Y.* 546, 22 *N. E. Rep.* 1068, 27 *N. Y. S. R.* 481; *affirming* 6 *N. Y. S. R.* 691, 43 *Hun* 637.—DISTINGUISHED IN *Losee v. Watervliet T. & R. Co.*, 44 *N. Y. S. R.* 343, 63 *Hun* 404, 18 *N. Y. Supp.* 297.

397. Failure to inform carrier of disability.—Plaintiff was a passenger on defendants' train. The night was dark and the station grounds were not lighted when plaintiff reached her destination. There was no platform on which to alight, but the ground was smooth and level. A brakeman came with a lantern, carried out the plaintiff's valise, and assisted her to alight. The lowest step of the carriage was 26 inches from the ground. Before assisting her to alight the brakeman placed the lantern on the ground. It cast a light 20 or 30 feet around. In alighting, the plaintiff injured her knee and was compelled in consequence to abandon her employment as cook in a hotel at Deloraine. It appeared at the trial that the plaintiff's knee had been weak for some time previously, and that she had been affected with synovitis in a sub-acute form. She did not tell the brakeman of this weakness of the knee. *Held*, that defendants were not guilty of negligence which should render them liable for the injury, and that if there was any negligence at all it was attributable to plaintiff in not telling the brakeman of her feeble and deli-

cate knee. *McGinney v. Canadian Pac. R. Co.*, 7 *Man.* 151.—DISTINGUISHING *Harrold v. Great Western R. Co.*, 14 *L. T.* 440; *Cornman v. Eastern Counties R. Co.*, 4 *H. & N.* 781; *Toomey v. London, B. & S. C. R. Co.*, 3 *C. B. N. S.* 146; *Owen v. Great Western R. Co.*, 36 *L. T.* 850; *Crafter v. Metropolitan R. Co.*, *L. R.* 1 *C. P.* 300; *Siner v. Great Western R. Co.*, *L. R.* 3 *Ex.* 150.

398. Choosing between two dangers.*—Where a company through fault induces a passenger to choose between the risk of leaving a train and being exposed to other dangers, to which it has no right to expose him, and he is injured in getting off under circumstances which would not prevent a person of ordinary prudence from doing so, the company is liable. *Delamater v. Milwaukee & P. du C. R. Co.*, 24 *Wis.* 578.—DISTINGUISHING *Siner v. Great Western R. Co.*, *L. R.* 3 *Ex.* 150.

Whether it is imprudent and careless to attempt leaving a car while in motion depends upon circumstances; and where a party, by the wrongful act of another, has been placed in circumstances calling for an election between leaving the cars or submitting to an inconvenience and a further wrong, it is a proper question for the jury whether it was a prudent act or whether it was a reckless exposure of the person to peril. *Taylor v. Missouri Pac. R. Co.*, 26 *Mo. App.* 336.

399. Stepping upon coupling-link.—That a passenger, when a train has halted at a station, steps, in getting off the train, upon the connecting link between two cars, is not *per se* negligence on the part of the passenger. *Johnson v. Winona & St. P. R. Co.*, 11 *Minn.* 296 (*Gil.* 204).—REVIEWED IN *Solen v. Virginia & T. R. Co.*, 13 *Nev.* 106.

400. Intoxication.†—If the liquor that plaintiff had taken interfered at all with his diligence in starting to leave the train, or lessened his caution or prudence in getting off, and this effect, however slight, contributed to the injury, he was not entitled to demand damages. *Strand v. Chicago & W. M. R. Co.*, 31 *Am. & Eng. R. Cas.* 54, 67 *Mich.* 380, 11 *West. Rep.* 538, 34 *N. W. Rep.* 712.

* See also *ante*, 346; and CONTRIBUTORY NEGLIGENCE, 41.

† See also *ante*, 37, 101, 115, 147, 312, 353; *post*, 434.

* See also *post*, 432.

† See also *ante*, 358, 388.

401. Passenger falling asleep.—

A passenger at night was asleep when the train stopped at his destination and failed to get off. He was awakened by the conductor, who stated that he was still near the station. Rather than go a long distance to the next stopping place, the train was stopped at his request and he got off. He then discovered that he was in a swamp, a mile from the depot, and would have to walk over a long bridge in returning. While on the bridge, carrying his child, he saw an approaching freight train and, hurrying back, barely escaped being run over. He was feeble, and the exertion and excitement caused injury to his health, and he sued the railroad company for damages. *Held*, that he could not recover, though probably misled by what the conductor said as to where the train was. He was negligent in not getting off at the station, and the conductor was serving him and not the company in afterwards stopping. *Wilson v. New Orleans & N. E. R. Co.*, 68 Miss. 9, 8 So. Rep. 330.

402. Question of fact for jury.*

—Whether by the use of ordinary care a pregnant woman could avoid the consequences to herself of the negligence of a company in not providing a safe and suitable landing place to alight from the cars, the conductor having designated the place as suitable and assisted her to alight, is a question for the jury. The matter being doubtful, and the doubt not being soluble by the record to the satisfaction of the court, the judgment of the superior court, denying the company a new trial, will not be reversed. *Georgia R. & B. Co. v. Ury*, 82 Ga. 54, 8 S. E. Rep. 186.

The like rule holds touching the question whether, after receiving the injury, the woman could, consistently with ordinary prudence, undertake a short journey to reach her home, rather than remain at the station and take immediate precautions to obviate the threatened consequences. *Georgia R. & B. Co. v. Ury*, 82 Ga. 54, 8 S. E. Rep. 186.

The question of plaintiff's contributory negligence in alighting from a train was for the jury. Acting in obedience to the request of the conductor in alighting, his act could not be said to be voluntary. *Bellman v. New York C. & H. R. R. Co.*, 5 N. Y. S. R. 153.

Plaintiff, a female passenger, was told to alight at a point where the car steps were not opposite the platform, and where she could not reach it, unless she jumped obliquely. A lady accompanying plaintiff jumped and landed safely; whereupon plaintiff attempted to jump to the platform, but missed it, and fell and was injured. The ground opposite the steps was muddy and slanted rapidly from the ends of the ties, and was unsuitable for a landing place. By jumping obliquely toward the platform, her skirts caught on the dog of a brake, causing her to fall. No employé of the company offered to assist. *Held*, the question of her contributory negligence was for the jury. *Delamaty v. Milwaukee & P. du C. R. Co.*, 24 Wis. 578. *Taylor v. Missouri Pac. R. Co.*, 26 Mo. App. 336.

b. In an Improper Manner or at Dangerous Place.

403. Generally.—Plaintiff was in the habit of riding on a dummy train and of alighting at a certain crossing, of which fact the trainmen had notice. On the day of the injury the train went past the crossing and was brought to a full stop 175 or 200 yards distant, at a place where plaintiff had previously gotten off, and without any intimation to plaintiff the train was backed up and against him while he was in the act of reaching back to the platform for his crutches. *Held*, that from all the circumstances, and in the absence of notice or warning, plaintiff was justified in concluding that as the train had stopped he might alight, and was not guilty of negligence in acting on this apparent invitation. *Gadsden & A. U. R. Co. v. Cawder*, 58 Am. & Eng. R. Cas. 258, 97 Ala. 235, 12 So. Rep. 439.

Where a ferry-boat is provided with two passageways, one for teams and the other for passengers, a passenger who attempts to enter the way for teams and is injured by the dropping of the guard-chain, is guilty of such negligence as to prevent a recovery. *Graham v. Pennsylvania R. Co.*, 39 Fed. Rep. 596, 13 N. J. L. J. 231.—FOLLOWING *Goodlett v. Louisville & N. R. Co.*, 122 U. S. 391, 7 Sup. Ct. Rep. 1234; *Kane v. Northern C. R. Co.*, 128 U. S. 91, 9 Sup. Ct. Rep. 16.

In an action to recover damages for personal injuries, when it appears that the defendant company had provided a safe and convenient place for passengers to land

* See also *post*, 414, 420.

from the saloon deck of the steamboat and given notice thereof to the passengers aboard, and that the place where plaintiff was injured was not intended for use by passengers, the plaintiff must, by disregarding the regulations of the company, be held to have taken all the risk of injury upon himself in leaving at the time and place and in the manner in which he did. *Dodge v. Boston & B. Steamship Co.*, 37 Am. & Eng. R. Cas. 67, 148 Mass. 207, 19 N. E. Rep. 373, 2 L. R. A. 83.

404. On wrong side of train.*—

(1) *Generally.*—The fact that a passenger attempts to alight from a train on the side opposite from the platform is not negligence *per se*, but is proper to be taken into consideration by the jury in determining the question, from all the facts of the case. *McQuilken v. Central Pac. R. Co.*, 16 Am. & Eng. R. Cas. 353, 64 Cal. 463, 2 Pac. Rep. 46.—DISTINGUISHING *Pennsylvania R. Co. v. Zebe*, 33 Pa. St. 318; *Michigan C. R. Co. v. Coleman*, 28 Mich. 440; *Bancroft v. Epsom & W. R. Co.*, 97 Mass. 275; *Siner v. Great Western R. Co.*, L. R. 3 Ex. 150, L. R. 4 Ex. 117.

Where a railroad provides a platform or other safe means of exit from car at a station, it is the duty of passengers to leave by the way provided, unless it be unsafe, or a justifying necessity exist to escape from peril or injury to life or limb; and it is error to admit evidence that persons were in the habit of getting out of the cars on the side opposite the platform. *Pennsylvania R. Co. v. Zebe*, 37 Pa. St. 420.

A company that has provided a sufficient platform for the egress of passengers from its cars is not liable for injuries to a passenger sustained in consequence of his voluntarily leaving them on the opposite side and stepping on the other track, instead of on the platform, unless there was gross negligence on its part in permitting the passengers thus to leave the car. *Pennsylvania R. Co. v. Zebe*, 33 Pa. St. 318.—DISTINGUISHED IN *McQuilken v. Central*

Pac. R. Co., 64 Cal. 463; *Van Ostran v. New York C. & H. R. R. Co.*, 35 Hun (N. Y.) 590. FOLLOWED IN *Drake v. Pennsylvania R. Co.*, 137 Pa. St. 352. QUOTED IN *Little Rock & Ft. S. R. Co. v. Cavenesse*, 48 Ark. 106. REVIEWED IN *Baltimore & Y. Turnpike Road v. Cason*, 72 Md. 377.

(2) *In violation of rules.**—When a company has provided safe and convenient means of ingress and egress to and from its trains, upon one side of its track, it has in this particular discharged its whole duty to passengers, and it is not bound to anticipate that, in disregard to its reasonable and known regulations, they will alight upon the opposite side. *Drake v. Pennsylvania R. Co.*, 137 Pa. St. 352, 20 Atl. Rep. 994.

A passenger who, with notice of a regulation requiring him to alight from his train upon the south side of the track, voluntarily alights upon the north side, and in alighting is injured by falling into an unguarded excavation made by the company, cannot recover damages from the company for his injuries. *Drake v. Pennsylvania R. Co.*, 137 Pa. St. 352, 20 Atl. Rep. 994.

(3) *Illustrations.*—A passenger who is familiar with the grounds cannot recover from a company for an injury received in getting off the train on the side opposite the platform in the night, where his only object in doing so is to save walking across the track and some four minutes' time until the train moves on. *Louisville & N. R. Co. v. Ricketts*, (Ky.) 19 S. W. Rep. 182.

Plaintiff got off the train on the side opposite the platform, and was struck by a train going in the opposite direction on another track, with a bell ringing and running some three miles an hour. The track at the time was obscured from view by escaping steam. There was a conflict of evidence as to whether the train from which plaintiff alighted was at rest or not. *Held*, not sufficient proof of negligence, and of freedom from contributory negligence, to warrant a recovery. *Goldberg v. New York C. & H. R. R. Co.*, 54 N. Y. S. R. 90, 71 Hun 613, *mem.*, 24 N. Y. Supp. 1143.—FOLLOWING *Goldberg v. New York C. & H. R. R. Co.*, 133 N. Y. 561, 44 N. Y. S. R. 71.

A passenger attempted to get off at a place where he resided and was familiar with the surroundings, on a highway on the

* See also *ante*, 354.

Contributory negligence in alighting on wrong side of train, see note, 16 AM. & ENG. R. CAS. 356.

Injury to passenger leaving train on wrong side, see 52 AM. & ENG. R. CAS. 207, *abstr.*

Liability for injury to a passenger who alights from train on side opposite from platform and is struck by a train on adjoining track, see 52 AM. & ENG. R. CAS. 371, *abstr.*

* See also *ante*, 351, 359, 369; *post*, 452, 470, 495.

side opposite the platform, when the train had either stopped or was running very slowly, without the knowledge of the conductor, who was on the opposite side and signaled the train to move up, as plaintiff was in the act of alighting, which caused him to fall. It was in proof that it was not usual for passengers to alight on the highway on that side of the train, though it was nearest the village. It was a reasonable inference from the evidence that the passenger would have had time to have safely alighted had it not been for the sudden start. *Held*, that the case should have been submitted to the jury, and it was error for the trial court to instruct the jury that plaintiff's manner of alighting did not furnish any evidence of contributory negligence. *Plopper v. New York C. & H. R. R. Co.*, 13 *Hun* (N. Y.) 625.—REVIEWING *Keating v. New York C. R. Co.*, 49 N. Y. 673.

A nonsuit is properly allowed where a passenger sues for an injury received by a passing car, caused by his alighting on the track side at a stopping place where there was no station or platform, though it appear that the track side was the smoother of the two, it not appearing that the other side was dangerous. *Morgan v. Camden & A. R. Co.*, (Pa.) 16 *Att. Rep.* 353.

A train stopped on a dark night some 600 feet from the station, where plaintiff and other passengers wished to get out, to allow a freight train to pass, but no notice was given that the train was at the station, yet several passengers started to leave the train. Plaintiff stepped from the train, and in crossing the adjoining track was struck by the freight engine and injured. It was customary for passengers to get on and off on either side, and plaintiff had been in the habit of getting off on the same side that he did on the night in question. *Held*, that both questions, of negligence and contributory negligence, were proper for the jury. *Boss v. Providence & W. R. Co.*, 21 *Am. & Eng. R. Cas.* 364, 15 *R. I.* 149, 1 *Att. Rep.* 9.—DISAPPROVING *Bridges v. North London R. Co.*, L. R. 6 Q. B. 377. DISTINGUISHING *Ormsbee v. Boston & P. R. Corp.*, 14 *R. I.* 102; *Wheelwright v. Boston & A. R. Co.*, 135 *Mass.* 225; *Stubley v. London & N. W. R. Co.*, L. R. 1 *Ex.* 13; *Ernst v. Hudson River R. Co.*, 36 *How. Pr.* (N. Y.) 84; *Pennsylvania R. Co. v. Zebe*, 33 *Pa. St.* 318; *Gonzales v. New York & H. R. Co.*, 38

N. Y. 440; *Chicago, R. I. & P. R. Co. v. Dingman*, 1 *Ill. App.* 162; *Bancroft v. Boston & W. R. Corp.*, 97 *Mass.* 275. QUOTING *Hart v. Hudson River Bridge Co.*, 80 *N. Y.* 622; *Detroit & M. R. Co. v. Van Steinburg*, 17 *Mich.* 99.

A passenger is not guilty of contributory negligence *per se* in disobeying notice in alighting from his train on the side opposite from the platform, which was the side next to his home, where, owing to the bad condition of the street which passed under the track at the point, it was the universal custom for persons to cross on the track. *Chicago, M. & St. P. R. Co. v. Lowell*, 151 *U. S.* 209, 14 *Sup. Ct. Rep.* 281.

405. At rear end of car.—A passenger on a train is not guilty of negligence *per se* in leaving a car at the rear platform. *McDonald v. Illinois C. R. Co.*, (Iowa) 58 *Am. & Eng. R. Cas.* 263, 55 *N. W. Rep.* 102.—FOLLOWING *Cartwright v. Chicago & G. T. R. Co.*, 16 *Am. & Eng. R. Cas.* 321, 52 *Mich.* 606, 18 *N. W. Rep.* 380.

Where there is a custom to leave by either end, passengers may rightfully presume, until in some way the contrary appears, that either platform of a car may be used as the means of egress. *McDonald v. Illinois C. R. Co.*, (Iowa) 58 *Am. & Eng. R. Cas.* 263, 55 *N. W. Rep.* 102.—FOLLOWING *Cartwright v. Chicago & G. T. R. Co.*, 16 *Am. & Eng. R. Cas.* 321, 52 *Mich.* 606, 18 *N. W. Rep.* 380.

It is not negligence to leave a car at its rear end, in the absence of any rule or general custom making the forward end the only proper place. *Cartwright v. Chicago & G. T. R. Co.*, 16 *Am. & Eng. R. Cas.* 321, 52 *Mich.* 606, 18 *N. W. Rep.* 380, 50 *Am. Rep.* 274.

If for any reason leaving by the rear platform is dangerous, it is the duty of the train-hands to warn the passengers, or to take proper precautions against an attempt to alight therefrom, and failure to do either is sufficient to charge the company with negligence. *McDonald v. Illinois C. R. Co.*, (Iowa) 58 *Am. & Eng. R. Cas.* 263, 55 *N. W. Rep.* 102.

406. From side door of baggage car.—That a passenger may have been familiar with the construction of cars, and that the injury occurred by the passenger falling while attempting to step from the side door of a baggage car in his egress from the car (when a safer mode of egress

was provided by a door in the end of the car (for such purpose), will not authorize the court to charge that such egress in the night-time was negligence on the part of the injured passenger. *Missouri Pac. R. Co. v. Long*, 81 Tex. 253, 16 S. W. Rep. 1016.

407. Under the directions of brakeman.*—Plaintiff was a passenger on defendant's train. There was only one passenger coach on the train and it was preceded by four flat-cars. Deep piles of snow were on both sides of the track. When the train reached the terminal station the brakeman beat down the snow by the side of the car to make a place for plaintiff to alight and stand until an engine removed the flat-cars which obstructed her passage along the track. After remaining in that position for some time she objected to staying there longer. The brakeman suggested she pass over the flat-cars. She thereupon proceeded over the cars successfully until she came to the place for alighting, and in attempting to get down from the car her clothes caught in the coupling-pin, and she fell and sustained her injuries. *Held*, that the question of defendant's negligence and plaintiff's contributory negligence was for the jury. *Hartsig v. Lehigh Valley R. Co.*, 154 Pa. St. 364, 26 Atl. Rep. 310.

In such circumstances plaintiff cannot be charged with contributory negligence for doing as she was told to do by the brakeman. She was still in the charge of the defendant company and therefore was not a discharged passenger. *Hartsig v. Lehigh Valley R. Co.*, 154 Pa. St. 364, 26 Atl. Rep. 310.

408. Getting off at wrong place, generally.—Passengers are presumed to know the every-day incidents of railway travel, and it cannot be expected that they will be treated, or put under restraint, as if they were children. So *held*, where passenger was hurt by voluntarily leaving train at wrong place. *Mitchell v. Chicago & G. T. R. Co.*, 12 Am. & Eng. R. Cas. 163, 51 Mich. 236, 16 N. W. Rep. 388, 47 Am. Rep. 566.

409. — where suitable egress was provided.—Where a proper landing place is provided and a passenger knows, or has the means of knowing, its locality, and that

he should leave the train at that place, and if in attempting to alight elsewhere he unnecessarily and negligently exposes himself to danger, and is thereby injured, his injury is the result of his own act, and he cannot recover damages. *Chicago, R. I. & P. R. Co. v. Dingman*, 1 Ill. App. 162.—DISTINGUISHED IN *Boss v. Providence & W. R. Co.*, 15 R. I. 149.

If a passenger is injured by alighting of his own accord from a car at a place where there is no platform, when by passing through the forward car he could alight with safety on the platform, he is guilty of negligence, and cannot recover. *Eckerd v. Chicago & N. W. R. Co.*, 27 Am. & Eng. R. Cas. 114, 70 Iowa 353, 30 N. W. Rep. 615.

410. Where train stops short of station, generally.*—Contributory negligence is attributable to a passenger who, without any intimation from the trainmen that it is his stopping place, while the train is halting a moment upon a trestle, alights hurriedly in the dark, without carefully looking for a place to alight, and sustains injury from falling into a canyon beneath the trestle; and this, notwithstanding other passengers believed that it was a regular station, and some of them were preparing to leave the train, and the plaintiff was told by one of the passengers to get out quick, as the train would only stop a moment. *Nagle v. California Southern R. Co.*, 88 Cal. 86, 25 Pac. Rep. 1106.

If a passenger leaves his seat while a car is slowing up, and, before it stops, reaches that part of the car from which the passengers get off, it is negligence for him to attempt to get off, unless he is sure, from all the circumstances, that it is a permanent stop for the purpose of discharging passengers. *Dunn v. Pennsylvania R. Co.*, 20 Phila. (Pa.) 258.

411. — and the name of the station was called.†—(1) *Generally.*—If from the announcement of the train-hand the passenger may have reasonably concluded that the train had arrived at the station for which he was bound and that he was justified in an attempt to get off, such a conclusion could not be lawfully indulged in if the circumstances or indications were

* See also *ante*, 200.

† See also *ante*, 230.

Passenger hearing name of station called, justified in attempting to alight, see note, 18 AM. & ENG. R. CAS. 179.

* See also *ante*, 355, 370, 378; *post*, 429, 431, 470.

such as to show to any person of reasonable prudence and ordinary observation that the train had not reached a platform or proper stopping place. *East Tenn., V. & G. R. Co. v. Holmes*, 58 *Am. & Eng. R. Cas.* 252, 97 *Ala.* 332, 12 *So. Rep.* 286.—FOLLOWING *Smith v. Georgia Pac. R. Co.*, 88 *Ala.* 538; *Richmond & D. R. Co. v. Smith*, 92 *Ala.* 237.

There is a difference between calling a station by a train officer and calling "All out" for the station. The latter may be regarded as a direction to passengers to leave the cars, with a guarantee that it is safe to do so, but the former cannot be regarded as anything more than informing the passengers of the name of a station which the train is approaching and will stop at. It does not relieve passengers from all the care that they would otherwise be required to exercise. *Gonzales v. New York & H. R. Co.*, 1 *J. & S. (N. Y.)* 57.

A station being called by the conductor of a railroad train and the passenger told to get off, there being no light or assistance offered, she had a right to rely upon the directions of the conductor and to presume that she was at the usual place of getting off, and that there was at that place a safe and suitable place to alight from the train. *East Tenn., V. & G. R. Co. v. Conner*, 15 *Lea (Tenn.)* 254.

A passenger was injured in alighting from a railway car in the night, at the wrong place and time, believing that he had reached his destination and had been directed to leave the car, whereby he was injured. *Held*, that in every such case all the facts surrounding the circumstances under which he left the car should be looked to, and from them, in each case, the jury must determine, as question of fact, whether the passenger was authorized to believe from the acts and words of the servants of the company that it was intended that he should alight from the car at the time and place he attempted to do so. *Texas & P. R. Co. v. Garcia*, 21 *Am. & Eng. R. Cas.* 384, 62 *Tex.* 285.

(2) *Company liable.*—Where a train is stopped in the night after a station is announced, and a passenger, supposing he is at the station, is injured by a sudden start of the train, the company is liable though it appears that the train had stopped short of the station, and had started again to pull fully up to it. *Memphis & L. R. R. Co. v.*

Stringfellow, 21 *Am. & Eng. R. Cas.* 374, 44 *Ark.* 322, 51 *Am. Rep.* 598.—DISTINGUISHING *Mitchell v. Chicago & G. T. R. Co.*, 51 *Mich.* 236, 47 *Am. Rep.* 566. DOUBTING *Lewis v. London, C. & D. R. Co.*, L. R. 9 Q. B. 66, 7 *Moak* 119. QUOTING *Bridges v. North London R. Co.*, L. R. 7 H. L. 213, 9 *Moak* 165; *Weller v. London, B. & S. C. R. Co.*, L. R. 9 C. P. 126, 8 *Moak* 441; *Central R. Co. v. Van Horn*, 38 *N. J. L.* 133; *Columbus & I. C. R. Co. v. Farrell*, 31 *Ind.* 408. REVIEWING *Taber v. Delaware, L. & W. R. Co.*, 71 *N. Y.* 489.

The company's servants announced that the next stop of the train on which the plaintiff's wife was riding would be at her station. The train ran on a side-track ten miles out from such station, in the nighttime, to permit a freight train to pass, when the plaintiff's wife, supposing she had arrived at her own station, no announcement having been made of the name of the station where the train was then stopping, alighted with the assistance of a brakeman, who did not inquire where she was going, and was left alone in the dark. Such side-track was not a regular stopping place for said train. *Held*, that she was not guilty of negligence and that the company was liable to her for damages sustained. *Pennsylvania Co. v. Hoagland*, 3 *Am. & Eng. R. Cas.* 436, 78 *Ind.* 203.—DISTINGUISHED IN *Lewis v. Flint & P. M. R. Co.*, 54 *Mich.* 55. RECONCILED IN *Cincinnati, W. & M. R. Co. v. Peters*, 6 *Am. & Eng. R. Cas.* 126, 80 *Ind.* 168.

Plaintiff's evidence tended to show, among other things, as follows: The plaintiff and her husband were passengers on the defendant's railroad train from Chanute to Ottawa, with tickets from Chanute to Topeka. They had with them their baby and a basket and some wraps. The conductor punched their tickets and gave them checks, and told them they would have to change cars at Ottawa. Afterward, on arriving at or near Ottawa, the conductor took up their checks, and in a little time the brakeman called out "Ottawa," and shortly afterward the train came to a full stop. They then gathered up their wraps and the baby and the basket, and started toward the rear end of the car to get off. Neither had ever before been in Ottawa, nor had either of them any knowledge of the place or of the station. The conductor and the brakeman saw them passing out of

the car, but said nothing, nor did they make any inquiries, nor did they see any other people acting as though they were about to leave the train. They believed that they had arrived at the station and were intending to leave the train for that reason. The husband got off first with the baby and the plaintiff was following him. While she was standing on the next to the last step and was in the act of stepping upon the last step, the train started suddenly with a jerk and threw her down on the ground and she was thereby injured. She heard no signal for starting the train, and knew of none. This was on one of the public streets of Ottawa, and it was dark at the time, and about three or four o'clock in the morning. There was no station there nor any platform upon which to alight, nor any lights. They believed that they were acting carefully in their attempt to leave the train. The train had not arrived at the station, however, but had stopped only at a railroad crossing. *Held*, that the evidence was sufficient upon which the jury might find that the defendant was guilty of culpable negligence causing the injury, and that the plaintiff was not guilty of any culpable contributory negligence. *Southern Kan. R. Co. v. Pavey*, 48 Kan. 452, 29 Pac. Rep. 593.

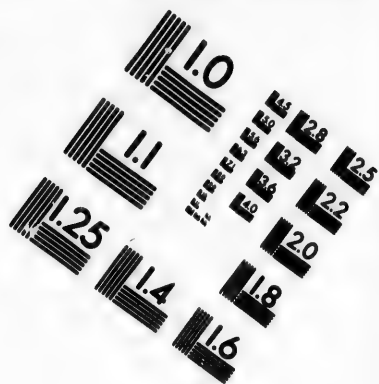
Where the defendant stopped its train at an unusual and unsafe place, before reaching which the station was announced, on a dark night when passengers in the caboose could not see the danger, and the conductor, on leaving the caboose with the light, might have seen it, his failure to warn the passengers of the dangerous character of the surroundings was gross negligence. The slowing up of the train as it approached the station, the sounding of the whistle, the announcement of the station, stopping the train, the act of the conductor and brakeman in leaving the caboose with the light, and the detachment of the engine to take water, must be construed as a direction to the passengers to alight then and there, and there was no negligence in the act of the plaintiff in acting on such direction. *McGee v. Missouri Pac. R. Co.*, 31 Am. & Eng. R. Cas. 1, 92 Mo. 208, 10 West. Rep. 282, 4 S. W. Rep. 739.

(3) *Company not liable*.—When the name of a station is called out on approaching it, and soon thereafter the train is brought to a standstill, a passenger may reasonably

conclude that it has stopped at the station and attempt to get off, unless the circumstances are such as would show to any person of reasonable prudence and ordinary observation that it had not reached the proper stopping place; and this does not appear where the facts show, as in this case, that about five o'clock on a dark morning, after the name of the station had been twice called out by the porter, the train stopped at a water-tank seventy-five yards from the station, where it very seldom stopped, and where the conductor did not know it would stop, and that plaintiff, a passenger, was injured in stepping from the front platform, the car standing on the trestle. *Richmond & D. R. Co. v. Smith*, 92 Ala. 237, 9 So. Rep. 223.—FOLLOWING *Smith v. Georgia Pac. R. Co.*, 88 Ala. 538.

Where the train was stopped, after calling out the name of the station, in a deep cut about two hundred yards from the platform, preparatory to taking a side-track until another train could pass, and the plaintiff was injured while attempting to step from the rear of the car as it moved forward again, and this occurred in the daytime, he was guilty of contributory negligence. *Smith v. Georgia Pac. R. Co.*, 41 Am. & Eng. R. Cas. 143, 88 Ala. 538, 7 So. Rep. 119.—QUOTING *Bridges v. North London R. Co.*, L. R. 6 Q. B. 377; *Taber v. Lackawanna & W. R. Co.*, 71 N. Y. 489. REVIEWING *Central R. Co. v. Van Horn*, 38 N. J. L. 133; *Mitchell v. Chicago & G. T. R. Co.*, 51 Mich. 236.—FOLLOWED IN *Richmond & D. R. Co. v. Smith*, 92 Ala. 237.

The name of a station was called and the train came to a stop, and a passenger proceeded to get out, but was injured by the sudden starting of the train. It was daylight and nothing to indicate that the train was alongside the station. It had only stopped, as required by statute, upon approaching another cross-track, and no one in charge of the train knew that the passenger was about to alight. *Held*, that no recovery could be had against the company. *Mitchell v. Chicago & G. T. R. Co.*, 12 Am. & Eng. R. Cas. 163, 51 Mich. 236, 16 N. W. Rep. 388, 47 Am. Rep. 566.—DISTINGUISHED IN *Memphis & L. R. R. Co. v. Stringfellow*, 21 Am. & Eng. R. Cas. 374, 44 Ark. 322, 51 Am. Rep. 598. REVIEWED IN *Smith v. Georgia Pac. R. Co.*, 41 Am. & Eng. R. Cas. 143, 88 Ala. 538.



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412. Where train overshoots station.*—Where a train is not bound to stop at a particular station to receive or discharge passengers, but is required by law to stop within eight hundred feet of a railway intersection some five hundred feet beyond such station, but the proof showed that the conductor received fare to such station, and that there were passengers for that station, and on approaching the station the whistle was sounded and the speed of the train slackened, and the train was finally stopped, —held, that a passenger on the train, in the absence of a contrary announcement, had the right to act on the belief that the stop was to enable passengers to get off, and that the company was liable for an injury to a passenger caused by starting the train before allowing a reasonable time to get off. *McNulta v. Ensich*, 134 Ill. 46, 24 N. E. Rep. 613; reversing 31 Ill. App. 100.

A company is not liable for injuries to a passenger where the carriage in which he was riding overshot the station platform and the name of the station was called out and he descended in a dark place and sprained his foot on the rough ground, the company not having requested him to alight there. *Plant v. Midland R. Co.*, 21 L. T. 836.

413. — and stops at a dangerous place.—Where a train having overshot the station stops, in the night, upon a bridge over a stream, to take water, it not being a stopping place for passengers to get on and off, the company is not required by law to notify passengers not to attempt to get off the cars at such place, and a failure to do so is not negligence. *Illinois C. R. Co. v. Green*, 81 Ill. 19.

A passenger is not necessarily guilty of contributory negligence who, without any knowledge of the dangerous place at which a train has stopped, after overshooting the station, and on a dark night, steps from a train which has been brought to a full stop, near the usual stopping place, at the regular time for stopping, and after the customary signal for stopping has been given. *Terre Haute & I. R. Co. v. Buck*, 18 Am. & Eng. R. Cas. 234, 96 Ind. 346, 49 Am. Rep. 168.—DISTINGUISHING *Cincinnati, W. & M. R. Co. v. Peters* 80 Ind. 168.

414. Question of fact for jury.†—A passenger is bound to use caution to escape

danger; but where a female passenger is carried beyond her station and is stopped so near a tunnel that it is impossible to leave the car at the platform, the question of her contributory negligence in attempting to alight on the other side is for the jury. *Onderdonk v. New York & S. B. R. Co.*, 74 Hun 42, 26 N. Y. Supp. 310, 56 N. Y. S. R. 190.

A female passenger in feeble health was carried 500 to 700 feet beyond the station, and then put off at an unsuitable place. She was assisted in getting off by the train officers, but was injured in stepping from the lower step to the ground, a distance of 22 inches, and also by having to walk back. Held, that the question of her contributory negligence in alighting at such a place was for the jury. *Foss v. Boston & M. R. Co.*, (N. H.) 47 Am. & Eng. R. Cas. 566, 21 Atl. Rep. 222.

Whether a passenger was guilty of contributory negligence is a question for the jury in the following cases:

Where a passenger, riding on the caboose of a freight train, carefully alights therefrom while the train is moving slowly, about two miles an hour, stepping from the caboose to the platform of the station, and is thrown under the train and injured, by reason of its defective condition, unknown to him. *Pennsylvania Co. v. Marion*, 123 Ind. 415, 7 L. R. A. 687, 23 N. E. Rep. 973.—FOLLOWING *Louisville & N. R. Co. v. Crunk*, 119 Ind. 542.

Where a passenger who is in feeble health, and whose mind is flustered, attempts, with the assistance of the company's servants, to alight from the cars at an unsuitable place, the train having been drawn beyond the station. *Foss v. Boston & M. R. Co.*, (N. H.) 47 Am. & Eng. R. Cas. 566, 21 Atl. Rep. 222.

In a suit brought to recover for injuries to a passenger while alighting from a train, where the evidence was closely balanced, both as to the negligence of the defendant and as to the contributory negligence, with considerable evidence to support both, either question depending upon a number of circumstances. *Dickens v. New York C. R. Co.*, 1 Abb. App. Dec. (N. Y.) 504.

Whether a passenger on a freight train was justified in assuming that it was the intention of those in charge of the train to discharge passengers at the first stop of the train at the station of his destination and

* See also *ante*, 261.

† See also *ante*, 402; *post*, 420.

in attempting to get off, in a suit by the passenger to recover for a personal injury caused by starting the train with a sudden jerk without warning. *Chicago & A. R. Co. v. Arnol*, 58 Am. & Eng. R. Cas. 411, 144 Ill. 261, 33 N. E. Rep. 204.

c. Moving Cars.*

415. Generally.—(1) *Statement of the rule.*—A company is not liable in damages to one who jumps from its moving train when there is no necessity for so doing. *Whelan v. Georgia M. & G. R. Co.*, 44 Am. & Eng. R. Cas. 335, 84 Ga. 506, 10 S. E. Rep. 1091.

If one voluntarily jumps from a rapidly moving train, not to avoid threatened danger, it is negligence. *Tabler v. Hannibal & St. J. R. Co.*, 31 Am. & Eng. R. Cas. 185, 93 Mo. 79, 11 West. Rep. 462, 5 S. W. Rep. 810.

While companies ought to be held responsible for all injuries occasioned to passengers on their trains by their fault and carelessness, they cannot be made liable and indebted when the same are sustained by the voluntary negligence and culpable imprudence of the travelers in jumping from a moving train. *Fournet v. Morgan L. & T. R. & S. Co.*, 43 La. Ann. 1202, 11 So. Rep. 541.

A passenger who goes out of the car, knowing that the train is in motion, and is injured by stepping off, is guilty of such negligence as to defeat a recovery for injuries received. *Gavett v. Manchester & L. R. Co.*, 16 Gray (Mass.) 501.—FOLLOWING *Lucas v. New Bedford & T. R. Co.*, 6 Gray 64.—APPROVED IN *Nelson v. Atlantic & P. R. Co.*, 68 Mo. 593. DISTINGUISHED IN *Meesel v. Lynn & B. R. Co.*, 8 Allen (Mass.) 234; *Van Ostran v. New York C. & H. R. R. Co.*, 35 Hun (N. Y.) 590. FOLLOWED IN *Burrows v. Erie R. Co.*, 63 N. Y. 556.

* See also *ante*, 377-391.

Alighting from moving trains, see notes, 31 AM. & ENG. R. CAS. 50; 30 *Id.* 612; 18 *Id.* 182; 3 *Id.* 431.

Liability for injury to passenger alighting from moving train, see notes, 1 L. R. A. 541; 11 *Id.* 395; 44 AM. REP. 508; 31 AM. & ENG. R. CAS. 50, *abstr.*

Liability for injuries to passengers in jumping from moving train, see note, 17 AM. ST. REP. 422.

Contributory negligence of passenger in alighting from a moving train, see 44 AM. & ENG. R. CAS. 336, *abstr.*; see note, 47 *Id.* 563; see 52 *Id.* 294, *abstr.*; see note 58 *Id.* 222.

QUOTED IN *Jewell v. Chicago, St. P. & M. R. Co.*, 6 Am. & Eng. R. Cas. 379, 54 Wis. 610, 41 Am. Rep. 63.

If a passenger be negligently carried beyond his destination, he can recover for the inconvenience, loss of time, and expense of traveling back; but if he jumps, or leaves the train under circumstances when prudence would forbid, he cannot recover for injuries received. *Kelly v. Hannibal & St. J. R. Co.*, 70 Mo. 604.—QUOTED IN *Waller v. Hannibal & St. J. R. Co.*, 83 Mo. 608; *Richey v. Burnes*, 83 Mo. 362.

(2) *Illustrations.*—Plaintiff having boarded defendant's passenger train, for a lawful purpose, on its arrival at one of the regular stations on the line of its railroad, was detained by his business until after the train had started on its journey; and while the train was moving from the depot, its speed increasing each moment, he, of his own accord, to prevent being carried off, and without notifying any of defendant's employés of his presence, and without requesting any of them to slow or stop the train, and without any effort to arrest its progress, walked from the platform of one car to that of another, and, with papers in his right hand, descended the steps of the car and jumped from the moving train at right angles thereto and fell, and in the fall his left arm was caught under the wheel of the car and crushed. *Held*, that the injury sustained by the plaintiff was attributable directly and immediately to his own thoughtless and reckless act, and he cannot therefore recover, though the defendant was negligent in not giving the signals required by the statute, before and at the time the train left the station. *Central R. & B. Co. v. Letcher*, 12 Am. & Eng. R. Cas. 115, 69 Ala. 106.—QUOTING *Pennsylvania R. Co. v. Aspell*, 23 Pa. St. 117.—QUOTED IN *Woodward Iron Co. v. Jones*, 80 Ala. 123; *Griswold v. Chicago & N. W. R. Co.*, 23 Am. & Eng. R. Cas. 463, 64 Wis. 652. REVIEWED IN *Central R. & B. Co. v. Miles*, 41 Am. & Eng. R. Cas. 149, 88 Ala. 256, 6 So. Rep. 696.

Plaintiff was riding at night on a caboose at the rear of a train, and was informed some three times that he was at his station and must get off, before he was fully aroused from sleep. About the time the train commenced backing the conductor stepped off to the station platform with his lantern, when plaintiff came out of the car, but instead of turning toward the platform, walked

straight ahead and off at the rear end of the caboose platform, falling on the track, and was injured by the backing of the cars. He claimed that he did not know where he was going. The night was very dark, and no lights were provided about the station except two lanterns. *Held*, that the company was at fault in not having the station properly lighted, which made it more incumbent on the conductor to exercise more than usual care; yet, as plaintiff's own negligence contributed to his injury, he cannot recover. *Richmond & D. R. Co. v. Morris*, 31 *Gratt. (Va.)* 200.—QUOTING *Pennsylvania R. Co. v. Aspell*, 23 *Pa. St.* 147.—FOLLOWED BY *Richmond & D. R. Co. v. Pickleseimer*, 8 *Va.* 798, 13 *Va. L. J.* 646, 10 *S. E. Rep.* 44. REVIEWED IN *Richmond & D. R. Co. v. Anderson*, 31 *Gratt. (Va.)* 812.

416. Proximate cause.*—While it may be negligence for a passenger to leave a slowly moving train, which stops very soon after he is off, still his doing so will not defeat a recovery for injuries received, which his own act does not cause or contribute to. *Van Ostran v. New York C. & H. R. R. Co.*, 35 *Hun (N. Y.)* 590; *affirmed* (?) 104 *N. Y.* 683, *mem.*, 7 *N. Y. S. R.* 868.—DISTINGUISHING *Mitchell v. Chicago & G. T. R. Co.*, 12 *Am. & Eng. R. Cas.* 163, 51 *Mich.* 236; *Michigan C. R. Co. v. Coleman*, 28 *Mich.* 440; *Pennsylvania R. Co. v. Zebe*, 33 *Pa. St.* 318, 37 *Pa. St.* 420; *Bancroft v. Boston & W. R. Corp.*, 97 *Mass.* 275; *Wheelwright v. Boston & A. R. Co.*, 135 *Mass.* 225; *Warren v. Fitchburg R. Co.*, 8 *Allen (Mass.)* 227; *Siner v. Great Western R. Co.*, L. R. 3 *Ex.* 150, L. R. 4 *Ex.* 117; *Morrison v. Erie R. Co.*, 56 *N. Y.* 302; *Gavett v. Manchester & L. R. Co.*, 16 *Gray (Mass.)* 501; *Jewell v. Chicago, St. P. & M. R. Co.*, 6 *Am. & Eng. R. Cas.* 379, 54 *Wis.* 610.

If there was any failure of the plaintiff at the time to exercise ordinary care on her part, as by attempting to leave the car while in motion, or otherwise, and the same directly contributed to the accident, in such wise that without such failure the accident would not have occurred, then the defendant is entitled to a verdict, unless the peril to which the plaintiff so exposed herself could have been discovered by the driver in time for him, by the exercise of ordinary care on his part, to have avoided the accident. *Central R. Co. v. Smith*, 74 *Md.* 212,

21 *Atl. Rep.* 706.—APPLYING *Baltimore & O. R. Co. v. Mulligan*, 45 *Md.* 490; *Western Md. R. Co. v. Carter*, 59 *Md.* 309.

417. Degree of care demanded.*—In an action by a woman to recover damages for injuries received in stepping from a moving train, her age, sex, and physical condition should be considered in determining whether she acted prudently or recklessly. *Little Rock & Ft. S. R. Co. v. Tankersley*, 54 *Ark.* 25, 14 *S. W. Rep.* 1099. *Hickman v. Missouri Pac. R. Co.*, 91 *Mo.* 433, 4 *S. W. Rep.* 127.

Where a passenger jumped off a train while running at a speed of from two to four miles an hour, and this was the proximate cause of the injury complained of, and contributory negligence is alleged, the true criterion of the care required from the passenger is that degree which may have been reasonably expected from a sensible person in such situation. *Lambeth v. North Carolina R. Co.*, 66 *N. Car.* 494.

418. Negligence per se.†—(1) *When so deemed.*—A passenger is guilty of contributory negligence in attempting to get off a moving train. *Louisville, N. A. & C. R. Co. v. Johnson*, 44 *Ill. App.* 56.

It is negligence for a passenger to attempt to alight from a moving train at all, however careful he may be. It is therefore error to instruct a jury that a passenger may recover for injuries received while getting off a moving train if "reasonable diligence and ordinary care in alighting from the train" were used. *Cincinnati, I., St. L. & C. R. Co. v. Dufrain*, 36 *Ill. App.* 352.

(2) *When not so deemed.*—It cannot be said, as matter of law, independently of any statute, that it would, under all circumstances, be an act of negligence for a passenger to attempt to alight from a moving train. *Raben v. Central Iowa R. Co.*, 31 *Am. & Eng. R. Cas.* 45, 74 *Iowa* 732, 34 *N. W. Rep.* 621.—REFERRING TO *Nichols v. Dubuque & D. R. Co.*, 68 *Iowa* 732; *Lindsey v. Chicago, R. I. & P. R. Co.*, 64 *Iowa* 410; *Vimont v. Chicago & N. W. R. Co.*, 71 *Iowa* 58.

An attempt to alight from a moving train whereby personal injury ensues is not in itself conclusive evidence of contributory negligence; but the existence of contribu-

* See also *ante*, 344; *post*, 482.

* See also *ante*, 348.

† See also *post*, 416.

tory negligence in so doing must be determined by the surrounding facts in each particular case. *Jackson v. St. Louis, I. M. & S. R. Co.*, 29 Mo. App. 495.—APPLYING *Lloyd v. Hannibal & St. J. R. Co.*, 53 Mo. 509; *Straus v. Kansas City, St. J. & C. B. R. Co.*, 75 Mo. 185; *Nelson v. Atlantic & P. R. Co.*, 68 Mo. 593. QUOTING *Wyatt v. Citizens' R. Co.*, 55 Mo. 485; *Pennsylvania R. Co. v. Kilgore*, 32 Pa. St. 292.

Whether it be so in a particular case depends upon the rapidity of the motion, the fact whether it is day or night, the distance from the car to the ground or surface upon which the passenger alights, the age and vigor of the party, and whether he takes the risk by the command or encouragement of the company's agent in charge of the train, or to escape a greater peril. *Little Rock & Ft. S. R. Co. v. Atkins*, 46 Ark. 423.—QUOTING *St. Louis, I. M. & S. R. Co. v. Cantrell*, 37 Ark. 526.

The fact that a passenger voluntarily alights from a moving train does not raise a conclusive presumption of negligence on his part. The rate of speed the train has acquired, the place, and all the circumstances connected with the alighting are to be considered. *Louisville & N. R. Co. v. Crunk*, 41 Am. & Eng. R. Cas. 158, 119 Ind. 542, 21 N. E. Rep. 31.

(3) *Under Nebraska statute*.—It is not such contributory negligence for a passenger to jump from a moving train, as will in every case prevent a recovery under the Nebraska Comp. St. § 3, art. 1, ch. 72; but where the circumstances are such as to render it obviously and necessarily perilous, and to show a wilful disregard of the danger incurred thereby, such act amounts to criminal negligence as above defined. *Chicago, B. & Q. R. Co. v. Landauer*, 54 Am. & Eng. R. Cas. 640, 36 Neb. 642, 54 N. W. Rep. 976.—REVIEWING *Omaha & R. V. R. Co. v. Chollette*, 33 Neb. 143.

419. Question of law for court.*—Ordinarily the question whether a passenger is guilty of contributory negligence in attempting to get off a moving train is for the jury; but where the facts are undisputed it becomes a question of law for the court. *Morrison v. Erie R. Co.*, 56 N. Y. 302, 6 Am. Ry. Rep. 166.—APPLYING *Filer v. New York C. R. Co.*, 49 N. Y. 47; *Pennsylvania R. Co. v. Kilgore*, 32 Pa. St. 292.—APPLIED

IN *Solomon v. Manhattan R. Co.*, 103 N. Y. 437, 9 N. E. Rep. 43, 56 Am. Rep. 843. DISTINGUISHED IN *Hunter v. Cooperstown & S. V. R. Co.*, 112 N. Y. 371, 19 N. E. Rep. 820, 21 N. Y. S. R. 1; *Van Ostran v. New York C. & H. R. R. Co.*, 35 Hun (N. Y.) 590. FOLLOWED IN *Burrows v. Erie R. Co.*, 63 N. Y. 556. QUOTED IN *Cumberland Valley R. Co. v. Maugans*, 18 Am. & Eng. R. Cas. 182, 61 Md. 53; *Halpin v. Third Ave. R. Co.*, 8 J. & S. (N. Y.) 175. REVIEWED IN *Solomon v. Manhattan R. Co.*, 3 N. Y. S. R. 636; *Worthington v. Central Vt. R. Co.*, 64 Vt. 107.

It is contributory negligence for a passenger to leave a car while it is motion, without necessity, real or apparent; and in an action to recover damages for injuries received while so alighting, the court should so instruct the jury. It is error to instruct them merely in such a case that they are to determine the question of contributory negligence from all the evidence. *New York, L. E. & W. R. Co. v. Enches*, 39 Am. & Eng. R. Cas. 444, 127 Pa. St. 316, 17 Atl. Rep. 991.

420. Question of fact for jury.*—

(1) *Generally*.—It cannot be said to be contributory negligence in all cases as a matter of law for a passenger to leave a moving car. Whether it is or not depends upon the rate of speed. The test is whether the party exercised ordinary care and caution under the circumstances of the case. *Mettstadt v. Ninth Ave. R. Co.*, 32 How. Pr. (N. Y.) 428, 4 Robt. 377.

Whether a passenger was guilty of contributory negligence is a question of fact for the jury to determine in the following cases:

In alighting from a moving train. *Louisville & N. R. Co. v. Crunk*, 41 Am. & Eng. R. Cas. 158, 119 Ind. 542, 21 N. E. Rep. 31.—FOLLOWED IN *Pennsylvania Co. v. Marion*, 123 Ind. 415.—*Bucher v. New York C. & H. R. R. Co.*, 21 Am. & Eng. R. Cas. 361, 98 N. Y. 128.

In jumping from a moving passenger car. *Western Md. R. Co. v. Herold*, 74 Md. 510, 22 Atl. Rep. 323.

In stepping from a moving car to the station. *Tabler v. Hannibal & St. J. R. Co.*, 31 Am. & Eng. R. Cas. 185, 93 Mo. 79, 11 West. Rep. 462, 5 S. W. Rep. 810.

In attempting to step from the cars when the train is in motion. *Waller v. Hannibal*

* See also *ante*, 418.

* See also *ante*, 402, 414; *post*, 428 (8).

& *St. J. R. Co.*, 83 Mo. 608.—QUOTING *Doss v. Missouri, K. & T. R. Co.*, 59 Mo. 37.—*Doss v. Missouri, K. & T. R. Co.*, 59 Mo. 27, 8 Am. Ry. Rep. 462.—APPROVED IN *Nelson v. Atlantic R. Co.*, 68 Mo. 593. FOLLOWED IN *Duncan v. Wyatt Park R. Co.*, 48 Mo. App. 659; *Waller v. Hannibal & St. J. R. Co.*, 83 Mo. 608. REVIEWED IN *Weber v. Kansas City Cable R. Co.*, 41 Am. & Eng. R. Cas. 117, 100 Mo. 194, 12 S. W. Rep. 804, 7 L. R. A. 819.

Where, in an action to recover for personal injuries received by a passenger while alighting from a train, the testimony is conflicting as to whether the train was in motion. *Enches v. New York, L. E. & W. R. Co.*, 135 Pa. St. 194, 19 Atl. Rep. 939.

Where a passenger, riding on the caboose of a freight train, carefully alights therefrom while the train is moving slowly, about two miles an hour, stepping from the caboose to the platform of the station, and is thrown under the train and injured, by reason of its defective condition, unknown to him. *Pennsylvania Co. v. Marion*, 123 Ind. 415, 7 L. R. A. 687, 23 N. E. Rep. 973.—FOLLOWING *Louisville & N. R. Co. v. Crunk*, 119 Ind. 542.

(2) *At conductor's invitation*.—Whether it is negligence in a passenger to step off a moving train at the invitation of the conductor depends upon the further inquiry as to whether the train is going at such speed as to render the attempt obviously hazardous, and is a question for the jury. *Highland Ave. & B. R. Co. v. Winn*, 93 Ala. 306, 9 So. Rep. 509.

The direction of the conductor to get off a moving train as quickly as possible, which was not accompanied by any threat or compulsion, would not justify the plaintiff in jumping off if it was imprudent or hazardous to do so; but in view of all the circumstances the question of contributory negligence, and the effect that the direction of the conductor to get off might have on plaintiff's mind, were questions for the jury. *Pittsburgh, C. & St. L. R. Co. v. Krouse*, 30 Ohio St. 222, 15 Am. Ry. Rep. 298.

(3) *Where passenger is placed in peril*.—When a passenger is placed in peril by the default or negligence of the company, or when he leaves the train while it is in motion by direction of the company's agent, it

is for the jury to say, upon the evidence, whether the act was negligent or not; and where there is evidence tending to show that a train was not stopped a reasonable time to allow passengers to alight, an instruction that even if the train did not stop a sufficient time to allow plaintiff to leave it, yet he should not have jumped off after it started, and his doing so was such contributory negligence on his part as will prevent a recovery, is properly refused. *Pennsylvania R. Co. v. Lyons*, 41 Am. & Eng. R. Cas. 154, 129 Pa. St. 113, 18 Atl. Rep. 759.

A person jumping from a moving car is not, as a matter of law, guilty of contributory negligence where she had been given permission to sit in the car while the station-room was being cleaned, and the car was suddenly moved out of the station without any signals having been given. *Shannon v. Boston & A. R. Co.*, 23 Am. & Eng. R. Cas. 511, 78 Me. 52, 2 Atl. Rep. 678.

(4) *Where train was checked up at station*.—Whether it is imprudent and careless for a passenger to attempt, at the station of his destination, which has been announced and the train slowed up but not stopped, to alight from the still moving train after it has passed the depot, depends on all the circumstances, and is a proper question for the jury. *Richmond v. Quincy, O. & K. C. R. Co.*, 49 Mo. App. 104.—DISTINGUISHING *Nelson v. Atlantic & P. R. Co.*, 68 Mo. 593. EXPLAINING *Filer v. New York C. R. Co.*, 49 N. Y. 47; *Wyatt v. Citizens' R. Co.*, 55 Mo. 485.—FOLLOWED IN *Duncan v. Wyatt Park R. Co.*, 48 Mo. App. 659.

Plaintiff purchased a ticket and got on a train, but found that, by mistake, he was on an express train which did not stop at his destination. The conductor took up his ticket and told him that he would "slow down" the train so he could get off. Held, that the question of his negligence in attempting to get off in that way was for the jury. *Schurr v. Houston*, 10 N. Y. S. R. 262.

Where, after the name of the next station was called, a train was slowed up on approaching and passing it, but was not brought to a full stop, and the plaintiff, who had purchased a ticket for that station, received injuries on alighting there—held, that there was evidence of an invitation to alight, and that it was for the jury to say

* See also *ante*, 207, 345; *post*, 435-440.

* See also *post*, 422, 425.

whether she had acted in a reasonably prudent and careful manner in availing herself of it. *Edgar v. Northern R. Co.*, 22 *Am. & Eng. R. Cas.* 433, 11 *Ont. App.* 452; *affirming* 4 *Ont.* 201.—APPROVING *Bridges v. North London R. Co.*, L. R. 6 Q. B. 377, L. R. 7 Q. B. 213.

Plaintiff was riding at a time when the road was carrying an unusual number of passengers, so that they overflowed all the seats and passageways and platforms, and even rode on the car roof. As the train approached his station he rose from his seat and endeavored to make his way to the car door, for the purpose of leaving it when the train stopped, and either fell or was pushed from the car platform by the crowd. He had been told that his train would stop at his station. *Held*, that he was justified in making proper preparations to leave the car, and he was not guilty of contributory negligence if his conduct was that of a reasonable and prudent man; and whether it was so is a question for the jury. *Treat v. Boston & L. R. Co.*, 3 *Am. & Eng. R. Cas.* 423, 131 *Mass.* 371.—DISTINGUISHED IN *Worthington v. Central Vt. R. Co.*, 64 *Vt.* 107. FOLLOWED IN *Fleck v. Union R. Co.*, 16 *Am. & Eng. R. Cas.* 372, 134 *Mass.* 480.

In a suit for damages for injuries sustained by a passenger on a gravity railroad in alighting while the train was moving no faster than a man can walk, past the point at which the conductor had promised to let him off, there was a conflict of testimony as to whether the conductor ordered him to get off or cautioned him against getting off until the train stopped. *Held*, that the fact of the passenger's negligence was for the jury. *Delaware & H. Canal Co. v. Webster*, (Pa.) 27 *Am. & Eng. R. Cas.* 160, 6 *Atl. Rep.* 841.

(5) *After starting from station.**—Where it is shown that a passenger got up from his seat when the cars stopped at his station and moved towards the door, and being informed by the porter that the train, which had started again and was moving about three miles an hour, would not stop again at that station, he stepped over the platform to the ground in the direction in which the train was moving, and in doing so was thrown down and his arm broken, his act cannot be said to constitute contributory negligence, as a matter of law, but should

be submitted to the jury. *Central R. & B. Co. v. Miles*, 41 *Am. & Eng. R. Cas.* 149, 88 *Ala.* 256, 6 *So. Rep.* 696.

In an action by a woman for personal injuries occasioned to her while a passenger on defendant's train, it appeared that when the train reached her destination the conductor called the name of the station, the train stopped, and several passengers got out at once without unusual delay, among them the plaintiff, who followed close after the person in front of her; and that when she got off the train had started and was moving, by reason of which she fell and received the injuries complained of. The plaintiff testified that she looked when she was stepping off, but that it was so dark she could not see the platform; and that she did not look to see whether the train was moving, because she felt sure it was still; and there was also evidence that there was no object which any one could see from which it could be determined whether the train was moving or not. It did not appear that there was any warning which the plaintiff could have heard that the train was about to start. *Held*, that the question whether the plaintiff was in the exercise of due care should have been submitted to the jury. *Brooks v. Boston & M. R. Co.*, 16 *Am. & Eng. R. Cas.* 345, 135 *Mass.* 21.

Plaintiff's testimony was to the effect that she was a passenger on defendant's train, which reached her station after dark; that she started out of the car with a number of packages, and when she reached the steps she became aware that the train was moving, having been negligently started before she had been given a reasonable opportunity to alight. She also testified that, at the instant of discovering that the train was moving, she went off the car, falling upon the ground and receiving injuries, without any conscious effort on her part to leave the car, and without having had time to think of doing so. There was testimony for defendant which tended to show that she stepped or jumped off the train. *Held*, that the court properly submitted to the jury the question whether plaintiff stepped down or jumped from the moving car, with instructions that, if she did so, she could not recover, unless she had reason to apprehend greater danger from remaining on the train, or the suddenness of the danger confronting her rendered her incapable of exercising proper judgment. *Leggett v. Western*

* See also *post*, 427, 428.

N. V. & P. R. Co., 143 *Pa. St.* 39, 21 *Atl. Rep.* 996.

421. Train moving slowly, generally.*—The question whether a passenger can recover for injuries received in getting off a slowly moving train depends upon whether he exercises the care of a prudent man in attempting to do so. *Price v. St. Louis, K. C. & N. R. Co.*, 3 *Am. & Eng. R. Cas.* 365, 72 *Mo.* 414.—FOLLOWED IN *Waller v. Hannibal & St. J. R. Co.*, 83 *Mo.* 608.

A young man in vigorous health, strong, active, and in the full possession of all his physical and mental faculties, having a valise containing clothing in his right hand and a basket of provisions on his left arm, attempted in broad daylight to leave a train while it was moving slowly, the distance from the lower step of the car to the platform being only eighteen inches, and in doing so was seriously injured. In an action for damages—*held*, that under the circumstances, in voluntarily stepping from the car when it was in motion, and when he had not the free and unrestricted use of his hands and arms, the plaintiff was not guilty of such negligence as would justify the court in taking the case from the consideration of the jury. *Cumberland Valley R. Co. v. Mangans*, 18 *Am. & Eng. R. Cas.* 182, 61 *Md.* 53.—QUOTING *Morrison v. Erie R. Co.*, 56 *N. Y.* 302; *Detroit & M. R. Co. v. Van Steinburg*, 17 *Mich.* 99.—FOLLOWED IN *New York, P. & N. R. Co. v. Coulbourn*, 69 *Md.* 360, 16 *Atl. Rep.* 208, 1 *L. R. A.* 541, 18 *Md. L. J.* 823. QUOTED IN *Terre Haute & I. R. Co. v. Voelker*, 39 *Am. & Eng. R. Cas.* 615, 129 *Ill.* 540, 22 *N. E. Rep.* 20; *Baltimore & O. R. Co. v. Owings*, 28 *Am. & Eng. R. Cas.* 639, 65 *Md.* 502.

If a train does not stop, an attempt of a passenger to get off would, perhaps, constitute such contributory negligence as would preclude a recovery. But if it stops for a moment, or moves so slowly as to be almost imperceptible, it will be for the jury to say whether it is such negligence as will preclude a recovery. *Clotworthy v. Hannibal & St. J. R. Co.*, 21 *Am. & Eng. R. Cas.* 371, 80 *Mo.* 220.—RECONCILED IN *Duncan v. Wyatt Park R. Co.*, 48 *Mo. App.* 659.

422. When speed has been checked up at station.†—(1) *Rule stated.*—It is

not contributory negligence *per se* for a passenger to alight from a train which has almost come to a full stop, at a regular passenger depot. *Nance v. Carolina C. R. Co.*, 94 *N. Car.* 619.

The court properly refused to instruct that it is contributory negligence *per se* for a passenger to alight from a train on the platform of the station if the train is in motion, where the only evidence as to the train's failure to stop is that it was barely moving, and this is coupled with the statement that the passenger was being assisted to alight by an employé in charge of the train. *Georgia Pac. R. Co. v. West*, 66 *Miss.* 310, 6 *So. Rep.* 207.

(2) *Illustrations.*—Where a passenger goes to the lower step of a train when it is approaching a station, but while still moving, from which he is thrown, by a sudden jerk, and injured, he is guilty of such negligence, in attempting to alight while the train is in motion, as to defeat a recovery. *Secor v. Toledo, P. & W. R. Co.*, 10 *Fed. Rep.* 15.—REVIEWED IN *Jewell v. Chicago, St. P. & M. R. Co.*, 6 *Am. & Eng. R. Cas.* 379, 54 *Wis.* 610, 41 *Am. Rep.* 63.

Where a conductor had agreed to slack the speed of a train so that plaintiff could get off, and it was the conductor's duty to so slack its speed that plaintiff could get off safely, a charge that, if the train slackened up so that plaintiff might have gotten off safely, it was for him to determine whether he would get off or not, and if he did get off, and in so doing was injured, he cannot recover, is erroneous. *Western R. Co. v. Young*, 51 *Ga.* 489, 7 *Am. Ry. Rep.* 352.

Plaintiff purchased a ticket for a station at which the train taken was advertised to stop, and, upon its approaching the station, the name of the station was called, and the speed of the train greatly reduced, so that some baggage was removed and one passenger got off. Plaintiff was told that the cars would not make any further stop, and that she must get off, and in attempting to do so was injured. *Held*, that as she was called upon to decide upon the instant between being carried on or getting off the moving train, she ought not to be held to the highest degree of caution; that getting off under such circumstances was not negligence *per se*, but presented a question for the jury. *Filer v. New York C. R. Co.*, 49 *N. Y.* 47, 3 *Am. Ry. Rep.* 460.—APPLYING *Pennsylvania R. Co. v. Kilgore*, 32 *Pa. St.* 292; *McIntyre v. New York C. R. Co.*, 37

* See also *post*, 428 (7).
Liability for injuries to passengers in alighting from slowly moving trains when so directed by conductor, see note, 21 *L. R. A.* 361.

† See also *ante*, 420 (4).

N. Y. 287; *Foy v. London, B. & S. C. R. Co.*, 18 C. B. N. S. 225. DISTINGUISHING *Lucas v. New Bedford & T. R. Co.*, 6 Gray (Mass.) 64; *Hickey v. Boston & L. R. Co.*, 14 Allen (Mass.) 429; *Pennsylvania R. Co. v. Aspell*, 23 Pa. St. 147; *Siner v. Great Western R. Co.*, L. R. 3 Ex. 150.—APPROVED IN *Nelson v. Atlantic & P. R. Co.*, 68 Mo. 593. DISTINGUISHED IN *Denver, S. P. & P. R. Co. v. Pickard*, 18 Am. & Eng. R. Cas. 284, 8 Colo. 163; *Solomon v. Manhattan R. Co.*, 103 N. Y. 437, 9 N. E. Rep. 430, 56 Am. Rep. 843 *n.*; *Hunter v. Cooperstown & S. V. R. Co.*, 112 N. Y. 371, 19 N. E. Rep. 820, 21 N. Y. S. R. 1; *Hunter v. Cooperstown & S. V. R. Co.*, 126 N. Y. 18. EXPLAINED IN *Richmond v. Quincy, O. & K. C. R. Co.*, 49 Mo. App. 104. FOLLOWED IN *Bucher v. New York C. & H. R. R. Co.*, 21 Am. & Eng. R. Cas. 361, 98 N. Y. 128; *Lent v. New York C. & H. R. R. Co.*, 44 Am. & Eng. R. Cas. 373, 120 N. Y. 467, 24 N. E. Rep. 653, 31 N. Y. S. R. 538; *Gainard v. Rochester City & B. R. Co.*, 18 N. Y. S. R. 692, 2 N. Y. Supp. 470. QUOTED IN *Wyatt v. Citizens' R. Co.*, 55 Mo. 485. REVIEWED IN *Carr v. Eel River & E. R. Co.*, 98 Cal. 366; *Burrows v. Erie R. Co.*, 63 N. Y. 556; *Solomon v. Manhattan R. Co.*, 3 N. Y. S. R. 636.

Stepping from a moving train, which checks its speed at a station instead of stopping, as required by law, is not necessarily negligence in him who thus steps from it and is thereby injured. If in stepping from the train he takes no more risk than a man of ordinary prudence would take under like circumstances, he is not thereby precluded from recovering for injuries sustained. If, on the contrary, he failed to exercise ordinary prudence, and stepped from the train when a prudent man would not, his recovery of damages for injury would be prevented by his contributing by his negligence to his own hurt. *Galveston, H. & S. A. R. Co. v. Smith*, 59 Tex. 406.—QUOTING *St. Louis, I. M. & S. R. Co. v. Cantrell*, 8 Am. & Eng. R. Cas. 202, 37 Ark. 519; *Chicago & A. R. Co. v. Bonifield*, 8 Am. & Eng. R. Cas. 494, 104 Ill. 223.

423. Train moving rapidly, generally.—An injury resulting from an attempt to alight from a rapidly moving railway train will generally afford no cause of action. *McLarin v. Atlanta & W. P. R. Co.*, 85 Ga. 504, 11 S. E. Rep. 840.—FOLLOWING *Coleman v. Georgia R. & B. Co.*, 84 Ga. 1.

A passenger who leaps from a car, when the train is in such rapid motion as to render the act manifestly unsafe, cannot recover damages for the personal injuries suffered by his thus leaping from the car; nor are his rights affected by the act of the employees managing the train in not stopping at the depot, where the passenger stopped in the car the five minutes required by statute, whereby he was being carried away without his consent. *Houston & T. C. R. Co. v. Leslie*, 9 Am. & Eng. R. Cas. 407, 57 Tex. 83.

For one to jump from a train of steam-cars while in rapid motion, voluntarily and not to avoid some threatened danger, is negligence; but to step from a car while in motion to a station platform may or may not be negligence. Whether it is or not is a question of fact. *Leslie v. Wabash, St. L. & P. R. Co.*, 26 Am. & Eng. R. Cas. 229, 88 Mo. 50.—QUOTED IN *Murphy v. St. Louis, I. M. & S. R. Co.*, 43 Mo. App. 342.

Whether a party stepping or jumping from a moving car is guilty of negligence must depend upon other circumstances than the speed of the car. If the rate of speed is so high and the place of descent so obviously perilous that a person of ordinary prudence would not attempt to get off, the act is contributory negligence and will bar a recovery. *Weber v. Kansas City Cable R. Co.*, 41 Am. & Eng. R. Cas. 117, 100 Mo. 194, 12 S. W. Rep. 804, 13 S. W. Rep. 587, 7 L. R. A. 819.—REVIEWING *Doss v. Missouri, K. & T. R. Co.*, 59 Mo. 27.

Although a person entering a wrong train by mistake, on discovering his mistake, could have safely left the train, the speed being then very slow, yet if he remained on it until the speed became greater, and then, under order from the agent in charge of the train, sought to leave it and was injured, the case would be one of contributory negligence. *Southwestern R. Co. v. Singleton*, 67 Ga. 306.

424. Running from five to twenty-five miles per hour.—(1) *Five miles per hour.*—Jumping from a train moving at the rate of five miles an hour is not negligence *per se*. *Louisville & N. R. Co. v. Crunk*, 41 Am. & Eng. R. Cas. 158, 119 Ind. 542, 21 N. E. Rep. 31.—QUOTING *New York, P. & N. R. Co. v. Coulbourn*, 69 Md. 360.

Jumping from a car moving at the rate of five miles an hour, by one rightfully therein, is not such negligence on his part as would, in itself, preclude his right to recover for an

injury sustained; but all the facts and circumstances of the case must be left to the jury; and it is for them to determine whether the person, in jumping from the car, acted as a reasonably cautious man would do under like circumstances. *New York, P. & N. R. Co. v. Coulbourn*, 69 Md. 360, 16 Atl. Rep. 208, 1 L. R. A. 541, 18 Md. L. J. 823.—*FOLLOWING* Cumberland Valley R. Co. v. Maugans, 61 Md. 53.—*QUOTED IN* Louisville & N. R. Co. v. Crunk, 41 Am. & Eng. R. Cas. 158, 119 Ind. 542.

(2) *Six to eight miles per hour.*—Where a passenger, in the night-time, without knowledge as to whether or not the train has reached a station previously announced, leaves it when it is moving at a rate of 6 or 7 miles an hour because he thinks it has passed his destination, he is guilty of such contributory negligence as will preclude a recovery for the injuries sustained by him. *East Tenn., V. & G. R. Co. v. Holmes*, 58 Am. & Eng. R. Cas. 252, 97 Ala. 332, 12 So. Rep. 286.

A passenger who, encumbered with hand-baggage, steps from the train on a dark night, while it is moving at the rate of six or eight miles per hour, before it has reached the platform of a regular station, at which he was to get off, and with the locality of which he is acquainted, against the advice of the conductor, and without reason to believe that the train would not stop as usual at the platform, is guilty of contributory negligence, which bars him from recovering damages for personal injuries sustained in stepping from the train. *South & N. Ala. R. Co. v. Schaufser*, 21 Am. & Eng. R. Cas. 405, 75 Ala. 136.

(3) *Fifteen miles per hour.*—If one leaps from a train of cars moving at the rate of fifteen miles per hour, on the advice or concurrence of the conductor, his right to recover involves the question whether he prudently used the only means provided by the company for him to get off, that the course of the company permitted him to use, and also his recklessness and want of ordinary care; for if by the use of ordinary care he could have avoided the injury, the company is not liable. *Southwestern R. Co. v. Singleton*, 66 Ga. 252.

If a company fails to stop its train at a station where it has contracted to carry a passenger, it furnishes no excuse for the passenger leaping from the train some three miles beyond, while the train is running fif-

teen miles an hour; and if he does so and is injured he cannot recover for such injury. He should remain on the train, and sue for damages in being carried beyond the proper station. *Dougherty v. Chicago, B. & Q. R. Co.*, 86 Ill. 467, 17 Am. Ry. Rep. 489.

A passenger was riding, with others, in a caboose, and while the train was running about 15 miles an hour, the stakes and fastenings holding lumber on a freight car immediately in advance of the caboose gave way and part of the lumber fell off. Some of it was blown against the caboose, making considerable noise and creating some confusion, but no injury was done to any one in the car, and none to the caboose, except that one window was broken by a board, and one door-hinge. The passenger, who was standing at the open side door of the car, became frightened and jumped out and was killed. *Held*, in an action against the company, that an instruction, "if the deceased jumped from the car when the train was running about 15 miles an hour, he was guilty of such contributory negligence as would defeat a recovery, unless at the time the circumstances were such as would reasonably have induced a man of ordinary prudence to believe that his life was in danger, or that he was in danger of great bodily harm," was correct. *Woolery v. Louisville, N. A. & C. R. Co.*, 27 Am. & Eng. R. Cas. 210, 107 Ind. 381, 57 Am. Rep. 114, 8 N. E. Rep. 226.

(4) *Twenty-five miles per hour.*—One who jumps from a train moving 25 miles an hour, when not invited or ordered to do so by the agents of the company, or not to avoid some threatened peril, is guilty of contributory negligence barring a recovery for injuries thereby received, although the place where he jumps is the place where he is expected to and is accustomed to leave the train; and the fact that he is an experienced train-hand, and is a poor man, and will not know how to get back there if he does not jump, is immaterial. *Jarrett v. Atlanta & W. P. R. Co.*, 83 Ga. 347, 9 S. E. Rep. 681.

425. Before train has reached station.*—(1) *Generally.*—Where a father took passage, with his son, aged about ten years, upon a train, being assured that the train would stop at a certain station, and, when the whistle was sounded for such station, he and his son went out of the coach upon the platform and stepped down on the

* See also *ante*, 280, 410.

steps, and, being burdened with luggage, stepped off the train before it had stopped, and the son was thrown upon the station platform, and from there fell under the wheels of the cars, where he received such an injury as to cause the loss of both legs—*held*, that no recovery could be had. *Ohio & M. R. Co. v. Stratton*, 78 Ill. 88.—DISTINGUISHED IN *Winters v. Kansas City Cable R. Co.*, 40 Am. & Eng. R. Cas. 261, 99 Mo. 509, 12 S. W. Rep. 652, 6 L. R. A. 536. REVIEWED IN *Chicago City R. Co. v. Wilcox*, 138 Ill. 370; *Stillson v. Hannibal & St. J. R. Co.*, 67 Mo. 671.

The plaintiff on a dark night was a passenger in the rear car of a train. As the train was approaching a refreshment-station the plaintiff arose and got off while the train was slowing up, but before it actually stopped. In so doing he stepped from the step of the car through a trestle upon stones in the bed of the creek and was injured. In an action by him against the company to recover damages, the only negligence alleged was the placing of a sleeping-car between the ordinary passenger cars so as to make the car on which plaintiff was riding the last in the train. *Held*, that the court should have ordered a verdict for defendant. *Adams v. Louisville & N. R. Co.*, 21 Am. & Eng. R. Cas. 380, 82 Ky. 603.

Where a passenger sues for an injury received by being struck by another train just after alighting, and it appears that the conductor had preceded plaintiff to the platform, without any notice or warning that another train was approaching, and where there is only slight evidence tending to show that the train had not stopped when the passenger alighted, and there is nothing to show that a different result would have occurred whether the train had stopped or not, it is proper to refuse an instruction to the effect that if plaintiff got off the train before it came to a stop, and if by remaining on the train until it had stopped, he would not have sustained the injury, then he was guilty of negligence which would defeat a recovery. *Armstrong v. New York C. & H. R. R. Co.*, 66 Barb. (N. Y.) 437; *affirmed* in 64 N. Y. 635, *mem.*—QUOTING *Gonzales v. New York & H. R. Co.*, 38 N. Y. 440.

Where, when the usual signal was given for slackening the speed of the train, the conductor went with a passenger and his companion out on the platform to assist them

in getting off safely, and such passenger, without any directions from the conductor, voluntarily increased danger by jumping off the train while in motion, the carrier is not responsible for injury resulting therefrom; but if the motion of the train was so slow that the danger of jumping off would not be apparent to a reasonable person, and the passenger acted under the instructions of the conductor, then the defense of contributory negligence would be unavailing. *Lambeth v. North Carolina R. Co.*, 66 N. Car. 494.—DISTINGUISHED IN *Pittsburgh, C. & St. L. R. Co. v. Krouse*, 30 Ohio St. 222. QUOTED IN *St. Louis, I. M. & S. R. Co. v. Rosenberry*, 45 Ark. 256.

(2) *When station has been announced.**—There is a difference between announcing a station as the train approaches it and announcing it after the train has stopped. The latter is equivalent to inviting passengers for that station to alight; and if a passenger is deceived by such announcement, whereby he is injured, the company is liable, but not if the passenger gets out without any announcement. *Central R. Co. v. Thompson*, 76 Ga. 770.

The announcement of a station by a train-hand, with the further announcement of "all out" for that station, is not such an instruction, order, or command to leave as will justify a passenger in getting off a train in motion. *East Tenn., V. & G. R. Co. v. Holmes*, 58 Am. & Eng. R. Cas. 252, 97 Ala. 332, 12 So. Rep. 286.

Although a passenger may reasonably conclude that he has reached his destination when the name of the station is called and the train comes to a stop, yet, if the circumstances would indicate to a prudent person that the proper stopping place had not been reached, and he voluntarily steps from a moving train in darkness, he is guilty of such contributory negligence as will defeat a recovery for injuries sustained. *East Tenn., V. & G. R. Co. v. Holmes*, 58 Am. & Eng. R. Cas. 252, 97 Ala. 332, 12 So. Rep. 286.

A female passenger, in the evening, when the brakeman opened and fastened back the door of the car and called out the name of her station, passed out upon the platform, and, receiving no warning from the brakeman, stepped off from the platform while the train was still in motion, and, falling

* See also *ante*, 230, 411.

under the train, was injured. The place where she attempted to get off was dark and badly lighted, and she supposed that the train had come to a standstill. *Held*, that she was guilty of contributory negligence, and could not recover. *England v. Boston & M. R. Co.*, 153 Mass. 490, 27 N. E. Rep. 1.

420. Where train has overshot station.—(1) *Generally*.—The failure of a train to stop at the station will not justify a hazardous attempt to alight from it while in motion. *Little Rock & Ft. S. R. Co. v. Tankersley*, 54 Ark. 25, 14 S. W. Rep. 1099. *Reibel v. Cincinnati, I., St. L. & C. R. Co.*, 114 Ind. 476, 15 West. Rep. 331, 17 N. E. Rep. 107.

Unless the passenger is expressly or impliedly invited to do so by the employes of the company. *Walker v. Vicksburg, S. & P. R. Co.*, 41 Am. & Eng. R. Cas. 172, 41 La. Ann. 795, 7 L. R. A. 111, 6 So. Rep. 916.

The fact that a train is about to pass a station without stopping does not justify a passenger in leaping off while it is in motion, though it is the duty of the conductor to stop the train at the station. *Jeffersonville R. Co. v. Hendricks*, 26 Ind. 228.—DISAPPROVED IN *Texas & P. R. Co. v. Miller*, 79 Tex. 78. DISTINGUISHED IN *Memphis & C. R. Co. v. Whitfield*, 44 Miss. 466. QUOTED IN *Kentucky & I. Bridge Co. v. Quinkert*, 2 Ind. App. 244.

Nor will it justify him in otherwise imprudently exposing himself to danger; and if he does, and is injured in consequence thereof, it is owing to his own want of ordinary care, and he cannot recover for such injury. *Illinois C. R. Co. v. Lutz*, 84 Ill. 598.

Where cars pass their usual stopping place, and to avoid being carried beyond his destination, a passenger, when they are in motion, jumps out, and in doing so sustains an injury, he cannot recover. *Damont v. New Orleans & C. R. Co.*, 9 La. Ann. 441.—QUOTED IN *Bon v. Railway Pass. Assurance Co.*, 56 Iowa 664.

And this is true though the conductor was also in fault in not stopping the train. *Jeffersonville R. Co. v. Swift*, 26 Ind. 459.—REVIEWED IN *Cincinnati, W. & M. R. Co. v.*

Peters, 6 Am. & Eng. R. Cas. 126, 80 Ind. 168.

And notwithstanding the fact that the passenger takes that course in order to save others distress on account of his absence. *Lake Shore & M. S. R. Co. v. Bangs*, 3 Am. & Eng. R. Cas. 426, 47 Mich. 470, 11 N. W. Rep. 276.

A passenger who jumps from a train in motion, not for the purpose of escaping some impending peril, but merely to avoid being carried past the station at which he intended to stop, is guilty of contributory negligence. *Nelson v. Atlantic & P. R. Co.*, 68 Mo. 593.—APPROVING *Doss v. Missouri, K. & T. R. Co.*, 59 Mo. 37; *Pennsylvania R. Co. v. Aspell*, 23 Pa. St. 147; *Illinois C. R. Co. v. Able*, 59 Ill. 131; *Chicago & A. R. Co. v. Randolph*, 53 Ill. 510; *Gavett v. Manchester & L. R. Co.*, 16 Gray (Mass.) 501; *Filer v. New York C. R. Co.*, 49 N. Y. 47.—APPLIED IN *Jackson v. St. Louis, I. M. & S. R. Co.*, 29 Mo. App. 495. DISTINGUISHED IN *Richmond v. Quincy, O. & K. C. R. Co.*, 49 Mo. App. 104. FOLLOWED IN *Waller v. Hannibal & St. J. R. Co.*, 83 Mo. 608. QUOTED IN *Murphy v. St. Louis, I. M. & S. R. Co.*, 43 Mo. App. 342. RECONCILED IN *Duncan v. Wyatt Park R. Co.*, 48 Mo. App. 659.

The plaintiff's act in jumping from the moving train being purely voluntary, uninfluenced by any invitation expressed or intended by the company's employes, and excused by no impending danger or necessity of any kind, except his simple unwillingness to be carried beyond his destination, is so imprudent and dangerous as to bar his action for resulting injury. *Walker v. Vicksburg, S. & P. R. Co.*, 41 Am. & Eng. R. Cas. 172, 41 La. Ann. 795, 7 L. R. A. 111, 6 So. Rep. 916.—DISTINGUISHED IN *Ober v. Crescent City R. Co.*, 44 La. Ann. 1059.

(2) *Illustrations*.—The evidence showed that a female passenger relied on the promise of the conductor to let her off at a certain street crossing, and that the train did not stop at such crossing, and that she jumped while it was in motion and was injured. *Held*, that it was proper to grant a nonsuit. *Watson v. Georgia Pac. R. Co.*, 81 Ga. 476, 7 S. E. Rep. 854.

A passenger cannot recover for an injury received by leaping from a train at a station where such train did not stop, if the danger was so apparent that a prudent man similarly situated would not have attempted the

* See also *ante*, 261, 412, 413.

Contributory negligence of a passenger in jumping from a moving train to avoid being carried past his station, see 33 AM. & ENG. R. CAS. 518, *abstr.*

leap, even if the conductor did give it as his opinion he could leap in safety. *Chicago & A. R. Co. v. Randolph*, 53 Ill. 510.—APPROVED IN *Nelson v. Atlantic R. Co.*, 68 Mo. 593.

The evidence for the plaintiff showing that he jumped from the train when it was in motion, of his own accord, and just before it stopped at the station which was his point of destination, and after he had been notified by the conductor that the train was going to stop at that station; and that the train did stop there, and if he had waited a minute or two he could have got off without injury, the court below should have granted a nonsuit; and, after refusal to grant a nonsuit, when the jury returned a verdict for the plaintiff, should have granted a new trial. *Savannah, F. & W. R. Co. v. Watts*, 82 Ga. 229, 9 S. E. Rep. 129.

It was contributory negligence on the part of the passenger on reaching the door of the car when it was in motion to pass out upon the platform and, finding no one to assist her to alight and the speed of the car increasing, to step off because she was afraid she would be carried past her station. *Toledo, St. L. & K. C. R. Co. v. Wingate*, (Ind.) 58 Am. & Eng. R. Cas. 232, 37 N. E. Rep. 274.

A passenger on a freight train wished to get off at a station where the train did not usually come to a full stop but merely slowed up to allow passengers to alight. Finding that the train had passed the station and was increasing its speed, he jumped from the platform of the caboose and was killed. Held, that he was guilty of contributory negligence which would preclude a recovery for his death, even though the company was negligent in the management of the train. *Brown v. Chicago, M. & St. P. R. Co.*, 80 Wis. 162, 49 N. W. Rep. 807.

(3) *English cases*.—If a female passenger knows that a carriage has not stopped at a station platform, and does not call for assistance, but proceeds to get down the steps as quickly as she can, and her foot slips, causing her to fall, there is no evidence of negligence on the part of the company to go to the jury. *Owen v. Great Western R. Co.*, 46 L. J. Q. B. D. 486, 36 L. T. 850.

If a female passenger is injured by jumping from a carriage which had overshot a station platform, not using the carriage steps, she is guilty of contributory negligence and there can be no recovery. *Siner*

v. Great Western R. Co., L. R. 4 Ex. 117, 38 L. J. Ex. 67, 20 L. T. 114, 17 W. R. 417; affirming L. R. 3 Ex. 150, 37 L. J. Ex. 98.—DISTINGUISHED IN *Cockle v. London & S. E. R. Co.*, L. R. 7 C. P. 321, 41 L. J. C. P. 140, 27 L. T. 320, 20 W. R. 754; *Robson v. North Eastern R. Co.*, L. R. 2 Q. B. D. 85, 46 L. J. Q. B. D. 50, 35 L. T. 535, 25 W. R. 418.

427. After reasonable time given to alight.—(1) *Rule stated*.—A company is not liable for injuries to a passenger received in attempting to alight at a station from a moving train if, after the station was called in the car, the train stopped long enough to afford an opportunity, by the use of reasonable diligence, to alight from it while stationary. *Little Rock & Ft. S. R. Co. v. Tankersley*, 54 Ark. 25, 14 S. W. Rep. 1099.

Where a train stops at a station long enough to allow a passenger to alight with safety, and the passenger delays until about the time the train is starting, and those in charge of the train have no knowledge or reason to believe that he is in the act of getting off, the company is not liable for any injury caused by the starting of the train. *Chesapeake & O. R. Co. v. Reeves*, (Ky.) 11 S. W. Rep. 464. *Clotworthy v. Hannibal & St. J. R. Co.*, 21 Am. & Eng. R. Cas. 371, 80 Mo. 220.—QUOTING *Straus v. Kansas City, St. J. & C. B. R. Co.*, 75 Mo. 185.

If the company stopped its train a reasonably sufficient time to allow the plaintiff, a passenger, to alight in safety, and he jumped off the train after it was again in motion, he cannot recover. If it did not, and if in attempting to get off he was not guilty of such negligence as to bar his right to recover, he would be entitled to recover such damages as he may have sustained. *Covington v. Western & A. R. Co.*, 34 Am. & Eng. R. Cas. 469, 81 Ga. 273, 6 S. E. Rep. 593.

(2) *Illustrations*.—Where a female passenger, in an enfeebled condition, not having time to leave the train during its stop at her place of destination, without any warning to the conductor or any other employé, leaps from such train after it gets in motion she is guilty of such contributory negligence as will bar her right to recover for injuries thereby sustained. *Louisville & N. R. Co. v. Lee*, 97 Ala. 325, 12 So. Rep. 48.

* See also *ante*, 420 (5).

In an action to recover for personal injuries sustained by the plaintiff in jumping from a moving train, the undisputed evidence was that after the train stopped at C. station, for which she held a ticket, the conductor called out the name of the station, but did not leave the train, being engaged in collecting tickets; but by his order the brakeman got off at the rear of the train and walked along the station platform to the rear of the next to the last car, where, after assisting some passengers to alight, and seeing no others to get off, he gave the signal, "All aboard!" After the train had started and was well under way, plaintiff, who had occupied the fourth seat from the front of the rear car, came out upon the front platform thereof, and after hurriedly stepping down one step, and without warning to the conductor or brakeman, who both supposed the passengers for that station had all left the train, and without looking to see where she would land, jumped at a right angle from the train, and in falling was severely injured. Another passenger, who had alighted on the opposite side, had walked the length of a car, crossed over on car platform, and walked 50 feet to the gate of a park that distance from the station, while other passengers had walked to a point some distance inside the park fence before the train pulled out. It also appeared that the plaintiff was a young woman seventeen years of age, of average intelligence, and well acquainted with the premises. *Held*, not to sustain the negligence charged, viz., the negligent starting of the train without giving plaintiff sufficient or reasonable time to alight. *Held*, further, that plaintiff was guilty of such contributory negligence as would prevent a recovery for injuries received in jumping from the train. *Chicago, B. & Q. R. Co. v. Landauer*, 54 Am. & Eng. R. Cas. 640, 36 Neb. 642, 54 N. W. Rep. 976.

Where the evidence whether a train was stopped at a station a sufficient time to permit a passenger to leave it is conflicting, and the defendant requests an instruction that even if the train did not stop a sufficient time to allow the passenger to leave it, yet it was contributory negligence to jump off after it started, it is error for the court to say, in refusing the instruction, that the question whether it was contributory negligence to leave the train whilst in motion depends altogether on the speed that the train was under at the time, and that it

must be left to the jury, as such an instruction authorizes a recovery even though the plaintiff may have been guilty of negligence in delaying to leave the train. *Pennsylvania R. Co. v. Lyons*, 41 Am. & Eng. R. Cas. 154, 129 Pa. St. 113, 18 Atl. Rep. 759.

428. Before lapse of time sufficient to alight.—(1) *Contributory negligence.*—It is the duty of those having charge of a train to stop it at the stations a sufficient time to enable passengers to leave the train, and it is carelessness for a passenger to attempt to leave the train while it is in motion. *Jeffersonville R. Co. v. Hendricks*, 26 Ind. 228.

One who passed out of a car and got upon the platform and attempted to step or jump from the car while it was in motion, cannot recover for injuries suffered in consequence thereof, even though he had reached his place of destination, and the train, which had previously stopped to permit passengers to alight, had not so stopped for a reasonable length of time. *Jewell v. Chicago, St. P. & M. R. Co.*, 6 Am. & Eng. R. Cas. 379, 54 Wis. 610, 12 N. W. Rep. 83, 41 Am. Rep. 63.—QUOTING *Pennsylvania R. Co. v. Aspell*, 23 Pa. St. 147; *Gavett v. Manchester & L. R. Co.*, 16 Gray (Mass.) 501; *Hickey v. Boston & L. R. Co.*, 14 Allen (Mass.) 429. REVIEWING *Secor v. Toledo, P. & W. R. Co.*, 10 Fed. Rep. 15.—DISAPPROVED IN *Carr v. Eel River & E. R. Co.*, 98 Cal. 366. DISTINGUISHED IN *Van Ostran v. New York C. & H. R. R. Co.*, 35 Hun (N. Y.) 590.

If a passenger voluntarily leaps from a train whilst it is in motion and is injured thereby, he cannot, as a general rule, recover of the company, although the train may not have been stopped at the station long enough to afford reasonable opportunity to get off in the usual way. *Atlanta & W. P. R. Co. v. Dickerson*, 89 Ga. 455, 15 S. E. Rep. 534.

In an action for the death of a passenger, plaintiff's testimony showed that the passenger attempted to alight from the train after it had begun to move and after two other passengers upon the platform of the same car had been thrown down in alighting, in consequence of the motion of the train. *Held*, that the passenger in attempting to alight under the circumstances was guilty of contributory negligence which justified binding instructions for defendant. *Brown v. Barnes*, 151 Pa. St. 562, 25 Atl. Rep. 144.

As a train approached the station, the station was called and the train stopped. Plaintiff, a child of twelve years, and her parents gathered up some packages and rose to their feet in the passage-way to leave the train. Before they got outside of the car the train started sharply, but they passed to the car-platform. It was dark and the train had already passed beyond the station platform. Plaintiff's father took her under his arm and stepped off and fell, injuring her. *Held*, that plaintiff was chargeable with contributory negligence as matter of law. *Morrison v. Erie R. Co.*, 56 N. Y. 302, 6 Am. Ry. Rep. 166.—APPLYING *Lucas v. New Bedford & T. R. Co.*, 6 Gray (Mass.) 64; *Phillips v. Rensselaer & S. R. Co.*, 49 N. Y. 177; *Nichols v. Sixth Ave. R. Co.*, 38 N. Y. 131. DISTINGUISHING *Foy v. London, B. & S. C. R. Co.*, 18 C. B. N. S. 225; *Siner v. Great Western R. Co.*, L. R. 3 Ex. 150, 4 Ex. 117; *Pennsylvania R. Co. v. Kilgore*, 32 Pa. St. 292.

(2) — *not heeding warnings*.—A train not stopping at a station a reasonable length of time to allow passengers to alight, one undertook, in spite of warnings, to get off after the train had started, and was injured. *Held*, that she was guilty of contributory negligence fatal to recovery. *Jewell v. Chicago, St. P. & M. R. Co.*, 6 Am. & Eng. R. Cas. 379, 54 Wis. 610, 12 N. W. Rep. 83, 41 Am. Rep. 63.—QUOTING *Pennsylvania R. Co. v. Aspell*, 23 Pa. St. 147; *Gavett v. Manchester & L. R. Co.*, 16 Gray (Mass.) 501; *Hickey v. Boston & L. R. Co.*, 14 Allen (Mass.) 429. REVIEWING *Secor v. Toledo, P. & W. R. Co.*, 10 Fed. Rep. 15.

(3) — *disobeying notice*.—A notice was posted in the car, which plaintiff read, forbidding passengers from getting on or off while the cars were in motion. The train stopped at the station where she wished to alight; but, before she got to the platform of the car, it started. She attempted to get off, with the assistance of B., whom she requested to help her, and was injured. *Held*, that the injury sustained was either owing to the fact that it was impracticable to descend from the car with safety, in which case she was negligent in making the attempt, or was attributable to the negligence or unskilfulness of the one assisting her, for which defendant was not responsible; that, while it was the duty of defendant to stop for a sufficient length of time to allow its passengers to alight, yet the violation of

this duty did not justify plaintiff in exposing herself to danger by getting off while the cars were in motion. *Burrows v. Erie R. Co.*, 63 N. Y. 556; *reversing 3 T. & C. 44*.—FOLLOWING *Morrison v. Erie R. Co.*, 56 N. Y. 302; *Gavett v. Manchester & L. R. Co.*, 16 Gray (Mass.) 501; *Lucas v. New Bedford & T. R. Co.*, 6 Gray (Mass.) 64. REVIEWING *Pennsylvania R. Co. v. Kilgore*, 32 Pa. St. 292; *Filer v. New York C. R. Co.*, 49 N. Y. 47.—APPLIED IN *Solomon v. Manhattan R. Co.*, 103 N. Y. 437, 9 N. E. Rep. 430, 56 Am. Rep. 843. REVIEWED IN *Solomon v. Manhattan R. Co.*, 3 N. Y. S. R. 636.

(4) *Not contributory negligence*.—Where a train starts before a passenger has had a reasonable time to alight therefrom, it is an implied invitation on the part of those in charge of the train for him to get off after it starts, and it is not negligence *per se* in him to do so, unless it is manifestly dangerous. *Louisville & N. R. Co. v. Stacker*, 86 Tenn. 343, 6 Am. St. Rep. 840, 6 S. W. Rep. 737.

Where a train has failed to stop at its station a sufficient length of time to enable passengers to alight with safety, and a passenger upon the lower step, just about to alight when the train starts, jumps off the train, within a distance of less than 100 feet, the act of the passenger in leaving the car is not negligence *per se*. *Carr v. Eel River & E. R. Co.*, 58 Am. & Eng. R. Cas. 239, 98 Cal. 366, 33 Pac. Rep. 213.—DISTINGUISHING *Filer v. New York C. R. Co.*, 49 N. Y. 47. QUOTING *Johnson v. West Chester & P. R. Co.*, 70 Pa. St. 357.

Where a female passenger sues for injuries received by the sudden starting of the train, when she is leaving it, and contributory negligence is relied on as a defense, it is proper to instruct the jury that she was not negligent, if she acted as a prudent and careful person would have done under the circumstances. *Murphy v. Rome, W. & O. R. Co.*, 32 N. Y. S. R. 381, 10 N. Y. Supp. 354, 56 Hun 645.—APPLYING *McDonald v. Long Island R. Co.*, 27 N. Y. S. R. 481. QUOTING *Parsons v. New York C. & H. R. Co.*, 113 N. Y. 364, 22 N. Y. S. R. 697.

A female passenger, accompanied by three young children, on arriving at her station proceeded to alight with them; two of the children had left the car, and whilst plaintiff was still upon the train the cars started, when she sprang upon the platform, on which one of the children had

fallen prostrate, and was injured. *Held*, that this was not such negligence as would prevent her from recovering. *Pennsylvania R. Co. v. Kilgore*, 32 Pa. St. 292. —APPLIED IN *Filer v. New York C. R. Co.*, 49 N. Y. 47. APPLIED AND DISTINGUISHED IN *Morrison v. Erie R. Co.*, 56 N. Y. 302. DISTINGUISHED IN *Pittsburgh, C. & St. L. R. Co. v. Krouse*, 30 Ohio St. 222. QUOTED IN *Dawson v. Louisville & N. R. Co.*, (Ky.) 11 Am. & Eng. R. Cas. 134; *Southern R. Co. v. Kendrick*, 40 Miss. 374; *Jackson v. St. Louis, I. M. & S. R. Co.*, 29 Mo. App. 495. REVIEWED IN *Burrows v. Erie R. Co.*, 63 N. Y. 556.

(5) — *obeying directions of employees.*—Where a train stops at the station to which a passenger is bound, but before he is able to alight it is started again, and he is injured in attempting to get off under the conductor's direction, while the train is moving slowly and the danger is not apparent, he is not guilty of such contributory negligence as will bar a recovery for the injury. *St. Louis, I. M. & S. R. Co. v. Person*, 30 Am. & Eng. R. Cas. 567, 49 Ark. 182, 4 S. W. Rep. 755.

A passenger is not guilty of negligence *per se* in alighting from a train after it has stopped and he has been invited to alight, and, while doing so, the train is started; and especially when the brakeman or conductor is standing upon the ground inviting and assisting him, unless the speed of the train is such that the danger is obvious. *McCaslin v. Lake Shore & M. S. R. Co.*, 52 Am. & Eng. R. Cas. 290, 93 Mich. 553, 53 N. W. Rep. 724.—FOLLOWING *Strand v. Chicago & W. M. R. Co.*, 64 Mich. 216.

(6) — *passenger assisting child.*—Where a train only stops at a station one minute, a female passenger who has to assist a little child in alighting will not be charged with contributory negligence because she herself jumps from the train after it has started, and is injured, where it appears that there was no unnecessary delay in her attempt to get off before the train was in motion. *Loyd v. Hannibal & St. J. R. Co.*, 53 Mo. 509, 12 Am. Ry. Rep. 474.—APPLIED IN *Jackson v. St. Louis, I. M. & S. R. Co.*, 29 Mo. App. 495.—See also *Pennsylvania R. Co. v. Kilgore*, 32 Pa. St. 292.

(7) — *when train is very slowly moving.**—Where the passenger is not allowed a

reasonable opportunity to alight, there being a slight stoppage of the train, but he attempts to do so after the train has resumed its motion, but before the motion has become at all rapid, and the stepping from the train would not seem dangerous to a man of ordinary prudence and judgment, and nevertheless bodily injury follows, in such case the passenger would be entitled to recover for the injury. *Illinois C. R. Co. v. Able*, 59 Ill. 131, 11 Am. Ry. Rep. 154.—APPROVED IN *Nelson v. Atlantic & P. R. Co.*, 68 Mo. 593. DISTINGUISHED IN *Denver, S. P. & P. R. Co. v. Pickard*, 18 Am. & Eng. R. Cas. 284, 8 Colo. 163. FOLLOWED IN *Illinois C. R. Co. v. Chambers*, 71 Ill. 519.

Where a passenger's destination is a regular station, and in addition the conductor has promised to stop the train, it is not negligence *per se* to step from the train to the platform when the train has come almost to a full stop, it being described as "a slight, gentle, creeping movement." *Nance v. Carolina C. R. Co.*, 94 N. Car. 619.

(8) *Question for jury.*—Where a passenger has partly descended the steps of a car when the train starts, it cannot be said, as a matter of law, that he is guilty of negligence if he proceeds to alight, but it is a question for the jury under all the facts. *Nichols v. Dubuque & D. R. Co.*, 27 Am. & Eng. R. Cas. 183, 68 Iowa 732, 28 N. W. Rep. 44.—REFERRED TO IN *Raben v. Central Iowa R. Co.*, 74 Iowa 732, 34 N. W. Rep. 621.

As a train reached the plaintiff's destination the conductor called the name of the station, the train stopped, and several passengers got out at once, without unusual delay. One of them, plaintiff, followed close after the person ahead of her. The train was in motion as she alighted and threw her down, injuring her spine. She testified that she looked when she was stepping off, but that it was so dark that she could not see the platform; that she did not look to see if the train was moving, because she felt sure it was still; but there was other evidence showing that there was no object which any one could see from which it could be found out whether the train was moving or not. *Held*, that the question of whether she was negligent or not was properly submitted to the jury.

* See also *ante*, 421.

* See also *ante*, 420.

Brooks v. Boston & M. R. Co., 16 Am. & Eng. R. Cas. 345, 135 Mass. 21.—DISTINGUISHED *Gavett v. Manchester & L. R. Co.*, 16 Gray (Mass.) 501; *Harvey v. Eastern R. Co.*, 116 Mass. 269.

Where insufficient time is allowed a passenger for safe and convenient egress from the cars, and before he attempts to alight the train is started, and he then jumps from the train while its motion is so slight as to be almost imperceptible, and is injured, it is for the jury to determine, from the age and physical condition of the passenger, whether he is guilty of contributory negligence. *Straus v. Kansas City, St. J. & C. B. R. Co.*, 6 Am. & Eng. R. Cas. 384, 75 Mo. 185.—APPLIED IN *Jackson v. St. Louis, I. M. & S. R. Co.*, 29 Mo. App. 495. FOLLOWED IN *Waller v. Hannibal & St. J. R. Co.*, 83 Mo. 608. QUOTED IN *Clotworthy v. Hannibal & St. J. R. Co.*, 21 Am. & Eng. R. Cas. 371, 80 Mo. 220; *Murphy v. St. Louis, I. M. & S. R. Co.*, 43 Mo. App. 342.

Where a passenger leaving a train at his destination crowds through out-bound passengers who have been admitted to the platform and door of the car, and, finding upon reaching the steps that the train has started, jumps off the steps and is injured, it is for the jury to say whether the company was guilty of negligence in admitting the passengers or starting the train, and whether the plaintiff was guilty of contributory negligence in jumping from the steps. *Pennsylvania R. Co. v. Peters*, 30 Am. & Eng. R. Cas. 607, 116 Pa. St. 206, 8 Cent. Rep. 408, 9 Atl. Rep. 317, 19 W. N. C. 418.—DISTINGUISHED IN *Ellinger v. Philadelphia, W. & B. R. Co.*, 153 Pa. St. 213.

The act of a passenger in jumping from a moving train is not negligence *per se*, but it is for the jury to say, under all the circumstances of the case, whether the act of jumping was justifiable or not; and if the passenger jumped when carried less than one hundred feet beyond the station, after an attempt to alight at the station, where there was not sufficient time allowed to alight with safety, and there is no evidence as to the speed of the train at the time of jumping, it is proper to instruct the jury that if they find that the train did not stop a reasonable length of time to allow the plaintiff to get off, and that she jumped

2 D. R. D.—31.

therefrom while the train was in motion, and under such circumstances that an ordinarily cautious, careful, and prudent person would not have apprehended danger therefrom, she was entitled to recover; and if they found that the jumping was under circumstances where such a person would have apprehended danger, it was an act of carelessness which would relieve the defendant from responsibility and entitle it to a verdict. *Carr v. Eel River & E. R. Co.*, 98 Cal. 366, 33 Pac. Rep. 213.—DISAPPROVING *Jewell v. Chicago, St. P. & M. R. Co.*, 54 Wis. 610, 41 Am. Rep. 63. REVIEWING *Filer v. New York C. R. Co.*, 49 N. Y. 47, 10 Am. Rep. 327; *Johnson v. West Chester & P. R. Co.*, 70 Pa. St. 357; *Louisville & N. R. Co. v. Crunk*, 119 Ind. 542, 12 Am. St. Rep. 443.

When the train upon which the plaintiff was a passenger had stopped at the point of his destination, he arose from his seat and started to leave the train. When he got off the cars were moving, which caused him to fall and receive the injury of which he complains. Other passengers had left the cars in safety ahead of him. There was a conflict of testimony as to how fast the cars were moving. Upon the plaintiff's showing the court refused to allow him to recover, because he was held to have been contributing by negligence to the injury. Held: (1) that the rule of prudence binding upon the plaintiff must be that which, under just such circumstances, would restrain all men of ordinary prudence, and if the mind of an ordinarily prudent man would have been impressed with a belief of danger, the plaintiff had no right to incur the risk; but if the danger was not apparent, he was not negligent in acting on that assumption; (2) that the fact of the cars beginning to move before the plaintiff had time to alight was a circumstance which would tend to disturb and hurry him; and although the motion of the train may have been such as to indicate danger, yet he might reasonably assume it to be safe, unless his senses told him plainly to the contrary; and under the circumstances the question of contributory negligence should have been submitted to the jury. *Strand v. Chicago & W. M. R. Co.*, 28 Am. & Eng. R. Cas. 213, 64 Mich. 216, 31 N. W. Rep. 184.—FOLLOWED IN *McCaslin v. Lake Shore & M. S. R. Co.*, 93 Mich. 553.

429. At the command or invitation of employes, generally.*—Ordinarily it is negligence to attempt to alight from a moving train; but where the cars are provided with gates to prevent passengers from getting on or off at improper times, throwing the gates open is an invitation to alight and an assurance of safety, and leaves the passenger's act in getting off only for the consideration of the jury. *Quin v. Manhattan R. Co.*, 7 N. Y. S. R. 252.

It is not negligence *per se* for a passenger to get off a car that is moving slowly, in response to an invitation by a person in charge of the train. But if the train is moving so rapidly as to render it clearly dangerous to attempt to get off, the passenger who does get off is negligent. *Delaware & H. Canal Co. v. Webster*, 27 Am. & Eng. R. Cas. 160, 6 Atl. Rep. 841.—REVIEWING *McClintock v. Railroad Co.*, 42 Leg. Int. (Pa.) 82; *Johnson v. West Chester & P. R. Co.*, 70 Pa. St. 357.

Where the risk or danger of alighting from a moving train is not apparent to a passenger, and he is urged to take the hazard by the company's employes, whose duty it is to know the danger, and he does so, he is not chargeable with negligence. When the danger is obvious, but slight, he has the right to rely upon the judgment of the conductor, whose duty and experience he may presume gives him a superior knowledge in such matters. *St. Louis, I. M. & S. R. Co. v. Rosenberry*, 45 Ark. 256.—QUOTING *Lambeth v. North Carolina R. Co.*, 66 N. Car. 494; *Pennsylvania R. Co. v. Aspell*, 23 Pa. St. 147; *Pittsburgh, C. & St. L. R. Co. v. Krouse*, 30 Ohio St. 222; *Filer v. New York C. R. Co.*, 49 N. Y. 47.

A passenger who alights from a slowly moving train at the instance or direction of the conductor or other agent in management of the train, on whose opinion or judgment in the matter he has the right to rely, and when the risk or danger is not apparent, is not chargeable with negligence. *St. Louis, I. M. & S. R. Co. v. Cantrell*, 8 Am. & Eng. R. Cas. 198, 37 Ark. 519, 40 Am. Rep. 105.—QUOTED IN *Galveston, H. & S. A. R. Co. v. Smith*, 59 Tex. 406.

* See also *ante*, 355, 370, 407; *post*, 470.

Contributory negligence of passenger in jumping from moving train by order of train-hands, see 58 AM. & ENG. R. CAS. 375, *abstr.*

If a person who accompanies a passenger to a train voluntarily jumps therefrom after it is started and before an opportunity has been offered him to get off, he is guilty of negligence; but if he jumps off in obedience to an order from the person in charge of the car, under circumstances which warrant him in believing that he was required by such person to jump, it is a question of fact whether or not under all the circumstances he was guilty of negligence in obeying the order. *Galloway v. Chicago, R. I. & P. R. Co.*, (Iowa) 58 Am. & Eng. R. Cas. 245, 54 N. W. Rep. 447.

430. At the command of the brakeman.*—In an action for injuries plaintiff testified that she took passage on defendant's road from Rochester to Fort Plain; as the train approached the latter station she passed out, with others, upon the platform; the train was moving slowly; a passenger who preceded her stepped off the car, and the brakeman said to her, "You had better step off, as we are not going to halt any longer;" she thereupon stepped down to the lower step, and as she attempted to step down upon the ground the cars gave a sudden jerk, which threw her down; her clothing caught, she was dragged upon the ground, and injured; that the person she called the brakeman had stood upon the platform, had opened the door and called the stations, and called the Fort Plain station, and when he gave the direction to her stood on the platform with his hand on the brakes. She could not recognize the man, and the brakeman on the train denied the plaintiff's statements. *Held*, that the evidence was sufficient to authorize the submission of the questions of negligence and contributory negligence to the jury, and to sustain a verdict for plaintiff. *Filer v. New York C. R. Co.*, 68 N. Y. 124.

One who, acting under the advice and orders of a brakeman, jumps off a moving train and is injured, is not guilty of a misdemeanor under McClain's Code, section 5203, and can recover for the injuries received. *Galloway v. Chicago, R. I. & P. R. Co.*, (Iowa) 58 Am. & Eng. R. Cas. 245, 54 N. W. Rep. 447.

For such section, providing that persons getting off a moving train without the consent of the persons in charge shall be guilty

* Advice by conductor or brakeman to passengers to alight from moving train, see note, 21 AM. & ENG. R. CAS. 409.

of a misdemeanor, does not apply to a person who jumps from a train on the advice of a brakeman and without objection on his part. *Galloway v. Chicago, R. I. & P. R. Co., (Iowa) 58 Am. & Eng. R. Cas. 245, 54 N. W. Rep. 447.*—REVIEWING *Raben v. Central Iowa R. Co., 31 Am. & Eng. R. Cas. 45, 74 Iowa 733.*

And it is proper to submit to the jury the question as to whether or not the brakeman was a person in charge of the car within the meaning of the section. *Galloway v. Chicago, R. I. & P. R. Co., (Iowa) 58 Am. & Eng. R. Cas. 245, 54 N. W. Rep. 447.*

431. At the command of the conductor.*—(1) *Rule stated.*—It is not sufficient to charge the company with liability that the conductor advised the passenger that he could safely jump from the train, and he did so while the train was in motion, to avoid being carried beyond the station at which he desired to stop. *Jeffersonville R. Co. v. Swift, 26 Ind. 459.*

As to whether there could be a recovery if it appeared that the passenger left the train in pursuance of the direction or command of the conductor, see *Jeffersonville R. Co. v. Swift, 26 Ind. 459.*

When a passenger upon a train, approaching the place at which he expects to get off, jumps while it is in motion, his right to recover for injuries received depends upon whether the danger was so obvious that a prudent man would not encounter it, though he is required and directed to jump by the conductor. *Whitlock v. Comer, 57 Fed. Rep. 565.*

Under the declaration and the evidence this case should have turned, as to the question of the defendant's liability, upon whether the conductor ordered the plaintiff's daughter to jump from the train while in motion; and, if so, whether the daughter was free from plain and manifest fault in obeying the order. If the order was not given, or if it should have been disobeyed on account of the obvious danger of complying with it, there could be no recovery; otherwise there could be a recovery, measured by the loss of services, reduced to their

present net value, from the time of the injury up to the time when the daughter would attain her majority, to which should be added any expense to the plaintiff occasioned by the injury. As the daughter was about 17 years of age she should not be treated, with respect to her duty to care for her own safety, as a child of "tender years," but should be treated as a person who is presumptively chargeable with the exercise of the ordinary discretion possessed by young persons of her class and condition. *East Tenn., V. & G. R. Co. v. Hughes, (Ga.) 58 Am. & Eng. R. Cas. 373, 17 S. E. Rep. 949.*

(2) *When contributory negligence.*—Where an adult passenger leaves a moving train under the advice or direction of the conductor in charge of the train, and, in leaving the train, receives personal injuries, such advice or direction, though plain and unambiguous, cannot be held to excuse an act of negligence, on the part of the passenger, which is so opposed to common prudence as to make it an obvious act of recklessness or folly. *South & N. Ala. R. Co. v. Schauster, 21 Am. & Eng. R. Cas. 405, 75 Ala. 136.*

Plaintiff got on a freight train as a passenger to ride to a station where the train did not stop. The conductor made no threats to put him off, but was angry and abusive, and ordered him to jump off when the train reached the station. Plaintiff was injured by jumping while the train was running some 10 to 12 miles per hour. *Held*, such contributory negligence as to defeat a recovery. *St. Louis, I. M. & S. R. Co. v. Rosenberry, 45 Ark. 256.*

A passenger got on a train that did not stop at a station that his ticket called for. Upon the conductor discovering this fact he used violent language and told the passenger that he must prepare to get off anyhow. When nearing the station, with the train running 10 or 12 miles an hour, the passenger, without reason to believe that he would have suffered bodily harm had he remained on the train, or that he would have been ejected by force while the train was in rapid motion, jumped from the train and was injured. *Held*, that the company was not liable for the injuries received by plaintiff in jumping from the train, though it might be liable, in a proper case, for damages on account of the bad treatment at the hands of the conductor while on the train.

* Injury to passenger leaving moving train by conductor's orders, see 41 AM. & ENG. R. CAS. 171, *abstr.*; or acting on advice of conductor, see note, 56 AM. REP. 843.

Injuries to passengers alighting from moving train against advice of the conductor, see 31 AM. & ENG. R. CAS. 53, *abstr.*

St. Louis, I. M. & S. R. Co. v. Rosenberry, (Ark.) 11 S. W. Rep. 212; *affirming* 45 Ark. 256.

After a train had started from an intermediate station plaintiff decided to get off there, and so informed the conductor, who replied, "Jump off quick, if you are going to." The evidence showed that it was very dark and that the train had acquired a speed of some 12 miles an hour. In jumping he fell into a culvert and was injured. *Held*, that the words of the conductor were not a requirement to leave the train at that time, so as to relieve plaintiff of contributory negligence. *Vimont v. Chicago & N. W. R. Co.*, 28 Am. & Eng. R. Cas. 210, 71 Iowa 58, 32 N. W. Rep. 100.—REFERRED TO IN *Raben v. Central Iowa R. Co.*, 74 Iowa 732, 34 N. W. Rep. 621.

Plaintiff, a passenger, requested the conductor to stop the train at a crossing short of his destination and let him off, which the conductor declined to do, but told him he would slacken the speed and he could jump off. The train passed the crossing at night, and at a speed of from 6 to 12 miles an hour, and plaintiff was injured in jumping, as the conductor directed him to do. Plaintiff was shown to be a man of intelligence, and admitted that he knew that an attempt to get off in that way was dangerous. *Held*, that a peremptory instruction to find for the defendant was correct. *Bardwell v. Mobile & O. R. Co.*, 63 Miss. 574.—FOLLOWED IN *McMurtry v. Louisville, N. O. & T. R. Co.*, 67 Miss. 601, 7 So. Rep. 401.

(3) — *and when not*.—One who receives injury in jumping from a moving train, and who jumps therefrom because ordered or directed so to do by a conductor who is ejecting him, cannot be charged with contributory negligence. *International & G. N. R. Co. v. Hassell*, 21 Am. & Eng. R. Cas. 315, 62 Tex. 256.

In an action for personal injuries, alleged to have been wilfully caused in compelling plaintiff, a woman, to leave the car while the train was in motion, a recovery cannot be had on proof of simple negligence merely, as by the failure to stop at her destination, or where it appears that she left the car voluntarily on the invitation and pacific insistence of the conductor; but if she left under protest and in obedience to his orders, it is not necessary to prove that she was forcibly ejected or compelled to

leave by threats or hostile demonstrations on his part. *Highland Ave. & B. R. Co. v. Winn*, 93 Ala. 306, 9 So. Rep. 509.—ADHERING TO *Louisville & N. R. Co. v. Johnston*, 79 Ala. 436; *Birmingham Mineral R. Co. v. Jacobs*, 92 Ala. 187. QUOTING *South & N. Ala. R. Co. v. Schaufler*, 75 Ala. 136.

When a company bound to stop its train to let off a passenger only slackens its speed, and the conductor tells the passenger to jump, and he does so and is injured, the latter is not guilty of contributory negligence in using the only means to get off the company affords him. *Georgia R. & B. Co. v. McCurdy*, 45 Ga. 288.

Plaintiff, who was a large woman and five months pregnant, was with her two children, aged two and five years respectively, a passenger on defendant's road. On arriving at her destination, which was a regular stopping place and had a platform for the use of passengers, the train only slackened, and the conductor told her to "get off." She asked how; he replied "jump," and she did jump, with the youngest child in her arms. *Held*, that she was not guilty of contributory negligence, and was entitled to recover. *Baltimore & O. R. Co. v. Leapley*, 27 Am. & Eng. R. Cas. 167, 65 Md. 571, 4 Atl. Rep. 891.

Unless a train is moving very slowly, and the circumstances are especially favorable, it is *prima-facie* negligence for a passenger to attempt to alight or jump from it when moving. The circumstances may, however, be such as to render the question a proper one for the jury. He may be justified in any particular case, in relying upon the superior knowledge of the conductor as to the speed and movements of the train, and other circumstances, and in following his directions, particularly when notified to act promptly to prevent being carried beyond a station. *Jones v. Chicago, M. & St. P. R. Co.*, 41 Am. & Eng. R. Cas. 169, 42 Minn. 183, 43 N. W. Rep. 1114.

It is not negligence *per se* for the passenger to leave the train while in motion; if he is told by the conductor to get off, or given by him to understand that he can do so in safety, and the surrounding circumstances are such as to give him reason to believe he may, he is justified in making the attempt. *Bucher v. New York C. & H. R. R. Co.*, 21 Am. & Eng. R. Cas. 361, 98 N. Y. 128.—QUOTED IN *Weiler v. Manhattan R. Co.*, 6 N. Y. Supp. 320.

If a conductor orders a person to get off a train while running at a speed which would be dangerous for him in getting off, refuses to stop the train to allow him to get off, and in violent and insulting language threatens to eject the person from the train by force if such order is not obeyed, and has force at his command to execute such threat, and the person jumps from the train to avoid ejection by force, there is sufficient compulsion or show of force to excuse the person from the charge of contributory negligence in so jumping from the train. *Boggress v. Chesapeake & O. R. Co.*, 37 W. Va. 297, 16 S. E. Rep. 525.—QUOTING *Kline v. Central Pac. R. Co.*, 37 Cal. 400.

432. At the advice of other passengers.—The presence of the conductor and his silence on hearing another passenger tell the plaintiff that the car was not going to stop and he had better get off, will not justify him in jumping from the car and causing his own injury. *Masterson v. Macon City & S. St. R. Co.*, 88 Ga. 436, 14 S. E. Rep. 591.

Plaintiff, in getting off one of defendant's cars while in motion, received an injury. It appeared that she was directed to get off when she did, but the evidence was conflicting as to whether the direction was given by a brakeman or by a person not connected with the running of the train. The court charged, in substance, that it was immaterial who gave the direction; it was for the jury to say whether it was prudent for her, acting under the advice so given by anybody to alight from the train. *Held*, error; that if directed by a brakeman or employé, the plaintiff had a right to assume that she could get off with safety, although the train was in motion; but not so if the direction was given by another passenger, as she could have no reason to suppose the latter knew more about the safety of the act than herself. *Filer v. New York C. R. Co.*, 59 N. Y. 351, 7 Am. Ry. Rep. 111.—REFERRING TO *Filer v. New York C. R. Co.*, 49 N. Y. 42.—DISTINGUISHED IN *Pittsburgh, C. & St. L. R. Co. v. Krouse*, 30 Ohio St. 222. QUOTED IN *Weiler v. Manhattan R. Co.*, 53 Hun (N. Y.) 372, 25 N. Y. S. R. 543, 6 N. Y. Supp. 320.

A boy of eleven years of age got on a freight train as a passenger, and told the conductor, on paying his fare, where he wanted to get off. It was the habit of the train to run past the station and then back

to the platform, to allow passengers to get off; but the boy was not informed of this, and as the train first slowly passed the platform another passenger told the boy he guessed the train would not stop, and in attempting to leave the boy fell and was injured. *Held*, that it was negligence not to inform the boy that the train would back to the platform, and let him off, and that the jury were justified in finding him not guilty of contributory negligence. *Hemmingway v. Chicago, M. & St. P. R. Co.*, 33 Am. & Eng. R. Cas. 511, 72 Wis. 42, 7 Am. St. Rep. 823, 37 N. W. Rep. 804.

433. Failing to heed warning.*—The evidence in the case disclosing that the plaintiff leaped from the cars merely to prevent being carried on, and that she was at the time warned that it was dangerous, and so thought herself—*held*, that she could not recover, she having contributed to the injury by her negligence. *Evansville & C. R. Co. v. Duncan*, 28 Ind. 441.

A passenger who, without necessity, attempts to alight from a moving train, in the face of a warning from a fellow-passenger not to do so, is guilty of contributory negligence, and cannot recover for an injury received in such attempt. *Kilpatrick v. Pennsylvania R. Co.*, 140 Pa. St. 502, 21 Atl. Rep. 408.

It is not error, in an action for an injury received in alighting from a train, to charge that, if the train was in motion and the plaintiff was informed of that fact by a fellow-passenger, and warned not to alight, it was his duty to heed the warning. *Kilpatrick v. Pennsylvania R. Co.*, 140 Pa. St. 502, 21 Atl. Rep. 408.

Where plaintiff jumped off the car when in motion, though warned not to do so, he could not recover for injury, though negligently carried beyond a station where he intended to stop. *Pennsylvania R. Co. v. Aspell*, 23 Pa. St. 147.—APPROVED IN *Nelson v. Atlantic & P. R. Co.*, 68 Mo. 593. NOT FOLLOWED IN *Murphy v. St. Louis, I. M. & S. R. Co.*, 43 Mo. App. 342. QUOTED IN *Norfolk & W. R. Co. v. Prinnell*, (Va.) 30 Am. & Eng. R. Cas. 574, 3 S. E. Rep. 95; *Central R. & B. Co. v. Letcher*, 12 Am. & Eng. R. Cas. 115, 69 Ala. 106; *Jewell v. Chicago, St. P. & M. R. Co.*, 6 Am. & Eng. R. Cas. 379, 54 Wis. 610, 41 Am. Rep. 63.

* See also *ante*, 372, 382, 394, 428 (2); *post*, 473.

REVIEWED IN *Wyatt v. Citizens' R. Co.*, 55 Mo. 485; *Hagan v. Philadelphia & G. F. R. Co.*, 15 Phila. (Pa.) 278.

434. Intoxicated passenger.*—In an action to recover damages sustained by the plaintiff while getting off defendant's train by the sudden starting up of the train, where it appeared that he had been drinking whiskey—*held*, that it was the duty of the court, upon the request of the defendant, to instruct the jury that, if the jury should find that plaintiff was at all under the influence of liquor, and that that fact contributed to produce the injury, he could not recover. *Strand v. Chicago & W. M. R. Co.*, 31 Am. & Eng. R. Cas. 54, 67 Mich. 380, 11 West. Rep. 538, 34 N. W. Rep. 712.

435. In great emergency or imminent peril, generally.—Where, by the gross negligence of a company, a person is placed in such a perilous position that he jumps from a train as a reasonable measure of safety, the company will be liable for the injury, though he would not have been injured had he remained. *South Western R. Co. v. Paulk*, 24 Ga. 356.—DISTINGUISHING *Collins v. Albany & S. R. Co.*, 12 Barb. (N. Y.) 492. QUOTING *Stokes v. Saltonstall*, 13 Pet. (U. S.) 181.

A company is not liable to a person, whether passenger or trespasser, who in a state of panic or fear jumps out of a train in motion and is injured thereby, in the absence of proof that such panic or fear was caused or inspired by word or act of an agent or employé of the company. *Reary v. Louisville, N. O. & T. R. Co.*, 34 Am. & Eng. R. Cas. 277, 40 La. Ann. 32, 8 Am. St. Rep. 497, 3 So. Rep. 390.

Fear of personal danger is not the only excuse that will exonerate one in jumping

* See also *ante*, 37, 101, 115, 147, 312, 353, 400.

† See also *ante*, 207, 345, 420 (3); *post*, 457-498.

Contributory negligence of passengers in sudden peril. Jumping from trains, see note, 12 AM. & ENG. R. CAS. 180.

Attempt of passenger to avoid injury by jumping from car, see note, 27 AM. & ENG. R. CAS. 215.

Injury to passenger by leaping from train under apprehension of collision, see note, 33 AM. & ENG. R. CAS. 539.

Jumping from train through fright, see note, 37 AM. & ENG. R. CAS. 193.

Jumping from moving train when in imminent danger not contributory negligence, see note, 7 L. R. A. 115.

from a moving train. A passenger may in some cases be justified in alighting from a moving train merely to save himself from serious inconvenience; all depends upon the speed of the train and the attendant circumstances. *Shannon v. Boston & A. R. Co.*, 23 Am. & Eng. R. Cas. 511, 78 Me. 52, 2 Atl. Rep. 678.

Three ladies, including plaintiff, were invited by the station agent to remain in a car while awaiting their train, the station not being fit for occupancy at the time, he assuring them that the car would remain there. Without notice or signal, and without any conductor or brakeman on the car, the train began to move, whereupon the ladies became startled, and hurried to the rear and jumped out, plaintiff becoming seriously injured. *Held*, that there was sufficient evidence to support a verdict against the company; and plaintiff, being a passenger, was not guilty of such contributory negligence as to bar a recovery. *Shannon v. Boston & A. R. Co.*, 23 Am. & Eng. R. Cas. 511, 78 Me. 52, 2 Atl. Rep. 678.

If a passenger in a stage-coach, by reason of a peril arising from an accident for which the proprietors thereof are liable, is in so dangerous a situation as to render his leaping from the coach an act of reasonable precaution, and he leaps therefrom and thereby breaks a limb, the proprietors are answerable to him in damages, though he might safely have retained his seat. *Ingalls v. Bills*, 9 (Metc.) Mass. 1.

436. Where reasonable ground of fear existed.—It is not contributory negligence for persons in a stage-coach to jump out if they were justified in believing they were in sudden danger, which was the result of the negligence of the driver. *Stokes v. Saltonstall*, 13 Pet. (U. S.) 181.—QUOTED IN *South Western R. Co. v. Paulk*, 24 Ga. 356; *South Covington & C. St. R. Co. v. Ware*, 27 Am. & Eng. R. Cas. 206, 84 Ky. 267.

Where a passenger jumps from a moving train, under a well-grounded fear that he will suffer death or great bodily harm from an impending collision, he is not chargeable with contributory negligence, though it afterward turns out that he would not have been injured had he remained on the train. *Baltimore & O. R. Co. v. McKenzie*, 24 Am. & Eng. R. Cas. 395, 81 Va. 71.—FOLLOWING *Richmond & D. R. Co. v. Morris*, 31 Gratt. (Va.) 200.

Where a passenger, to avoid impending danger, attempts to leave the car in which he is riding, believing, upon reasonable grounds, that by so doing he will escape injury, and while in the act of leaving is injured through the company's negligence, he is not chargeable with contributory negligence, although had he made no attempt to leave the car the injury would not have happened. *Iron R. Co. v. Mowery*, 3 *Am. & Eng. R. Cas.* 361, 36 *Ohio St.* 418, 38 *Am. Rep.* 597.

Where a passenger is placed in a situation of great peril, as where the cars get off the track while running some 20 miles an hour, and the passenger jumps from the train and is injured, he is not chargeable with contributory negligence if it appears that his act was one which a person acting with ordinary prudence might make under the same circumstances; and this is to be determined from the circumstances as they appeared to the passenger at the time. *Wilson v. Northern Pac. R. Co.*, 26 *Minn.* 278, 37 *Am. Rep.* 410, 3 *N. W. Rep.* 333.

And whether a passenger had or had not a reasonable excuse for jumping off a moving car is usually a question for the jury. An extreme case may be determined by the court. *Shannon v. Boston & A. R. Co.*, 23 *Am. & Eng. R. Cas.* 511, 78 *Me.* 52, 2 *Atl. Rep.* 678.

437. Where no reasonable ground for fear existed.—If a passenger is, by the wrongful act of the carrier, placed in a position where, under a sudden impulse to save himself from serious inconvenience, he attempts to alight from a moving train, where the danger is not imminent and where persons of ordinary care and caution would make the attempt, the question of his negligence in making the attempt is for the jury. *Cousins v. Lake Shore & M. S. R. Co.*, 96 *Mich.* 386, 56 *N. W. Rep.* 14.

Where the court instructed the jury that, if the plaintiff knowingly entered the car in violation of the rules of the company, or if, having entered even without knowledge of such rules, she jumped from the car from an apprehension of danger which did not in fact exist, or which would cause a person of ordinary prudence to jump from the car, then the plaintiff was not entitled to recover, the defendant has no just ground of complaint as to the instruction. *Western Md. R. Co. v. Herold*, 74 *Md.* 510, 22 *Atl. Rep.* 323.

Plaintiff, a female passenger, with her husband and other passengers, was in a car lying stationary near a station, when some one called out, "Here comes a train right on us," whereupon the passengers generally ran out and jumped off, and in doing so plaintiff was injured. It appeared that the approaching train was some 400 yards distant when the alarm was given and had stopped 100 yards distant by the time the passengers were off. It seemed that there was no danger of a collision, no negligence in the management of the trains, and no one connected with the road did anything to cause alarm. *Held*, that the company was not liable. *Gulf, C. & S. F. R. Co. v. Wallen*, 26 *Am. & Eng. R. Cas.* 219, 65 *Tex.* 568.—EXPLAINED IN *St. Louis & S. F. R. Co. v. Murray*, 55 *Ark.* 248.

438. Frightened by falling lumber.—If a passenger leaps out of a car attached to the rear of a freight train upon becoming alarmed by the noise and confusion made by reason of lumber from a former car falling and being blown against the passenger car, when there is no reasonable cause to apprehend danger to life or limb, there can be no recovery if he is killed by leaping, though it may have been negligence in the company to load the lumber so that it would fall off. *Woolery v. Louisville, N. A. & C. R. Co.*, 27 *Am. & Eng. R. Cas.* 210, 107 *Ind.* 381, 57 *Am. Rep.* 114, 8 *N. E. Rep.* 226.

439. Jumping to escape collision.—If a passenger leaps from a moving car and is injured, in an attempt to avoid an impending collision, he is not chargeable with contributory negligence if he acted as a person of ordinary prudence would have done under the same circumstances, though it turns out that he would not have been injured had he remained on the train. *Twomley v. Central Park, N. & E. R. R. Co.*, 69 *N. Y.* 158, 18 *Am. Ry. Rep.* 113.—QUOTED IN *Kleiber v. People's R. Co.*, 107 *Mo.* 240.

A passenger who is injured in attempting to leave the cars on seeing two trains approaching each other at such a speed as to make a serious collision inevitable, is not to be deemed guilty of negligence. *Buel v. New York C. R. Co.*, 31 *N. Y.* 314.—REVIEWED IN *Mowrey v. Central City R. Co.*, 66 *Barb.* (N. Y.) 43.

Although he is upon the platform of the cars attempting to escape at the time he

was injured, he is not standing or riding upon the platform in such a sense as to excuse the company under the regulation prohibiting passengers from standing or riding on the platform when the cars are in motion. *Buel v. New York C. R. Co.*, 31 N. Y. 314.

Where a passenger, through the negligence of a company, is placed in a situation apparently so perilous as to render it prudent for him to leap from the train in order to avoid a collision with another train, whereby he is injured, he will be entitled to recover damages, although he would not have been hurt if he had remained. *St. Louis & S. F. R. Co. v. Murray*, 52 Am. & Eng. R. Cas. 373, 55 Ark. 248, 18 S. W. Rep. 50.—EXPLAINING *Chicago, R. I. & P. R. Co. v. Felton*, 125 Ill. 458; *Gulf, C. & S. F. R. Co. v. Wallen*, 65 Tex. 568.

In such a case testimony as to the opinions, language, and acts of other passengers at the time of the apparent peril is admissible to show how the situation appeared to plaintiff and his fellow-passengers at the time he leaped from the train, and whether he acted prudently. *St. Louis & S. F. R. Co. v. Murray*, 52 Am. & Eng. R. Cas. 373, 55 Ark. 248, 18 S. W. Rep. 50.

Plaintiff's intestate had taken his seat as a passenger in a car, in the rear of the train, which had been put in place to receive passengers; and while seated, waiting for it to proceed, another train approached from the rear at a great speed. Apprehending danger he attempted to escape, but was killed on the platform. Other passengers got off the car and were uninjured, and one who remained in the car was not killed. *Held*, that there was no evidence to establish contributory negligence on the part of the intestate. *St. Louis, I. M. & S. R. Co. v. Maddy*, 58 Am. & Eng. R. Cas. 327, 57 Ark. 306, 21 S. W. Rep. 472.

If, soon after boarding a train, a collision is imminent, and to avoid danger a passenger leaps from the train and is injured, he will not be held to have acquired the rights of a passenger merely because he had entered the caboose with the shipper, without objection by the conductor, who merely expressed surprise that he also was going, it appearing that the conductor was busily occupied and, up to the time of the accident, had not demanded his fare, or seen the bill of lading, or learned of such purpose to claim free passage under it. *Rich-*

mond & D. R. Co. v. Burnsed, 70 Miss. 437, 12 So. Rep. 958.

440. When car has left track.—If a passenger, on a car which has been derailed by the negligence of the company and is in danger of overturning, jumps from the car while in motion in order to escape peril, and receives injuries in so doing, it is no defense to his action for such injuries to say that he was unnecessarily alarmed and that he would have escaped injury if he had remained on the car. *Dimmitt v. Hannibal & St. J. R. Co.*, 40 Mo. App. 654.

Where a passenger is injured in jumping from a moving train because a rear coach has left the track, and after the conductor has warned him to keep his seat and be quiet, he cannot recover for injuries received, it appearing that he was not exercising ordinary care in doing so. *Mobile & O. R. Co. v. Klein*, 43 Ill. App. 63.

Plaintiff and two others, all young men, got on a train to go a short distance, and were told by the conductor that the passenger cars were all filled and that they must go into the baggage-car. While there they got into a play and scuffle, which brought on a racing through the other cars. While in a passenger car it was thrown from the track, and plaintiff became frightened and leaped out, and was injured. The baggage-car was not thrown off, and there was nothing to excite the most timid person in it. *Held*, that no recovery could be had against the company. *Galena & C. U. R. Co. v. Yarrow*, 15 Ill. 468.—EXPLAINING *Peoria & R. I. R. Co. v. Lane*, 83 Ill. 448. REVIEWED IN *Lawrenceburgh & U. M. R. Co. v. Montgomery*, 7 Ind. 474; *Huelsenkamp v. Citizens' R. Co.*, 37 Mo. 537.

4. At or near Stations.*

441. Generally.—It is not negligence for a passenger awaiting a train to leave the waiting-room and go out on the platform before it is necessary to board his train; and if he is injured by the baggage-man carelessly running a truck against him, he may recover. *Chicago & A. R. Co. v. Woolridge*, 32 Ill. App. 237.

* See also *ante*, 265-285; and STATIONS AND DEPOTS, 110-127.

Contributory negligence of passengers in going to or from cars in and about stations, but not at platform, when for jury, see note, 50 AM. REP. 277.

Obligation of company as to place where passengers alight; contributory negligence, see note, 16 AM. & ENG. R. CAS. 323.

A passenger entitled to safe transportation over a railroad and ferry connecting therewith, upon invitation of the employés of the railroad company managing the ferry passed from a boat by a way upon the ferry-bridge provided for animals and vehicles. As he was so doing a runaway horse belonging to the railroad company, careering at random about the ferry-house, bolted over a bow which aided in the support of the ferry-bridge, into the way the passenger was, and injured him. *Held*, that by being in the way indicated the passenger was not guilty of negligence which contributed to his injury. *Watson v. Camden & A. R. Co.*, 58 *Am. & Eng. R. Cas.* 377, 55 *N. J. L.* 125, 26 *Atl. Rep.* 136.—FOLLOWING New York, L. E. & W. R. Co. v. Ball, 53 *N. J. L.* 283, 21 *Atl. Rep.* 1052.

442. Failure to use proper care.—Plaintiff sued for injuries received in falling off a platform at night when walking along it for the purpose of getting on a train. The negligence charged was both in the construction of the platform and in not having it sufficiently lighted. The defense of contributory negligence was made. *Held*, that he could not recover unless he showed that he was exercising reasonable care and caution—that of a prudent person. *Renneker v. South Carolina R. Co.*, 18 *Am. & Eng. R. Cas.* 149, 20 *So. Car.* 219.

A company is bound, as to passengers and persons intending to become passengers, to make such arrangements as are suitable to preserve from harm reasonable and prudent men in possession of ordinary senses and capacities. There is no obligation to provide arrangements suitable to the protection of persons falling below that standard, physically or mentally. Such persons must be cautious and prudent in proportion to their defects. *Renneker v. South Carolina R. Co.*, 18 *Am. & Eng. R. Cas.* 149, 20 *So. Car.* 219.—CRITICISED IN *Madden v. Port Royal & W. N. C. R. Co.*, 52 *Am. & Eng. R. Cas.* 286, 35 *So. Car.* 381. QUOTED IN *Simms v. South Carolina R. Co.*, 30 *Am. & Eng. R. Cas.* 571, 27 *So. Car.* 268, 3 *S. E. Rep.* 301.

If the station-house is separated by a side-track from a platform provided for passing to the trains, and there are no regulations or directions as to when or how passengers shall pass to them, the question whether a passenger is bound to wait in the station-house until the arrival of a train at

the platform, or may go to and stand on the platform during its approach, depends on what is a reasonably safe and prudent course for him to adopt, in determining which it is proper for a jury to consider what is the usage of passengers there, and whether such usage is known to and permitted by the company. *Caswell v. Boston & W. R. Corp.*, 98 *Mass.* 194.—APPROVING *Warren v. Fitchburg R. Co.*, 8 *Allen (Mass.)* 227.—DISTINGUISHED IN *Forsyth v. Boston & A. R. Co.*, 103 *Mass.* 510.

443. Failure to use means provided for safety.—Passengers must occupy the premises provided for their use while waiting for trains; and in going to and from the depot, offices, platforms, and trains must use the ways and means provided for that purpose. *Little Rock & Ft. S. R. Co. v. Cavenesse*, 48 *Ark.* 106, 2 *S. W. Rep.* 505. —QUOTING *Pennsylvania R. Co. v. Zebe*, 33 *Pa. St.* 326; *Bancroft v. Boston & W. R. Corp.*, 97 *Mass.* 275.

In order to make a passenger using a platform guilty of contributory negligence, the defect must be such as would naturally suggest to one of common understanding that it was dangerous and such as to place one in peril to pass over it. A passenger is not bound to that degree of inspection and care as a servant in the master's service. *Ohio & M. R. Co. v. Stansberry*, 132 *Ind.* 533, 32 *N. E. Rep.* 218.—QUOTING *Brassell v. New York C. & H. R. R. Co.*, 84 *N. Y.* 241.

In an action for injuries received in falling from a platform upon leaving a car at a depot, where the negligence alleged was not that the company had not constructed a safe passageway, but that it had provided no means by which that way was apparent to passengers alighting in the night-time, it would be improper to charge the jury that plaintiff could not recover if defendant had provided a way upon which the public could safely travel, and if plaintiff went in a direction which the public did not usually go. *Texas & P. R. Co. v. Brown*, 78 *Tex.* 397, 14 *S. W. Rep.* 1034.

444. Using unlighted stairway.—Plaintiff, who resided near defendant's station, reached it after dark. There were four stairways, by any one of which he could reach the street, and passengers were accustomed to take any one of them indiscriminately. Three of them which were convenient for plaintiff to use were well lighted; the fourth was not lighted. He

passed the three lighted stairways and attempted to find the fourth, but missed it in the dark and walked over the edge of the platform. *Held*, that by failing to avail himself of the opportunity to use the lighted stairway and by attempting to find the unlighted stairway, which was indistinguishable, he assumed the risk of accident therefrom, and that he was not entitled to recover. *Bennett v. New York, N. H. & H. R. Co.*, 41 *Am. & Eng. R. Cas.* 184, 57 *Conn.* 422, 18 *Atl. Rep.* 668.

445. Stepping off platform.—Plaintiff got off a train on a very dark night at a station where he was familiar, but instead of walking to the end of the platform where steps led to the highway, walked to the side of it and stepped off, intending to go obliquely to the highway. In stepping off he fell into a cattle-guard and was injured. It was so dark that he had to feel for the edge of the platform. *Held*, that he could not recover for the injuries. *Forsyth v. Boston & A. R. Co.*, 103 *Mass.* 510.—DISTINGUISHING *Warren v. Fitchburg R. Co.*, 8 *Allen (Mass.)* 227; *Caswell v. Boston & W. R. Corp.*, 98 *Mass.* 194; *Gaynor v. Old Colony & N. R. Co.*, 100 *Mass.* 208.—DISTINGUISHED IN *Mayo v. Boston & M. R. Co.*, 104 *Mass.* 137; *Bullard v. Boston & M. R. Co.*, 27 *Am. & Eng. R. Cas.* 117, 64 *N. H.* 27. NOT FOLLOWED IN *Missouri Pac. R. Co. v. Neiswanger*, 39 *Am. & Eng. R. Cas.* 471, 41 *Kan.* 621, 21 *Pac. Rep.* 582.

The plaintiff, a woman about 52 years of age, arrived at the station-house in the city of Beloit before dark on May 6, 1886, intending to become a passenger on the defendant's westward-bound train, and purchased a ticket for that purpose. The station platform was about three feet high from the ground and there were steps at the west end which she passed over in going from the ground to the platform. She remained at the station waiting for her train to arrive until after dark. The train was delayed and it was not known when it would arrive. There were no water-closets or other like conveniences in or about the station-house, and it became necessary for her to retire from the station-house and from the platform. There was a public street at the west end of the platform, and she passed towards the east end. It was dark and there were no artificial lights upon the platform or outside of the station-house, but there was sufficient natural light to

enable her to see the platform and to see the ground. When she arrived at the east end of the platform she saw the edge of the platform and saw the ground, and, believing that they were upon the same level, she attempted to step from the platform to the ground, but the ground being about three feet below, she lost her balance and fell to the ground, causing the injuries for which she sued the railway company in this action. *Held*, that the questions as to whether the defendant was guilty of negligence and whether the plaintiff was guilty of contributory negligence were proper questions for the jury, and their verdict upon these questions is conclusive. *Missouri Pac. R. Co. v. Neiswanger*, 39 *Am. & Eng. R. Cas.* 471, 41 *Kan.* 621, 21 *Pac. Rep.* 582.—NOT FOLLOWING *Reed v. Axtell*, 84 *Va.* 231; *Forsyth v. Boston & A. R. Co.*, 103 *Mass.* 510.

446. Stumbling over obstructions.—Plaintiff, who was a stranger at a station, and who was waiting for a night train, saw his train stop at a freight depot some distance from the passenger station, and supposed that it would pull up so he could get on. About the time it was starting he was told by the ticket agent that it would not make another stop, and in running to get on he fell over a box on the platform and was injured. *Held*, that he had a right to suppose that the train would be brought to the passenger station and stop for him to get on, and it was, therefore, not negligence to wait in the passenger station after the train stopped; neither was it negligence *per se* to run in the dark to get on. *MacLennan v. Long Island R. Co.*, 20 *J. & S. (N. Y.)* 22; *affirmed (?)* 107 *N. Y.* 623, *mem.*, 13 *N. E. Rep.* 939, 11 *N. Y. S. R.* 882.

447. Standing in dangerous place.—A passenger at a station who, in anticipation of the approach of his train, stands on the planking between the east and west bound tracks, and is injured in consequence of a coal train backing up on one track while his train is arriving on the other track, is guilty of contributory negligence, there being a safe place beyond the tracks provided by the company at which he could have remained until the actual arrival of his train. *McGeehan v. Lehigh Valley R. Co.*, 50 *Am. & Eng. R. Cas.* 32, 149 *Pa. St.* 188, 24 *Atl. Rep.* 205.—QUOTING *Moore v. Philadelphia W. & B. R. Co.*, 108 *Pa. St.* 349.—Compare also *Atchison, T. & S. F. R. Co. v.*

Johns, 34 *Am. & Eng. R. Cas.* 480, 36 *Kan.* 769, 14 *Pac. Rep.* 237.

448. — on the track.—A person having negligently stood upon the track in full view of a near-approaching train, which rang its bell and sounded its whistle, and having failed to use his senses in his eager absorption in the attempt to board a moving train—in itself an improper and indiscreet act—must be held guilty of contributory negligence which debars recovery. *Weeks v. New Orleans, S. F. & L. R. Co.*, 40 *La. Ann.* 800, 8 *Am. St. Rep.* 560, 5 *So. Rep.* 72.—REVIEWED IN *Chaffee v. Old Colony R. Co.*, 17 *R. I.* 658.

A passenger got off at a station where the company had provided a sufficiently convenient place of egress from the platform, on which he stepped. He could have reached the highway through the passage so provided without going on the track of the railroad; but instead he attempted to pass across the track at a moment when he knew that the train which he had just left was slowly moving off so as to obstruct his view, by reason of which he did not see an incoming express train in time to extricate himself, or avoid a collision. *Held*, that he was not in the exercise of due care. *Bancroft v. Boston & W. R. Corp.*, 97 *Mass.* 275.—APPROVED IN *Haines v. Illinois C. R. Co.*, 41 *Iowa* 227. DISTINGUISHED IN *McQuilken v. Central Pac. R. Co.*, 64 *Cal.* 463; *Gaynor v. Old Colony & N. R. Co.*, 100 *Mass.* 208; *Mayo v. Boston & M. R. Co.*, 104 *Mass.* 137; *Van Ostran v. New York C. & H. R. R. Co.*, 35 *Hun (N. Y.)* 590; *Boss v. Providence & W. R. Co.*, 15 *R. I.* 149. QUOTED IN *Little Rock & Ft. S. R. Co. v. Cavenesse*, 48 *Ark.* 106.

449. Walking on track.—A company is not liable for injuring a passenger who is walking on the track, though he had been in the habit of doing so, when he heard a train approaching and stepped aside until it had passed, as he thought, when he stepped on the track again and was struck by a detached portion of the train which had broken loose, where there is nothing to show negligence causing the break, and where it appeared that there were two men on the detached cars trying to set the brakes, but who did not see plaintiff. *Louisville & N. R. Co. v. Schmetzer*, (Ky.) 22 *S. W. Rep.* 603.

450. Walking alongside main track in the dark.—When a passenger

on a dark night is walking alongside of the main track of a railroad, a usual approach to the station where he is to board his train, and has almost reached the station, which is without any light, when he hears the train back of him, and his retreat to the side is prevented by a coal car which, by reason of the darkness, he had not seen, on a siding he did not know of, and a basket on his arm is struck and he is knocked down and injured, the testimony as to the ringing of the bell and blowing the whistle being conflicting, and also as to the speed of the train, although this is admitted to have been greater than was allowed by an ordinance of the borough where the occurrence took place, the question of defense, negligence and plaintiff's contributory negligence is for the jury. *Shutt v. Cumberland Valley R. Co.*, 149 *Pa. St.* 266, 24 *Atl. Rep.* 305.

451. Crossing tracks, generally.—Where the giving of a signal, by the whistle of an engine, is a proper one under the circumstances of the case, there can be no negligence in giving the same; and if a passenger be frightened thereby, and in consequence thereof leaves the car on which he has taken passage and runs upon another track, where he is injured, without the fault of the company, no recovery can be had for the injury. *Chicago, R. I. & P. R. Co. v. Felton*, 33 *Am. & Eng. R. Cas.* 533, 125 *Ill.* 458, 15 *West. Rep.* 41, 17 *N. E. Rep.* 765; *reversing* 24 *Ill. App.* 376.

Though it may be negligence to stop a freight train on a siding between the ticket office and a passenger train at the time when the latter is receiving passengers, yet a person of mature years who attempts to cross between the cars of the freight train at night without notice to the company's employes, and knowing that it may start at any moment, is guilty of such contributory negligence as to defeat a recovery for an injury received. *Chicago, B. & Q. R. Co. v. Dewey*, 26 *Ill.* 255.—FOLLOWED IN *Chicago & A. R. Co. v. Gretzner*, 46 *Ill.* 74.

The mere fact that a passenger began to cross a track at a time when her view along the tracks was obstructed by a departing train—*held*, not to be conclusive that she did not use due care. *Mayo v. Boston & M. R. Co.*, 104 *Mass.* 137.—DISTINGUISHED

* Passenger leaving train at intermediate station and run over by freight train. Contributory negligence, see 39 *AM. & ENG. R. CAS.* 469, *abstr.*

IN *Donnelly v. Boston & M. R. Co.*, 42 Am. & Eng. R. Cas. 182, 151 Mass. 210; *Ormsbee v. Boston & P. R. Co.*, 14 R. I. 102, 51 Am. Rep. 354.

Passengers leaving trains temporarily, which have stopped on a side-track to allow other trains to pass, must use their senses and exercise reasonable caution when crossing main track, to avoid injury from passing trains. *De Kay v. Chicago, M. & St. P. R. Co.*, 39 Am. & Eng. R. Cas. 463, 41 Minn. 178, 4 L. R. A. 632, 43 N. W. Rep. 182.

A passenger, upon leaving the train at a station, attempted to cross an adjoining track which passengers had been accustomed to cross without objection, and was struck by or drawn into a train which was traveling at a high rate of speed. *Held*, that the question whether he was in the exercise of the care of a prudent man, under the circumstances, was for the jury to determine. *Robostelli v. New York, N. H. & H. R. Co.*, 34 Am. & Eng. R. Cas. 515, 33 Fed. Rep. 796.

There is no absolute obligation on a passenger alighting at a station at night to take a street on his way home which passes under the track, and which is unlighted and unimproved and marshy, where it is the universal custom of persons crossing at the place to cross on the tracks. *Chicago, M. & St. P. R. Co. v. Lowell*, 151 U. S. 209, 14 Sup. Ct. Rep. 281.—COMPARING *Dublin, W. & W. R. Co. v. Slattery*, 3 App. Cas. 1155.

Where an intending passenger at a station, in endeavoring to cross the track to reach a platform on the other side, is struck by a passing train, which he saw, his contributory negligence precludes a recovery. *Wright v. Great Northern R. Co.*, L. R. 8 Ir. 257.

452. — in violation of rules.*—At a station there was a flight of steps leading down about 15 or 20 feet to a street which, at that point, passed under the tracks of the company, which street was not graded, lighted, or in any way improved, being a natural ravine, in a marshy, muddy, and wet condition, and irregular and uneven under foot. It appeared that it was customary for passengers to cross the tracks, going to their homes, instead of descending the steps provided by the company, which custom was well known to it; furthermore,

there was a notice conspicuously posted in the cars requiring passengers leaving the same not to cross the tracks in so leaving. *Held*, that if the custom of the passengers in disregarding the rule was so common as to charge the servants of the road with notice of that fact, it was their duty to take active measures to enforce the rule, or to so manage their trains at that point as to render it safe to disregard it, and that the disregard of the notice was not, as a matter of law, contributory negligence. *Chicago, M. & St. P. R. Co. v. Lowell*, 58 Am. & Eng. R. Cas. 401, 151 U. S. 209, 14 Sup. Ct. Rep. 281.

453. Passenger's duty to look and listen.*—(1) *Rule in Colorado*.—A passenger, while passing from the cars to the depot, is not required to exercise that degree of care in crossing a track which is imposed upon other persons. He has the right to assume that the company will discharge its duty in making the way safe; and relying upon this assumption he may neglect precautions that are ordinarily imposed upon a person not holding that relation. *Atchison, T. & S. F. R. Co. v. Shean*, 18 Colo. 368, 33 Pac. Rep. 108.—QUOTING *Baltimore & O. R. Co. v. Hauer*, 60 Md. 463.

(2) — *in Illinois*.—A person about to take a train standing on a second track from the platform has a right to presume that trains will be so run and the road so operated that the intervening track may be passed with safety; and if he is injured by a train on the intervening track, while attempting to cross to his own train, he may recover. *Pennsylvania Co. v. Keane*, 41 Ill. App. 317.—QUOTING *Chicago & A. R. Co. v. Wilson*, 63 Ill. 167.

(3) — *in Louisiana*.—Passengers crossing a track at a station, in order to leave or board a train halted for that purpose, are not held to the exercise of the same care and diligence which are ordinarily exacted from persons crossing tracks, but are authorized to assume that the company will so order its trains that they will be safe from harm on the track which they are thus invited and required to cross in order to secure their passage. *Weeks v. New Orleans, S. F. & L. R. Co.*, 40 La. Ann. 800, 8 Am. St. Rep. 560, 5 So. Rep. 72.

But where a person attempts to board the train while moving, and after it has left the

* See also *ante*, 351, 359, 360, 371 (2); *post*, 479, 495.

* See also *ante*, 303.

station, he no longer acts on the invitation or stands under the protection of the company, and, while crossing or occupying the track, is bound to use proper care for his own protection. *Weeks v. New Orleans, S. F. & L. R. Co.*, 40 La. Ann. 800, 8 Am. St. Rep. 560, 5 So. Rep. 72.

(4) — *in Maryland*.—It was in evidence that, as the train of the defendant, on which the plaintiff was a passenger, approached a city station it slowed up; the name of the station was then called out, and the train stopped at the outer end of the platform. The plaintiff started to leave the car in which he was riding, but when he reached the car platform the train had commenced to move on slowly. Nevertheless he stepped from the car, and immediately on reaching the ground was struck by a train coming from the opposite direction. If he had looked ahead before he left the step of the platform he would have seen the light of the advancing train and could have avoided the danger. *Held*, that it could not be ruled as a matter of law that the plaintiff was guilty of contributory negligence because he did not look out for the approaching train before he left the car, but the question was one to be determined by the jury. *Philadelphia, W. & B. P. Co. v. Anderson*, 44 Am. & Eng. R. Cas. 345, 72 Md. 519, 20 Atl. Rep. 2.

(5) — *in Massachusetts*.—If at a station the direct and usual course for passengers to reach the station-house cars waiting to receive them is by crossing one of the tracks, they have a right to rely, to some extent, for their safety in crossing upon proper and usual signals of warning to be given by trains or cars approaching upon it. *Chaffee v. Boston & L. R. Corp.*, 104 Mass. 108.

A passenger has no right to assume that a train will not pass on another track while the train on which he came into the station is discharging passengers, and cannot recover for injuries sustained by being struck by such train where he got off between the two tracks, attempted to cross one, and was struck by an approaching train which he could easily have seen had he looked before he attempted to cross. *Connolly v. New York & N. E. R. Co.*, 158 Mass. 8, 32 N. E. Rep. 937.

(6) — *in New York*.—A passenger, when taking or leaving a car at a station, has a right to assume that the company will not expose him to unnecessary danger, but will

discharge the duty requiring it to provide passengers a safe passage to and from the train. A passenger, therefore, is not in all cases liable to the charge of contributory negligence because he attempts to cross an intervening track without looking for approaching trains. *Brassell v. New York C. & H. R. R. Co.*, 3 Am. & Eng. R. Cas. 380, 84 N. Y. 241.—*FOLLOWING Terry v. Jewett*, 78 N. Y. 338.—*DISTINGUISHED IN De Kay v. Chicago, M. & St. P. R. Co.*, 39 Am. & Eng. R. Cas. 463, 41 Minn. 178, 4 L. R. A. 632; *Ormsbee v. Boston & P. R. Co.*, 14 R. I. 102, 51 Am. Rep. 354. *FOLLOWED IN Dobiecki v. Sharp*, 8 Am. & Eng. R. Cas. 485, 88 N. Y. 203; *Murphy v. New York C. & H. R. R. Co.*, 8 Am. & Eng. R. Cas. 490, 88 N. Y. 445. *QUOTED IN Ohio & M. R. Co. v. Stansberry*, 132 Ind. 533. *REVIEWED IN Parsons v. New York C. & H. R. R. Co.*, 37 Hun (N. Y.) 128.

A passenger arrived at a station on a train that was due one minute before an express train going in the opposite direction, but just as he stepped off he was struck by the express. *Held*, that he had a right to rely upon there being no danger in getting off as he did; that it was the duty of the conductor to observe the true time of the trains, and to give warning if one train was off time, or of anything that might cause danger. *Gonzales v. New York & H. R. Co.*, 39 How. Pr. (N. Y.) 407.

As a matter of law it cannot be said to be contributory negligence for a passenger, seeking to get on a train, to attempt to cross an intermediate track without first looking to see if trains are approaching. *Terry v. Jewett*, 78 N. Y. 338; *affirming 17 Hun* 395.

If a passenger leaves a train before it is at the station and attempts to cross over tracks he is bound to make use of the same vigilance as in crossing a track on a highway; but if he leaves at such place, and walks along the side of his train to the regular station, then he has a right to assume that no trains will be run on intervening tracks, so as to endanger his safety. *Parsons v. New York C. & H. R. R. Co.*, 37 Hun (N. Y.) 128.—*REVIEWING Brassell v. New York C. & H. R. R. Co.*, 84 N. Y. 243.

(7) — *in Pennsylvania*.—Where a passenger was told that the next station was his place to get off, and as the train slowed up he saw the name of the station on a station-house, and, leaving the car, was killed by a passing train on another track, which

it was necessary to cross—*held*, that the rule to "stop, look, and listen" did not apply, and that his contributory negligence was for the jury, though it appeared that the train had only stopped to allow the other to pass, and regularly discharged its passengers at a station a little further on, where crossing the other track was not necessary. *Pennsylvania R. Co. v. White*, 88 Pa. St. 327.—DISTINGUISHING *Pennsylvania R. Co. v. Beale*, 73 Pa. St. 504; *Nagle v. Allegheny Valley R. Co.*, 88 Pa. St. 35.—FOLLOWED IN *Pennsylvania R. Co. v. Peters*, 30 Am. & Eng. R. Cas. 607, 116 Pa. St. 206, 8 Cent. Rep. 408, 9 Atl. Rep. 317, 19 W. N. C. 418. QUOTED IN *Atchison, T. & S. F. R. Co. v. Shean*, 18 Colo. 368.

(8) — *in Texas*.—Plaintiff had gone to the station from the train on the main track. On leaving the station he passed along the platform to the steps at its north end, and descending them found a pile of shells, placed there by the company, obstructing his further progress and requiring him to step aside on the ends of the cross-ties on the side-track, and after taking four steps he was struck and injured. Steam was escaping from the engine on the main track, so he could not hear the approaching train. The appellee's servants saw and could have warned him, but did not, and he did not know that another train was due, but the servants of the company did. These facts do not show that appellant was guilty of contributory negligence. *Sanchez v. San Antonio & A. P. R. Co.*, 3 Tex. Civ. App. 89, 22 S. W. Rep. 242.

454. Passing under train.—Plaintiff, in assisting a passenger to a train on defendant's road in the night-time, attempted to pass under one of a train of freight cars standing across the road, to which an engine was attached, and, while under the car, was injured by the starting of the train. *Held*, that he was guilty of contributory negligence. *Smith v. Chicago, R. I. & P. R. Co.*, 55 Iowa 33, 7 N. W. Rep. 398.

455. Question of fact for jury.—Whether a passenger who alights from an excursion train, which has stopped temporarily to allow a regular train to pass, to get a drink of water, and who was run over by the regular train passing at full speed, was guilty of contributory negligence or not is a question of fact for the jury. *Wandell v. Corbin*, 38 Hun (N. Y.) 391.

Plaintiff was a member of a military com-

pany and was a passenger on an east-bound special train. The train stopped at an intermediate station to permit a west-bound train to pass, and lay some fifteen or twenty minutes, but no announcement was made of the purpose of the stop. The day was very hot, and plaintiff, becoming ill and very thirsty, and not finding any water on the train, left it and crossed another track to a passenger platform and entered a switch-house for water. In crossing the track he looked eastward but saw no train, but very soon after entering the switch-house heard a train-bell ring, and supposing it was for the purpose of starting his train, hurried back, but in crossing the track was struck by a west-bound train. *Held*, that the question as to whether plaintiff was guilty of contributory negligence was for the jury. *Wandell v. Corbin*, 17 N. Y. S. R. 718, 1 N. Y. Supp. 795. And see also *Bethmann v. Old Colony R. Co.*, 155 Mass. 352, 29 N. E. Rep. 587.

In an action for an injury sustained by a passenger who on a dark night, upon the arrival of a train on a main track next to the station-house, alighted on a narrow platform between that track and a side-track, and in crossing from the platform to the highway was struck by an engine backing on the side-track, if the evidence at the trial has any tendency to show, according to the general knowledge and experience of men, that the situation, arrangement, and use of the premises were such as to invite the plaintiff to cross to the highway in the manner in which he attempted to do, that he used ordinary care in the attempt, and that the defendants did not provide proper safeguards against such an accident, the questions whether there was due care on the part of the plaintiff, and negligence on the part of the defendants, are for the jury. *Gaynor v. Old Colony & N. R. Co.*, 100 Mass. 208.—DISTINGUISHING *Bancroft v. Boston & W. R. Corp.*, 97 Mass. 275.—QUOTED IN *Dodge v. Boston & B. Steamship Co.*, 37 Am. & Eng. R. Cas. 67, 148 Mass. 207, 19 N. E. Rep. 373, 2 L. R. A. 83; *Stafford v. Hannibal & St. J. R. Co.*, 22 Mo. App. 333.

Where a passenger at a station on a dark night was obliged to cross the track to reach a platform from which his train started, and while so doing was knocked down and injured by a special train running rapidly through the station without warning, a non-suit on the ground of contributory negli-

gence is wrong, and the case should go to the jury. *Brown v. Great Western R. Co.*, 52 L. T. 226.—DISTINGUISHING *Davey v. London & S. W. R. Co.*, L. R. 12 Q. B. D. 70.

456. After alighting at place near station.*—A passenger was carried past the station at which he wished to stop and put off at the east end of a trestle across the river. His gun was put out on the embankment after the train had crossed to the west end. When he boarded the train he was directed to place the gun in the baggage-car. He delivered it to a person there who demanded and received 25 cents for the service. He walked across the trestle and got his gun, and in crossing back with it, his feet being wet and covered with mud, his foot slipped and he fell upon the cross-ties and received injury, for which he brought suit. *Held*, that he could not recover. *International & G. N. R. Co. v. Folliard*, (Tex.) 27 Am. & Eng. R. Cas. 280, 1 S. W. Rep. 624.

A female passenger was negligently carried beyond her station and was forced to get off on the track some 80 or 90 rods from the station. In attempting to walk back she fell into a cattle-pit and was injured. *Held*, that she was not guilty of contributory negligence in failing to observe gates leading into private grounds, through which she might have returned to the station by an unmarked and circuitous route. It is only natural that she should attempt to walk on the track to the station, and she might recover for such injuries. *New York, C. & St. L. R. Co. v. Doane*, 37 Am. & Eng. R. Cas. 87, 115 Ind. 435, 15 West. Rep. 465, 17 N. E. Rep. 913, 1 L. R. A. 157, 7 Am. St. Rep. 451.

About half-past nine o'clock on a dark, rainy, and snowy night plaintiff went to defendant's depot at a village for the purpose of taking the caboose-car at the rear end of defendant's freight train for his place of residence. The train stopped with the caboose-car several rods north of the depot platform, and two car-lengths north of a cattle-guard, which was constructed across both tracks of the road and between them, and was partly uncovered. Plaintiff asked the night-watchman whether he would have to walk that far back to get on the caboose, and was answered affirmatively; and while

on his way to the caboose met the conductor with a lantern accompanying lady passengers from the caboose. Nothing was said to him by the conductor; and before plaintiff reached the caboose he fell into the open cattle-guard and was injured. He had been in the habit of taking this train with the caboose standing north of the platform, but had never taken it with the caboose standing north of the cattle-guard; and he had never noticed the situation and condition of the cattle-guard, nor did he know before the accident that the caboose stood north of it. *Held*, that these facts warranted the jury in finding plaintiff free from contributory negligence. *Hartwig v. Chicago & N. W. R. Co.*, 1 Am. & Eng. R. Cas. 65, 49 Wis. 358, 5 N. W. Rep. 865.

5. Riding in Perilous Position or Place.*

a. In General.

457. Care required of passenger.—Where a passenger sues for an injury received by the falling of a bridge, and it appears that he was in his proper place in the car, and made no exposure of his person to danger, there can be no question of contributory negligence in the case. *Louisville, N. A. & C. R. Co. v. Snyder*, 37 Am. & Eng. R. Cas. 137, 117 Ind. 435, 20 N. E. Rep. 284, 3 L. R. A. 434.

458. Duty to select safe seat or position.—It is the duty of the passenger, on getting on board of a car, to place himself in a safe position therein, if he is able to obtain such a position, and it is no excuse for him to place himself in an unsafe one, that the persons in charge know he is unsafe, and do not drive him therefrom, when the unsafety is known to the passenger. *Ashbrook v. Frederick Ave. R. Co.*, 18 Mo. App. 290.—QUOTING *Clark v. Eighth Ave. R. Co.*, 36 N. Y. 137.

The passenger owes no duty to a company to select for himself the safer seat on the train. It is the duty of the company to the passenger to make all seats safe. *Willis v. Long Island R. Co.*, 34 N. Y. 670; affirming 32 Barb. 398.

* See also *ante*, 207, 345, 420 (3), 435-440.

Passenger riding in perilous position, see notes, 21 AM. & ENG. R. CAS. 248; 31 *Id.* 72; 13 *Id.* 27.

Injuries to passengers riding in dangerous places, see 31 AM. & ENG. R. CAS. 72, *abstr.*

* See also *ante*, 285.

Plaintiff entered a caboose car as a passenger, but instead of taking a stationary seat along the side of the car he took a light, loose chair known to be only for the use of the conductor, and sat in it, leaning back against a box within a few inches of the open side door, with his legs crossed, when he was thrown out while the train was running at a rapid rate around a curve. *Held*, such contributory negligence as to bar a recovery. *Norfolk & W. R. Co. v. Ferguson*, 79 Va. 241.

A passenger does not owe a duty to the company to push and crowd his way in order to get an advantage over other passengers in securing a place within the cars, and it does not follow, as a matter of law, that he will be guilty of negligence for not so doing. Nor will his duty to the company require that he shall wholly disregard the usual and ordinary courtesies and amenities of life. In fact, it is not necessarily, and as a matter of law, negligence to stand aside and allow ladies to occupy the safest and most desirable positions in a public conveyance. *Chicago & A. R. Co. v. Fisher*, 141 Ill. 614, 31 N. E. Rep. 406; *affirming* 38 Ill. App. 33.

459. Riding in dangerous position, generally.—(1) *Rule stated.*—A passenger who voluntarily and unnecessarily puts himself in a position of danger is not entitled to recover damages for personal injuries to himself, as he has been guilty of contributory negligence. *Little Rock & Ft. S. R. Co. v. Miles*, 13 Am. & Eng. R. Cas. 10, 40 Ark. 298, 48 Am. Rep. 10.

A company is not liable for failure to take steps to avert injury from one who has placed himself in danger, where it has not omitted to discharge any duty towards such person. *Carroll v. Interstate Rapid Transit Co.*, 52 Am. & Eng. R. Cas. 273, 107 Mo. 653, 17 S. W. Rep. 889.

Where a passenger, without the consent of the carrier, selects a place to ride which is obviously not intended for that purpose, and is hurt by reason of hazards peculiar to that position, he has no cause of action. *Carroll v. Interstate Rapid Transit Co.*, 52 Am. & Eng. R. Cas. 273, 107 Mo. 653, 17 S. W. Rep. 889.

(2) *Permission of employé.*—A station agent has no authority to permit a passen-

ger to ride in a dangerous place, and if an accident occurs to a passenger so riding, the company will not be liable for injuries happening to him. *Little Rock & Ft. S. R. Co. v. Miles*, 13 Am. & Eng. R. Cas. 10, 40 Ark. 298, 48 Am. Rep. 10.—*QUOTING* *Wilton v. Middlesex R. Co.*, 107 Mass. 108; *Flower v. Pennsylvania R. Co.*, 69 Pa. St. 210. *REVIEWING* *Eaton v. Delaware, L. & W. R. Co.*, 57 N. Y. 382; *Robertson v. New York & E. R. Co.*, 22 Barb. (N. Y.) 91; *Snyder v. Hannibal & St. J. R. Co.*, 60 Mo. 413.

If a person takes an exposed position upon a train not designed for the use of passengers, he himself incurs the special risks of that position, whether he takes it by the license, non-interference, or even express permission of the conductor. *Files v. Boston & A. R. Co.*, 149 Mass. 204, 21 N. E. Rep. 311.

(3) *Illustrations.*—If a passenger goes to the rear end of a caboose when he ought to have been in the car, and is thrown down by a sudden jerk, he cannot complain of the absence of a guard-chain across the end of the car platform, which would have prevented his falling. *Hazard v. Chicago, B. & Q. R. Co.*, 1 Biss. (U. S.) 503.

A passenger on an excursion train, who seats himself on the rear end of the box of an open car, the end board not exceeding two and one half inches in thickness, with his feet elevated by being placed on the seat directly in front of him, and with no possible opportunity of protecting himself in case of a sudden jolt of the car, when he might have found a safe seat in an adjoining car or stood up in the car in question, is guilty of contributory negligence as a matter of law; and, in an action for his death, caused by falling from his seat while the train was in motion, it is error to submit the question of contributory negligence to the jury. *Jackson v. Crilly*, 16 Colo. 103, 26 Pac. Rep. 331.

460. — in open flat-car.—The plaintiff was voluntarily on the train where he was injured, by the invitation of the conductor, made at his own request; he paid no fare, and none was expected from him; he selected an open flat-car, on which he rode, rather than in the passenger coach, and was in a position where he was more exposed to accident from sparks and cinders than he would have been had he taken a seat in the closed coach. *Held*, that he was

*Riding in dangerous place, when bars action for injury, see CONTRIBUTORY NEGLIGENCE, 38.

entitled to look only for such security as that mode of conveyance was reasonably expected to afford; and having voluntarily incurred the injury of which he complains, resulting from getting a cinder in his eye, he was not entitled to recover from the railroad, even if it were somewhat at fault. *Higgins v. Cherokee R. Co.*, 27 *Am. & Eng. R. Cas.* 218, 73 *Ga.* 149.—REVIEWED IN *Western & A. R. Co. v. Bloomingdale*, 74 *Ga.* 604.

A company was running a train used primarily in the construction of the road, but carrying a number of passengers. Plaintiff and others placed empty kegs on a flat-car and made seats by placing a plank across them. Both the conductor and brakeman requested them to go into a box-car. They replied that they wished to ride on the flat-car to see the country. During the trip plaintiff and others were killed by the derailment of the train, caused by the company's negligence in its management. *Held*, that the deceased was not necessarily guilty of negligence in taking a position on the flat-car, unless he was there in disregard of some monition of danger, or in disobedience of some rule or order of the company. The question was one for the jury, whether, under all the facts and circumstances, an ordinarily prudent man would have reasonably anticipated, by taking such position, that he was exposing himself to injury, though it appeared that he might not have been injured had he been in the box-car. *Wagner v. Missouri Pac. R. Co.*, 97 *Mo.* 512, 3 *L. R. A.* 156, 10 *S. W. Rep.* 486.

461. — on engine.*—If a passenger leaves his place on a car where it is customary for passengers to ride, and at the request of a fireman commences to clean the headlight of the engine, at which place he received the injury complained of, he was guilty of negligence, and it should have been submitted to the jury to determine if such negligence proximately contributed to the injury; and if so, to further determine if the conduct of the defendant was wanton and intentional, or so reckless as to be the equivalent thereof. *Brown v. Scarborough*, 58 *Am. & Eng. R. Cas.* 364, 97 *Ala.* 316, 12 *So. Rep.* 289.

Where a company is in the habit of carrying its shopmen to and from their work as a matter of accommodation and without

any agreement or compensation therefor, if its train is so crowded that one of said shopmen cannot get a seat in the cars, that fact will not justify him in sitting on the pilot of the engine; and if he does improperly do so, it is his duty to leave the pilot and go into the cars at his first opportunity. *Downey v. Chesapeake & O. R. Co.*, 28 *W. Va.* 732.

If the passenger rides where he has no right to ride by the rules of the company, or in a place of great danger—as on top of the car or cow-catcher or pilot of the engine—where no man of ordinary prudence would attempt to ride, the mere knowledge or consent of the conductor or trainmen to his riding there will not entitle the plaintiff to any greater rights against the company on account of any injury received by him while so riding, than if the conductor or trainmen had been wholly ignorant that he was so riding. *Downey v. Chesapeake & O. R. Co.*, 28 *W. Va.* 732.—QUOTING *Pennsylvania R. Co. v. Langdon*, 92 *Pa. St.* 21.

A colored man, coming to the station to take passage upon a train, seated himself on the pilot of the engine, and when asked by the conductor what he was doing there, stated that he had not enough money to pay his fare, but had given fifty cents to the fireman for permission to ride there. After the train started he was thrown off and injured by the engine running over a hand-car. The man was of ordinary intelligence. By the rules of the company employes were prohibited from allowing passengers to ride in such a place. In an action to recover damages from the company—*held*, that the plaintiff had been guilty of such contributory negligence as precluded all right of recovery. *Rucker v. Missouri Pac. R. Co.*, 21 *Am. & Eng. R. Cas.* 245, 61 *Tex.* 499.

462. — on running-board of excursion train.—The cars on an excursion train were provided with a running-board along either side instead of an aisle through the middle. Plaintiff, a passenger, was allowed to leave his car for the purpose of selling tickets. When passing along such running board he was injured by being struck by a coal-bin, constructed very near the track. *Held*, that it was not contributory negligence for him to attempt to use the running-boards, nor to fail to notice the coal-bin. *Dickinson v. Port Huron & N. W. R. Co.*, 21 *Am. & Eng. R. Cas.* 456, 53 *Mich.* 43, 18 *N. W. Rep.* 553.—DISTINGUISHING

* See also *ante*, 21.

Hickey v. Boston & L. R. Co., 14 Allen (Mass.) 429; *Camden & A. R. Co. v. Hoosey*, 99 Pa. St. 492, 44 Am. Rep. 120.

463. — on top of caboose.—A passenger on a freight train, riding on a projection or cupola several feet above the roof of a caboose, where there are no guards of any sort, and thrown therefrom by the jar caused by the coupling of a switch-engine to the train, cannot recover upon mere proof that the injury was caused by the jar. It is contributory negligence to ride in that way. *Tuley v. Chicago, B. & Q. R. Co.*, 41 Mo. App. 432.—REVIEWING *Harris v. Hannibal & St. J. R. Co.*, 89 Mo. 233.—And see also *Downey v. Chesapeake & O. R. Co.*, 28 W. Va. 732.

464. Standing up in car.—A passenger is bound to occupy a seat in the car provided for passengers. If, however, he places himself in some other position with the assent of the conductor, the company is liable if an injury occurs through its negligence. *Little Rock & Ft. S. R. Co. v. Miles*, 13 Am. & Eng. R. Cas. 10, 40 Ark. 298, 48 Am. Rep. 10.—REVIEWING *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 291.—QUOTED IN *Atchison, T. & S. F. R. Co. v. Lindley*, 41 Am. & Eng. R. Cas. 72, 42 Kan. 714, 6 L. R. A. 646, 41 Alb. L. J. 92, 22 Pac. Rep. 703.

The plaintiff admitted that she had frequently taken passage on the train and was familiar with its operation; that when the train started, after the first stop, she could have taken a seat without inconvenience to herself, and waited for the car to stop again; that she saw the brakeman pull the bell-cord and that the door was open, and knew that the door, which swung on hinges, was not fastened, and that the train ran only three or four feet after it had started. *Held*, that contributory negligence on her part was not conclusively established by these facts. *Madden v. Missouri Pac. R. Co.*, 50 Mo. App. 666.

Where a passenger was thrown down and his thigh broken while standing up in the car, by reason of heavy jolts and jars, and there is some evidence tending to prove that the locomotive was overloaded and that the train was carelessly managed, it is error to instruct the jury that the injury was the result of a mere accident, and that plaintiff was guilty of contributory negligence. *Wallace v. Western N. C. R. Co.*, 37 Am. & Eng. R. Cas. 159, 101 N. Car. 454, 8 S. E. Rep. 166.

A railway train should stop a reasonable length of time at depots to allow all passengers to enter the cars, and a reasonable time thereafter for them to be seated, after which the company will not be rendered liable on account of an injury sustained by one who, having an opportunity to be seated, fails to sit down and is thrown down by the starting of the train after the usual signal to start was sounded. *International & G. N. R. Co. v. Copeland*, 60 Tex. 325.

465. — standing near door—Open door.*—(1) *Generally.*—"If there be any danger in standing near an open side door of the car, when the train is starting or in motion, it is not an unreasonable presumption that persons of ordinary prudence are aware of it;" and when a person so standing is thrown from the car by the shock attendant on its coupling with the train, and thereby injured, he cannot complain that he was not notified of his danger, nor warned of the coming shock. *Thompson v. Duncan*, 76 Ala. 334.

Plaintiff, a passenger on the car of the defendant, while the train was stopped was standing by the door of the car, the door shutter being open, with his hand resting upon the door-frame against which the shutter closed. While in that position the door was closed, injuring his little finger. A brakeman appears to have closed the door, and while he might have seen the hand of the plaintiff, there is no proof that he did see it. Judgment having been rendered for damages—*held*, that the evidence showed negligence on part of plaintiff in resting with his hand in danger. It was not the duty of the brakeman to see that the plaintiff was taking care of himself, and he had a right to presume that the passenger was taking such care. Had the brakeman seen the danger and then shut the door, doing the injury, the negligence of the passenger would not have relieved the defendant from liability. *Texas & P. R. Co. v. Overall*, 82 Tex. 247, 18 S. W. Rep. 142.

A contract with the government to transport prisoners of war includes necessary guards and stationing them at proper places.

* Contributory negligence of passenger negligently injured by or about car door, see note, 21 AM. & ENG. R. CAS. 434.

Liability to passenger who was struck by a missile while sitting at open car window, see 52 AM. & ENG. R. CAS. 407, *abstr.*

So, where a soldier is injured while acting as guard, and standing on the car platform where he is stationed and required to stand, it is not error to refuse to instruct that he could not recover for the injuries by reason of his position when injured. *Truex v. Erie R. Co.*, 4 *Lans. (N. Y.)* 198.

(2) *English cases*.—A passenger who leans too heavily upon a carriage door and is injured by its opening is guilty of contributory negligence. *Warburton v. Midland R. Co.*, 21 *L. T.* 835.

Where a passenger, although without necessity for so doing, leans against a carriage door which flies open and causes him to fall out and sustain injuries, there is evidence of the liability of the company to go to the jury. *Gee v. Metropolitan R. Co.*, 21 *W. R.* 584, *L. R.* 8 Q. B. 161, 42 *L. J. Q. B.* 105, 28 *L. T.* 282.—FOLLOWED IN *Richards v. Great Eastern R. Co.*, 28 *L. T.* 711.

Where a passenger, after getting into a carriage, leaves his hand for about half a minute on the door-jamb, and the guard, after crying out to the passengers to take their places, shuts the door and, not seeing the passenger's hand, injures his thumb, there is no evidence of negligence on the part of the company, but there is evidence of contributory negligence on the part of the passenger. *Richardson v. Metropolitan R. Co.*, 37 *L. J. C. P.* 300.

466. Scuffling in car.—Plaintiff and others, all young men, entered a train, and were told that the passenger car was full and were directed to go into the baggage-car. They got to playing and scuffling, which brought on racing from one car to another, and while in the passenger car plaintiff was injured. He would not have been injured had he remained in the baggage-car. *Held*, that he could not recover, if his own carelessness or imprudence contributed in any way to the injury. *Galena & C. U. R. Co. v. Fay*, 16 *Ill.* 558.

467. Shutting car door.—A passenger, sitting close to the front door of a crowded car when passing through a tunnel, attempted to shut the door, after the car was in total darkness, in order to keep out smoke and cinders, and in doing so was injured. *Held*, that the facts justified a verdict against the company, if the jury found the passenger free from contributory negligence. *Western Md. R. Co. v. Stanley*, 18 *Am. & Eng. R. Cas.* 206, 61 *Md.* 266, 48

Am. Rep. 96.—DISTINGUISHING *Adams v. Lancashire & Y. R. Co.*, *L. R.* 4 C. P. 739.

A passenger who falls from a carriage while attempting to fasten a door which continually flew open cannot recover for the injuries received, where it is shown that the train would have arrived at the next station within two or three minutes, and that in five minutes he would have finished his journey. *Adams v. Lancashire & Y. R. Co.*, 38 *L. J. C. P.* 277, *L. R.* 4 C. P. 739, 20 *L. T.* 850, 17 *W. R.* 884.—QUESTIONED IN *Gee v. Metropolitan R. Co.*, *L. R.* 8 Q. B. 161, 42 *L. J. Q. B.* 105, 28 *L. T.* 282, 21 *W. R.* 584.

468. Sitting in dangerous position.—A passenger traveling upon a train composed partly of freight and partly of passenger cars, who knows that the shocks in coupling such trains are greater and more frequent than in the case of trains composed wholly of passenger cars, is guilty of negligence contributing to injuries received through being thrown against a seat, if he sits on the arm of one of the seats with his elbow on the back of the seat and his hand holding onto the corner of one of the adjoining seats. *Smith v. Richmond & D. R. Co.*, 34 *Am. & Eng. R. Cas.* 557, 99 *N. Car.* 241, 5 *S. E. Rep.* 896.—DISTINGUISHING *Gee v. Metropolitan R. Co.*, *L. R.* 8 Q. B. 161. REVIEWING *Harris v. Hannibal & St. J. R. Co.*, 27 *Am. & Eng. R. Cas.* 216, 89 *Mo.* 233; *Wallace v. Western N. C. R. Co.*, 98 *N. Car.* 494.

469. — in chair instead of stationary seat.—Where a passenger enters a caboose and sees a chair, he is justified in inferring that it is there for a seat; and using it in preference to the stationary seats around the side of the car is not contributory negligence. *Quackenbush v. Chicago & N. W. R. Co.*, 34 *Am. & Eng. R. Cas.* 545, 73 *Iowa* 458, 35 *N. W. Rep.* 523.

470. Occupying dangerous position at invitation of carrier.—If a passenger takes a place of extra peril by the invitation of the carrier's servants, the law requires of the latter the exercise of a corresponding degree of care for his safety. The carrier's care ordinarily is to be measured by the known peril of the party it undertakes to carry. If the passenger is placed in a position of great danger he

* See also *ante*, 45, 295, 378, 429.

should be informed of that fact, so as to enable him to exercise greater caution or avoid the danger altogether. *Lake Shore & M. S. R. Co. v. Brown*, 31 *Am. & Eng. R. Cas.* 61, 123 *Ill.* 162, 14 *N. E. Rep.* 197.—REVIEWED IN *Wilburn v. St. Louis, I. M. & S. R. Co.*, 36 *Mo. App.* 203.

The fact that servants of the company invited or even directed passengers to occupy a position of danger will not render the company liable for injuries resulting therefrom, if the danger was so obvious that a reasonably prudent person would not have obeyed the servant or accepted the invitation. *Kentucky & I. Bridge Co. v. Quinkert*, 2 *Ind. App.* 244, 28 *N. E. Rep.* 338.

471. Leaving seat while train is moving.*—(1) *Rule stated.*—The company has a right to expect that passengers will sit in the cars until stations are called, as is the common custom on railroads; or if they do not, that they will inform themselves of their whereabouts. *Minock v. Detroit, G. H. & M. R. Co.*, 97 *Mich.* 425, 56 *N. W. Rep.* 780.

That a passenger leaves his seat and steps into the aisle near an open door does not show contributory negligence. *Condy v. St. Louis, I. M. & S. R. Co.*, 13 *Mo. App.* 587; *affirmed* (?) 85 *Mo.* 79.

Nor is it necessarily contributory negligence for a passenger to leave his seat as a car is approaching his station, with a view of hastening his departure, though it is probable that if he had retained his seat he would not have been injured. *Wylde v. Northern R. Co.*, 14 *Abb. Pr. N. S. (N. Y.)* 213.

But in a Pennsylvania case it has been held that it is negligence in a passenger to leave his seat while a car is slowing up near a station or elsewhere, if, by remaining in his seat until the car stops, the accident complained of would not have occurred. *Dunn v. Pennsylvania R. Co.*, 20 *Phila. (Pa.)* 258.

(2) *Question for jury.*—In an action for personal injuries caused by the alleged negligence of the engineer of a passenger train in backing the train after stopping at a station, while the plaintiff was alighting from the train, where the evidence is conflicting

as to the period of time between the stop and the movement backwards, the question of contributory negligence of the plaintiff in leaving her seat in the car before the train stopped is fairly within the province of the jury to decide. *Morgan v. Southern Pac. Co.*, 95 *Cal.* 501, 30 *Pac. Rep.* 601.

The contract between a carrier and a passenger which requires the former to furnish the latter with a seat, does not, as a matter of law, oblige the passenger to keep it during the entire journey; and the question of his contributory negligence in standing in the passageway after the car is at his station, for the purpose of hastening his departure, is for the jury. *Barden v. Boston, C. & F. R. Co.*, 121 *Mass.* 426.

(3) *Illustrations.*—In an action for personal injuries to a passenger, a nonsuit is properly allowed where the plaintiff's own evidence shows that, when within three or four hundred yards of his destination, the conductor came through the car and announced the station, spoke to plaintiff and passed onto the platform of the next car, leaving the door of plaintiff's car open; that the train was running rapidly; that plaintiff followed the conductor to the car platform, but was thrown down by the motion of the car before he could catch the car railing. *Blitch v. Central R. Co.*, 76 *Ga.* 333.

If the conduct of those operating a freight train, and their management thereof, amounts to an invitation to a passenger to alight at a station for the discharge of passengers, and would be so understood and acted upon by reasonable and prudent persons, and a passenger acting in good faith upon such invitation arises, upon the train coming to a standstill, for that purpose, and is injured by a sudden start of the train, the jury will be justified in finding that he was in the exercise of ordinary care for his safety at the time of the injury. *Chicago & A. R. Co. v. Arnol*, 58 *Am. & Eng. R. Cas.* 411, 144 *Ill.* 261, 33 *N. E. Rep.* 204.

The plaintiff was a passenger on a freight train on the defendant road. Before the train reached the depot at the place of his destination it stopped to do some switching. The plaintiff got up from his seat to see if he was to get off there. While walking to the door of the car a coupling was made, causing a violent jar, which threw plaintiff to the floor and injured him. In an action to recover damages for the injuries sustained—*held*, that the plaintiff was

* Liability of company for injuries to passengers caused by leaving seat before train stops at station, see note, 58 *AM. REP.* 113.

Passenger leaving seat before train stops, see also *ELEVATED RAILWAYS*, 211.

guilty of contributory negligence and could not recover; that the dangers naturally incident to travel by rail are greater on freight than on passenger trains, and call for a correspondingly higher degree of care on the part of passengers. *Harris v. Hannibal & St. J. R. Co.*, 27 *Am. & Eng. R. Cas.* 216, 89 *Mo.* 233, 1 *S. W. Rep.* 325.—REVIEWED IN *Smith v. Richmond & D. R. Co.*, 34 *Am. & Eng. R. Cas.* 557, 99 *N. Car.* 241, 5 *S. E. Rep.* 896.

A passenger, in obedience to a trainman's call to "change cars," and after the car, on arriving at a station, had so nearly stopped that it appeared to persons of ordinary intelligence and observation to have fully stopped, rose and walked toward the exit. He was thrown down and injured by a sudden jerk of the car. *Held*, that he was not chargeable with contributory negligence, and may recover damages for injuries received. *Bartholomew v. New York C. & H. R. R. Co.*, 27 *Am. & Eng. R. Cas.* 154, 102 *N. Y.* 716, 1 *Silv. App.* 72, 7 *N. E. Rep.* 623, 2 *N. Y. S. R.* 490.—QUOTED IN *Dillon v. Manhattan R. Co.*, 16 *N. Y. S. R.* 767. REVIEWED IN *Cook v. Long Island R. Co.*, 47 *N. Y. S. R.* 200; *Myers v. Long Island R. Co.*, 10 *N. Y. S. R.* 430, 45 *Hun* 591.

b. Upon Platform of Car.*

472. Generally.—For a passenger to be upon the platform of a rapidly moving steam-car is, as matter of law, *prima-facie* negligence, and no recovery can be had for an injury which was contributed to by the fact of his being in that position, unless his presence there was excused by the occasion. *Worthington v. Central Vt. R. Co.*, 52 *Am. & Eng. R. Cas.* 384, 64 *Vt.* 107, 23 *Atl. Rep.* 590, 15 *L. R. A.* 326.—APPROVING *Hickey v. Boston & L. R. Co.*, 14 *Allen (Mass.)* 429; *Camden & A. R. Co. v. Hoosey*, 99 *Pa. St.* 492. DISTINGUISHING *Willis v. Long Island R. Co.*, 34 *N. Y.* 670; *Werle v. Long Island R. Co.*, 98 *N. Y.* 650; *Treat v. Boston & L. R. Co.*, 131 *Mass.* 371; *Zemp v. Wilmington & M. R. Co.*, 9 *Rich. (So. Car.)* 84. EXPLAINING *Nolan v. Brooklyn City & N. R. Co.*, 87 *N. Y.* 63. REVIEWING *Graville v. Manhattan R. Co.*, 105 *N. Y.* 525.

The riding upon the platform of a pas-

senger car is such negligence, on the part of the passenger, as will bar his recovery for injuries sustained by being thrown from the platform in rounding a curve. *Goodwin v. Boston & M. R. Co.*, 52 *Am. & Eng. R. Cas.* 380, 84 *Me.* 203, 24 *Atl. Rep.* 816.

And it is no excuse that he was on the platform for the purpose of sending a message to his family. *Torrey v. Boston & A. R. Co.*, 147 *Mass.* 412, 7 *N. Eng. Rep.* 148, 18 *N. E. Rep.* 213.

Where a passenger sues for an injury by being thrown down by the starting of the train, while he was on the car platform, it is proper to instruct the jury "that if he was unnecessarily or improperly there, knowing that the train was about to start, and was thrown down by the starting of the engine with an unusual or unnecessary jerk, he could not recover." *Torrey v. Boston & A. R. Co.*, 147 *Mass.* 412, 7 *N. Eng. Rep.* 148, 18 *N. E. Rep.* 213.

A passenger reaching a train late hurriedly jumped on the platform between the tender and express-car. The door to the express-car was locked, and after standing some time and getting very cold he was thrown off and injured. *Held*, that the express agent was under no obligation to admit passengers through his car, the express business and railroad business belonging to distinct companies; and that the railroad company was not liable. *Ohio & M. R. Co. v. Allender*, 47 *Ill. App.* 484.—DISTINGUISHING *Lake Shore & M. S. R. Co. v. Brown*, 123 *Ill.* 162; *Nashville & C. R. Co. v. Erwin*, (Tenn.) 3 *Am. & Eng. R. Cas.* 465; *Wilton v. Middlesex R. Co.*, 107 *Mass.* 108; *Chicago, B. & Q. R. Co. v. Sykes*, 96 *Ill.* 162; *Hanson v. Mansfield R. & T. Co.*, 38 *La. Ann.* 111; *Union R. & T. Co. v. Shacklett*, 19 *Ill. App.* 145; *Chicago & N. W. R. Co. v. Rielly*, 40 *Ill. App.* 416.

473. After being warned and requested to enter car.—A passenger who remains on the platform of a car at the rear end of a long freight train, after a request or order from the employés to enter the car, voluntarily occupies a place of danger, and assumes the risk of being thrown from the car and injured by the sudden jerk of the train on being put in motion. *Louisville & N. R. Co. v. Bisch*, 41 *Am. & Eng. R. Cas.* 89, 120 *Ind.* 549, 22 *N. E. Rep.*

* Contributory negligence of passengers in riding on platforms, see note, 58 *AM. & ENG. R. CAS.* 358.

Passenger riding on platform, see also *ELECTRIC RAILWAYS*, 26; *ELEVATED RAILWAYS*, 213.

* See also *ante*, 372, 382, 394, 428 (2), 433.

662.—QUOTED IN *Kentucky & I. Bridge Co. v. Quinkert*, 2 Ind. App. 244.

It is the duty of a passenger standing on the platform of a steam-railroad car to go inside the car when requested so to do by a person having charge of the train, if there is standing-room inside, although there are no vacant seats. The fact that the passenger has a well-founded ground of complaint against the railroad company for not providing adequate accommodations for passengers, does not release him from the duty of leaving the platform. *Graville v. Manhattan R. Co.*, 34 Am. & Eng. R. Cas. 375, 105 N. Y. 525, 12 N. E. Rep. 51, 8 N. Y. S. R. 20; reversing 13 Daly 32.—REVIEWED IN *Worthington v. Central Vt. R. Co.*, 64 Vt. 107.

Whether, where a passenger refuses to go inside the car when so requested, the brakeman or conductor has the right to force him to do so, *quare*. *Graville v. Manhattan R. Co.*, 34 Am. & Eng. R. Cas. 375, 105 N. Y. 525, 12 N. E. Rep. 51, 8 N. Y. S. R. 20; reversing 13 Daly 32.

A passenger unnecessarily riding on the platform of a car in motion must go into the car when requested by the conductor or other person having charge of the train, when there is standing-room inside; and if, by reason of such refusal and by going down onto the steps of the car without the knowledge of the conductor or other person having charge of the train, he loses his balance, falls overboard, and is injured, he is guilty of contributory negligence such as will preclude his recovery for such injury. *Fisher v. West Virginia & P. R. Co.*, (W. Va.) 58 Am. & Eng. R. Cas. 337, 19 S. E. Rep. 578.

474. Where there are unoccupied seats inside.—If at the time of an accident by which a passenger is injured he is voluntarily and unnecessarily upon the platform of a running car, when there is room for him inside the car, this is such contributory negligence as will prevent a recovery for the injury. *Memphis & L. R. R. Co. v. Salinger*, 46 Ark. 528.

A passenger who voluntarily and unnecessarily stands or rides upon the platform of the car when there are unoccupied seats in the car, is guilty of such negligence as will prevent a recovery for injuries received while so on the platform. *Kentucky & I. Bridge Co. v. Quinkert*, 2 Ind. App. 244, 28 N. E. Rep. 338.

475. Where train is crowded.—A party voluntarily boarding a crowded train and taking his place on the platform of a car, without complaint, or effort to obtain a seat or other better accommodations, cannot assign the overcrowding of the train as negligence in the railroad company. On the other hand, when the conductor sees him in that position and collects his fare without objection, the company cannot attribute its occupancy as negligence. *Olivier v. Louisville & N. R. Co.*, 47 Am. & Eng. R. Cas. 576, 43 La. Ann. 804, 9 So. Rep. 431.

In such case the passenger is bound to conduct himself with the care and caution which his position requires, and the company is bound to guard him from danger incident to the position arising from its own acts. *Olivier v. Louisville & N. R. Co.*, 47 Am. & Eng. R. Cas. 576, 43 La. Ann. 804, 9 So. Rep. 431.

Plaintiff was traveling on a national holiday. Upon starting, the cars were so crowded that he was compelled to ride on the car steps, but before he reached his destination a considerable number of the passengers had left the cars, but plaintiff continued on the steps, from which he was thrown by a jerk of the train and injured. The company had provided trains and cars for ample accommodations for the number of passengers that it anticipated, basing its estimate upon the number carried the former year; but on this year the number of passengers was double that of the former year on the same holiday. *Held*, that it was not negligence on the part of the company to fail to provide better accommodations, if such a crowd could not reasonably have been anticipated; and, after a portion of the passengers had left the train, it was the duty of plaintiff to go inside, or at least to see whether there was room for him inside. *Chicago & N. W. R. Co. v. Carroll*, 5 Ill. App. 201.

A return excursion train was so crowded and overloaded that all the seats and standing-room in the coaches were occupied, as well as the platforms to the cars and the steps to the same. Plaintiff got on the steps of a front car and was carried to the next station, when a large number of passengers got off. It did not appear that the plaintiff might have got a better or safer position, or that he received any notice by the conductor or any one else that he might find room in some other car, and

so he continued to occupy his position on the platform steps until he arrived at another station, when he was pushed off the steps by the crowd of other passengers and injured. *Held*, that his failure at the first stop of the train to try and find a safer place was not such negligence, as a matter of law, as to preclude a recovery by him, but that the question of his negligence in fact was properly submitted to the jury. *Chicago & A. R. Co. v. Fisher*, 141 Ill. 614, 31 N. E. Rep. 406; *affirming* 38 Ill. App. 33.

470. — and there are no vacant seats inside.—Passengers are not to be deemed guilty of negligence for standing on the platform of cars in motion, when there are no vacant seats for them within the cars. *Willis v. Long Island R. Co.*, 34 N. Y. 670; *affirming* 32 Barb. 398.—**FOLLOWING** *Carroll v. New York & N. H. R. Co.*, 1 Duer (N. Y.) 571; *Haley v. Earle*, 30 N. Y. 208. **QUOTING** *Colegrove v. New York & N. H. R. Co.*, 20 N. Y. 492, 6 Duer 382.—**APPROVED** IN *Bills v. New York C. R. Co.*, 3 Am. & Eng. R. Cas. 318, 84 N. Y. 5. **CRITICISED** IN *Thrings v. Central Park R. Co.*, 7 Robt. (N. Y.) 616. **DISTINGUISHED** IN *Worthington v. Central Vt. R. Co.*, 64 Vt. 107. **REVIEWED** IN *Goodrich v. Pennsylvania & (N. Y. Canal & Railroad Co.)* 29 Hun (N. Y.) 50.

And if they are injured the company will not thereby be relieved from damages. *Morris v. Eighth Ave. R. Co.*, 52 N. Y. S. R. 61, 22 N. Y. Supp. 666.

The fact that a passenger, failing to find a seat, and having none pointed out to him by an employé of the company, takes a position on the platform of the car, where other passengers are riding, and without objection from any employé, and is thrown from the car by a sudden lurch given it by the great and increased speed with which the train is run when turning a curve, does not, as matter of law, establish contributory negligence. *Werle v. Long Island R. Co.*, 21 Am. & Eng. R. Cas. 429, 98 N. Y. 650.—**DISTINGUISHED** IN *Worthington v. Central Vt. R. Co.*, 64 Vt. 107.

The contributory negligence of a passenger in standing on the car platform or steps depends upon whether there is a vacant seat in the car of which he is aware, and which he might take, and whether standing on the platform is more dangerous than occupying a seat; and where it appears that a place on the platform is more dangerous,

a passenger will not be excused for riding there because others did so and because his riding there was known to the conductor. *Chicago W. D. R. Co. v. Klaubler*, 9 Ill. App. 613.—**QUOTING** *Chicago, B. & Q. R. Co. v. Lee*, 68 Ill. 576; *Illinois C. R. Co. v. Hetherington*, 83 Ill. 510.

That all the seats in the car are occupied and the aisles crowded to that extent that the position of a passenger standing in the aisle is one of "positive discomfort to himself and evident annoyance to others," does not excuse a passenger who goes upon the platform voluntarily and remains there while the train is in rapid motion. *Worthington v. Central Vt. R. Co.*, 52 Am. & Eng. R. Cas. 384, 64 Vt. 107, 23 Atl. Rep. 590, 15 L. R. A. 326.

A passenger was unable, in consequence of the crowded condition of the cars, to obtain a seat. Although there was standing-room inside, he placed himself on or near the edge of the outside platform, and rode there for some distance, with his back against the end car window, holding on by a little iron rail. While in this position a jolt occurred, by which he was thrown upon the track and injured. *Held*, that plaintiff was guilty of such contributory negligence as to defeat a recovery. *Camden & A. R. Co. v. Hoosey*, 6 Am. & Eng. R. Cas. 454, 99 Pa. St. 492, 44 Am. Rep. 120.—**APPROVED** IN *Worthington v. Central Vt. R. Co.*, 64 Vt. 107. **DISTINGUISHED** IN *Dickinson v. Port Huron & N. W. R. Co.*, 21 Am. & Eng. R. Cas. 456, 53 Mich. 43.

477. While cars are being coupled.—The locomotive of a stationary train at one of the stations of the defendant company, having been detached, returned shortly after with freight cars, which the employés of the company coupled to those which had been left standing on a side-track. The coupling caused a considerable jolt and moving of the cars, which, under ordinary circumstances, would not have been dangerous to grown persons standing upon the platform of the passenger coach. On the particular occasion a child 2 years and 11 months old was standing upon the platform. The jar caused it to be thrown down and to fall through the opening between two cars. The mother, a passenger, who was inside the coach, ran out, jumped to the ground, and, thrusting her arm under the car, saved the child; but in so doing her own arm was caught under one of the wheels and badly

broken. The present suit is for damages for her injuries. The action is grounded upon the charge that the defendant was guilty of gross and wanton negligence in not having built a station-house at the station, and upon a charge of negligence on the part of the officers and employés of the company in not having notified the passengers of the approach of the coupling-cars. The conductor had, in a tone loud enough to be heard, told passengers to keep their seats; but he had not specially warned them not to go upon the platform, nor did he give them notice that the cars were about to be coupled. *Held*, that the failure of the company to build a station-house was a fact too remote to furnish a ground for action in this case, as it was not the proximate cause of the accident; that the accident was due solely to the fact that a child of such tender years was standing where it should not have been—upon the platform of the coach; that but for such exceptional fact, which the conductor could not reasonably be expected to have anticipated, neither the coupling of the cars nor a position on the platform would have been attended with any danger; that the coupling was such as is habitually made at the station while waiting the arrival of the train on the main road; that the employés were at their respective posts for such work, and that the concussion from the coupling was not greater than was usual, nor unreasonably violent; that, however deplorable the accident, the defendant cannot legally be held responsible for it under the circumstances. *De Mahy v. Morgan L. & T. R. & S. Co.*, 58 *Am. & Eng. R. Cas.* 448, 45 *La. Ann.* 1329, 14 *So. Rep.* 61.

478. During switchings and temporary stops.—Where a passenger in a caboose sues for an injury caused by being jarred from the platform while cars were being switched, and plaintiff's evidence that there was ample seating-room in the caboose, and that he knew that certain cars would be switched and jarring necessarily produced by attaching them; that there was no necessity for his leaving the seat, and that he would not have been injured if he had been sitting down, shows contributory negligence sufficient to warrant sustaining a demurrer to his evidence. *Smotherman v. St. Louis, I. M. & S. R. Co.*, 29 *Mo. App.* 265.—*QUOTING Harris v. Hannibal & St. J. R. Co.*, 89 *Mo.* 233.

Where a train stopped on a trestle and

a passenger went on the car platform and was thrown to the ground by a sudden start of the train—*held*, that his own negligence was the proximate cause of the injury, and would prevent a recovery. *Rockford, R. I. & St. L. R. Co. v. Coultas*, 67 *Ill.* 398.—*QUOTED IN Chicago & N. W. R. Co. v. Rielly*, 40 *Ill. App.* 416.

479. In violation of rules.—(1) *Generally.*—A regulation forbidding passengers to stand on the platform of a car while the train is in motion being reasonable and proper, a passenger who is injured while standing on the platform, in violation of such regulation, is guilty of contributory negligence, and cannot maintain an action to recover damages for such injuries. *Alabama G. S. R. Co. v. Hawk*, 18 *Am. & Eng. R. Cas.* 194, 72 *Ala.* 112, 47 *Am. Rep.* 403.—*APPROVING Hickey v. Boston & L. R. Co.*, 14 *Allen (Mass.)* 429; *Quinn v. Illinois C. R. Co.*, 51 *Ill.* 495; *Baltimore & P. R. Co. v. Jones*, 95 *U. S.* 439. *DISTINGUISHING Cook v. Central R. & B. Co.*, 67 *Ala.* 533. *QUOTING Memphis & C. R. Co. v. Copeland*, 61 *Ala.* 376.—*APPROVED IN McCauley v. Tennessee, C., I. & R. Co.*, 93 *Ala.* 356. *REVIEWED IN Central R. & B. Co. v. Miles*, 41 *Am. & Eng. R. Cas.* 149, 88 *Ala.* 256, 6 *So. Rep.* 696.—*McCauley v. Tennessee C., I. & R. Co.*, 47 *Am. & Eng. R. Cas.* 580, 93 *Ala.* 356, 9 *So. Rep.* 611. *Macon & W. R. Co. v. Johnson*, 38 *Ga.* 409.

But a passenger who goes upon a platform for the purpose of leaving the train, and who remains there only long enough to ascertain that the train would not stop again, does not violate a regulation prohibiting passengers from traveling upon platforms. *Central R. & B. Co. v. Miles*, 41 *Am. & Eng. R. Cas.* 149, 88 *Ala.* 256, 6 *So. Rep.* 696.—*REVIEWING Alabama G. S. R. Co. v. Hawk*, 72 *Ala.* 112.

(2) *Statutes.*—Section 484 of the Cal. Civil Code, protecting a company from damages for an injury to a passenger received on or from the platform of a car, in violation of printed regulations posted in the car, or of verbal instructions to the passenger, is intended to prevent the imprudent act of standing or riding on the platform, and neither the statute nor the regulation has any application where a passenger is justifiably entering or leaving the

*See also *ante*, 40, 70, 294, 351, 359, 369, 371 (2), 452; *post*, 495.

cars when injured. *Mitchell v. Southern Pac. R. Co.*, 87 Cal. 62, 25 Pac. Rep. 245.

Where a company has a printed regulation, in accordance with N. Y. act 1850, ch. 140, § 46, posted inside of the car, warning passengers not to ride on the platform, the mere fact that a conductor does not object to a passenger standing on the platform when there is sufficient room inside, will not justify the presumption that the company thereby waived the protection given by the statute, especially where the notice expressly declares that the company would claim the benefit of the act. *Higgins v. New York & H. R. Co.*, 2 Bosw. (N. Y.) 132.

480. By permission of carrier.*—

If the servants of the company knowingly permit a passenger, drunken to unconsciousness, to ride sitting on the car steps, from which he falls and is killed, the company will be liable. *St. Louis, A. & T. H. R. Co. v. Carr*, 47 Ill. App. 353.

A passenger who is told by an employé of the train to remain on the platform of the car until a more suitable place for alighting is reached, is not guilty of contributory negligence in failing to attempt to return to her seat when the car is started, if the danger is not so obvious that a reasonably prudent person would not have obeyed the employé. *Kentucky & I. Bridge Co. v. Quinkert*, 2 Ind. App. 244, 28 N. E. Rep. 338.

Plaintiff was riding in defendant's caboose, and was asleep, and so failed to get off at his destination when the station was called. After the station had been passed, and the train was moving too fast for plaintiff to leave it safely, the conductor told him if he wanted to get off at that station to get off quickly, whereupon he placed himself upon the steps in readiness to get off if the train should stop. While so standing, on account of a sudden jerk in taking up the "slack" of the train, he was thrown to the ground and injured. *Held*, that his position was a dangerous one, voluntarily taken, and that, if there was negligence on the part of defendant, still, on account of his own contributory negligence, he could not recover. *Lindsey v. Chicago, R. I. & P. R. Co.*, 18 Am. & Eng. R. Cas. 179, 64 Iowa 407, 20 N. W. Rep. 737.—*COMPARING Bon v. Railway Pass. Assur. Co.*, 56 Iowa 664.—*REFERRED TO IN Raben*

v. Central Iowa R. Co., 74 Iowa 732, 34 N. W. Rep. 621.

481. Neglecting to hold railing.*—

A passenger on a freight train, who stands on the rear platform without holding to anything, is guilty of contributory negligence and cannot recover for any injury which he may sustain by reason of the sudden starting of the train. *Malcom v. Richmond & D. R. Co.*, 44 Am. & Eng. R. Cas. 379, 106 N. Car. 63, 11 S. E. Rep. 187.

482. Must proximately contribute to injury.†—

Riding on the platform of a car, in violation of the rules of the carrier, is not the proximate cause of an injury to a passenger received from backing the train after he had gotten off. *Gadsden & A. U. R. Co. v. Causler*, 58 Am. & Eng. R. Cas. 258, 97 Ala. 235, 12 So. Rep. 439.

Where a passenger has left a train and is standing on the ground when the train is backed against him, thereby causing the injury complained of, and it appears that he had been on the car platform in violation of a rule of the company, there is no such causal connection between the violation of the rule and the injury inflicted as will preclude him from recovering for such injury. *Gadsden & A. U. R. Co. v. Causler*, 58 Am. & Eng. R. Cas. 258, 97 Ala. 235, 12 So. Rep. 439.—*FOLLOWING Western R. Co. v. Mutch*, 54 Am. & Eng. R. Cas. 107, 97 Ala. 194.

Standing on the platform of a car will not prevent a passenger recovering from the company for an injury, where his act is not the cause of the injury nor contributory to it. *Lackawanna & B. R. Co. v. Chenewith*, 52 Pa. St. 382.—*DISTINGUISHING Pennsylvania R. Co. v. McCloskey*, 23 Pa. St. 526; *McCully v. Clarke*, 40 Pa. St. 406; *Pennsylvania R. Co. v. Aspell*, 23 Pa. St. 149.—*FOLLOWED IN Fry v. People's Pass. R. Co.*, 17 Phila. (Pa.) 61.

483. Questions of fact and law.—

Where the negligence of the defendant is admitted, but it is claimed that defendant is not liable to plaintiff on account of plaintiff's contributory negligence by being on the platform of a passenger car and not in the inside, the appellate court cannot say, as a matter of law, that such conduct was negligence *per se*. *Woods v. Southern Pac. Co.*, 9 Utah 146, 33 Pac. Rep. 628.

* See also *ante*, 40, 420.

* See also *ante*, 358.

† See also *ante*, 344, 416.

Standing or sitting upon the platform or steps of a railway car when the train is in motion, although it may be *prima-facie* evidence of negligence, is not under all circumstances negligence *per se* and as a matter of law. *Chicago & A. R. Co. v. Fisher*, 141 Ill. 614, 31 N. E. Rep. 406; *affirming* 38 Ill. App. 33.—DISTINGUISHING *Quinn v. Illinois C. R. Co.*, 51 Ill. 495. QUOTING AND DISTINGUISHING *Chicago, R. I. & P. R. Co. v. Eininger*, 114 Ill. 79.

It is not negligence as a matter of law for a passenger to go on the car platform where it does not contribute to his injury. So *held*, where a passenger was accidentally shot while on the platform by a revolver in the hands of a conductor. *Gerstle v. Union Pac. R. Co.*, 23 Mo. App. 361.

The question of the contributory negligence of a passenger who was injured while riding on the car platform is for the jury, where it appears that the train was closely crowded and that the passenger was able to stand some distance from the edge of the platform and in a position apparently not dangerous. *Merwin v. Manhattan R. Co.*, 1 N. Y. Supp. 267.

Plaintiff entered one car, and near the door of the next car to the rear was a notice posted that passengers should not stand on the platforms. Plaintiff was injured by reason of the unfinished and imperfect condition of the track, but no one in the rear car was injured. *Held*, that it was proper to leave the question to the jury whether plaintiff had knowledge of the notice, and if so, how far the negligence of the company was excused by his going on the platform in violation of the notice. *Zemp v. Wilmington & M. R. Co.*, 9 Rich. (So. Car.) 84.

Where at the time the accident occurred the plaintiff was standing on the platform of the car, and his testimony showed that he had gone there immediately before the accident, in fear that some disaster would occur because of the speed of the train, and that he intended to jump therefrom to the sand, but that the car was overturned as soon as he reached the platform, it is a question for the jury whether the attempt thus made was an unreasonable or rash act, or was one which a person of ordinary care and prudence might do under the circumstances. *Mitchell v. Southern Pac. R. Co.*, 87 Cal. 62, 25 Pac. Rep. 245.

c. With Part of Person Projecting from Window.

484. Putting arm out of window, generally.*—A traveler is presumed to know the use of a seat from that of a window. The former is to sit in, the latter to admit light and air. It is negligence to put out his limbs when they ought not to be and expose them to be broken without his ability to know whether there is or was danger approaching. *Moore v. Edison Electric Ill. Co.*, 43 La. Ann. 792, 9 So. Rep. 433.

A traveler in a car cannot recover damages against the company for a personal injury sustained wholly or in part by reason of allowing his arm or elbow to be outside of the window. *Todd v. Old Colony & F. R. R. Co.*, 3 Allen (Mass.) 18; *affirmed in Todd v. Old Colony & F. R. R. Co.*, 7 Allen 207.—DISAPPROVED IN *Spencer v. Milwaukee & P. du C. R. Co.*, 17 Wis. 487. DISTINGUISHED IN *Meesele v. Lynn & B. R. Co.*, 8 Allen (Mass.) 234; *Snow v. Housatonic R. Co.*, 8 Allen 441. QUOTED IN *Moakler v. Willamette Valley R. Co.*, 41 Am. & Eng. R. Cas. 135, 18 Oreg. 189; *Dun v. Seaboard & R. R. Co.*, 16 Am. & Eng. R. Cas. 363, 78 Va. 645, 49 Am. Rep. 388. REVIEWED IN *Pittsburg & C. R. Co. v. Andrews*, 39 Md. 329.

Unless he can show gross negligence on the part of the company, or its agents or servants, for whose conduct it is legally responsible, or that the injury was intentionally done, or that it could have been avoided by ordinary care. *Louisville & N. R. Co. v. Sickings*, 5 Bush (Ky.) 1.—QUOTED IN *Favre v. Louisville & N. R. Co.*, 91 Ky. 541.

Protrusion by passenger of his limb out of the car window, to any extent whatever, is such contributory negligence as will bar recovery for injury thereto. *Richmond & D. R. Co. v. Scott*, 52 Am. & Eng. R. Cas. 405, 88 Va. 958, 14 S. E. Rep. 763.—QUOTING *Dun v. Seaboard & R. R. Co.*, 78 Va. 662.

Where a passenger sues to recover for being negligently injured, it is not error for the trial court to refuse to instruct the jury that "if plaintiff was sitting with his elbow

* Injuries to passenger riding at open car window with arm on window-sill, see note, 50 AM. REP. 589; or projecting their persons beyond the side of the car, see notes, 39 AM. & ENG. R. CAS. 459; 18 *Id.* 205; 16 *Id.* 372.

or arm projecting out of the window, and sustained the injury complained of by reason of that fact, he could not recover." *Spencer v. Milwaukee & P. du C. R. Co.*, 17 Wis. 487.—DISAPPROVING *Todd v. Old Colony & F. R. R. Co.*, 3 Allen (Mass.) 18.—DISAPPROVED IN *Georgia Pac. R. Co. v. Underwood*, 90 Ala. 49; *Pittsburg & C. R. Co. v. Andrews*, 39 Md. 329. QUOTED IN *Chicago & A. R. Co. v. Pondrom*, 51 Ill. 333.

485. Coming in collision with object near track.—If a passenger on a train puts his arm or any part of his body outside a car when in motion, and by coming in contact with some object receives an injury he would not have received if he had kept his body entirely inside the car, he is guilty of such contributory negligence that he cannot recover of the company. *Favre v. Louisville & N. R. Co.*, 47 Am. & Eng. R. Cas. 594, 91 Ky. 541, 16 S. W. Rep. 370.—QUOTING *Louisville & N. R. Co. v. Sickings*, 5 Bush (Ky.) 1.

486. — with bridge.—Plaintiff, while traveling in a car, permitted his hand to extend outside of the window, whereby his arm was broken by coming in contact with a bridge. *Held*, that the carrier was not liable if he gave timely notice of the danger, which the plaintiff might have avoided. *Laing v. Colder*, 8 Pa. St. 479.—DISTINGUISHED IN *Pennsylvania R. Co. v. MacKinney*, 37 Am. & Eng. R. Cas. 153, 124 Pa. St. 462. REVIEWED IN *Lawrenceburgh & U. M. R. Co. v. Montgomery*, 7 Ind. 474.

487. — with water-tank.—Where an injury results from the arm of a passenger, placed by him several inches outside the window, coming in contact with the structure of a water-tank, the carrier is not liable. *Indianapolis & C. R. Co. v. Rutherford*, 29 Ind. 82.—QUOTED IN *Bellefontaine R. Co. v. Hunter*, 33 Ind. 335; *Moakler v. Willamette Valley R. Co.*, 41 Am. & Eng. R. Cas. 135, 18 Oreg. 189.

488. — with pile of wood.—A passenger, while sitting with his arm protruding outside of an open window of a car in swift motion, was struck on the elbow by wood piled near the track and was injured. *Held*, that the protrusion of the arm through the window was such contributory negligence as to bar a recovery, however incautious the carrier may have been in guarding against such accidents. *Dun v. Seaboard & R. R. Co.* 16 Am. & Eng. R. Cas. 363, 78 Va. 645, 49 Am. Rep. 388.—QUOTING *Baltimore*

& P. R. Co. v. Jones, 95 U. S. 439; *Todd v. Old Colony & F. R. R. Co.*, 3 Allen (Mass.) 18. REVIEWING *Northern C. R. Co. v. State*, 31 Md. 357.—DISTINGUISHED IN *Carrico v. West Virginia C. & P. R. Co.*, 35 W. Va. 389. QUOTED IN *Norfolk & W. R. Co. v. Ferguson*, 79 Va. 241.

489. — with passing train.—Where a passenger is riding with his arm beyond the car window, a failure of the conductor to warn him of his danger will not make the company liable for an injury received by being struck by cars passing very near, on a parallel track, in the opposite direction. *Miller v. St. Louis R. Co.*, 5 Mo. App. 471.

Plaintiff, a passenger on one of defendant's trains, while sitting by an open window, with his arm resting upon the sill, so that the window could have been closed without touching his arm, was struck on the arm and injured, as the evidence tended to show, by a swinging door on a passing freight train. No explanation of the accident was given by the defendant. *Held*, that want of proper care on defendant's part was to be presumed, and a recovery by plaintiff was proper. *Breen v. New York C. & H. R. R. Co.*, 34 Am. & Eng. R. Cas. 523, 109 N. Y. 297, 16 N. E. Rep. 60, 14 N. Y. S. R. 835; *affirming 40 Hun* 638, *mem.*—REVIEWED IN *Francis v. New York Steam Co.*, 114 N. Y. 380, 21 N. E. Rep. 988, 23 N. Y. S. R. 543.

490. — with standing car.—A freight car was run onto a siding very near the main track. Plaintiff was a passenger, sitting with his arm resting on the car window-sill, and his elbow protruding outward, when it came in contact with a leaning standard in the freight car, which rubbed the passenger car its entire length. It appeared that no injury would have occurred if his arm had been inside. *Held*, that his own contributory negligence prevented a recovery. *Louisville & N. R. Co. v. Sickings*, 5 Bush (Ky.) 1.—DISTINGUISHING *Louisville & N. R. Co. v. Yandell*, 17 B. Mon. (Ky.) 598; *Louisville & N. R. Co. v. Collins*, 2 Duv. (Ky.) 114. QUOTING *Pittsburg & C. R. Co. v. McClurg*, 56 Pa. St. 295.

If a passenger of mature years voluntarily or inattentively projects his elbow or arm out of the window of a car in which he is traveling, and it is injured by coming in contact with a freight car standing on a siding near the main track of the railroad,

he is not entitled to recover damages for such injury from the company. The placing of his arm out of the window is an act of contributory negligence on his part, and the court should so instruct the jury, as matter of law, notwithstanding the company may have been guilty of negligence in permitting the car on the siding to be placed too near the track of the passing train. *Pittsburg & C. R. Co. v. Andrews*, 39 Md. 329, 10 Am. Ry. Rep. 485.—DISAPPROVING *Spencer v. Milwaukee & P. du C. R. Co.*, 17 Wis. 487; *Chicago & A. R. Co. v. Pondrom*, 51 Ill. 333. REVIEWING *Todd v. Old Colony & F. R. R. Co.*, 3 Allen (Mass.) 18; *Holbrook v. Utica & S. R. Co.*, 12 N.Y. 236. REVIEWING AND APPROVING *Pittsburg & C. R. Co. v. McClurg*, 56 Pa. St. 294. REVIEWING AND DISAPPROVING *New Jersey R. Co. v. Kennard*, 21 Pa. St. 203.

491. Resting arm on window-sill.*

—It is not contributory negligence for a passenger to ride with his elbow on the sill of an open car window, and he may recover for an injury caused by a collision which jarred his arm outside the window and broke it. *Farlow v. Kelly*, 11 Am. & Eng. R. Cas. 104, 108 U. S. 288, 2 Sup. Ct. Rep. 555.—FOLLOWED IN *Schneider v. New Orleans & C. R. Co.*, 54 Fed. Rep. 466.

It is not contributory negligence for a passenger to place his arm on the sill of an open car window while passing over a rough place in the road, without first examining the sash to see if it is safe against falling. *Gulf, C. & S. F. R. Co. v. Killebrew*, (Tex.) 20 S. W. Rep. 182.

To rest the arm upon the window-sill of a car, provided it does not protrude, is not negligence *per se*; but if it does protrude, the act becomes negligent, in the contemplation of law. *Carrico v. West Virginia C. & P. R. Co.*, 52 Am. & Eng. R. Cas. 393, 35 W. Va. 389, 14 S. E. Rep. 12.

A railroad employé is not bound to look every time that a window is raised by a passenger, to see that it is put to the proper height. A passenger who places his hand under an open window must look and see that it is caught, and in the event of the window falling and injuring him, the company is not negligent, unless the catch was defective. *Voorhees v. Kings County El.*

R. Co., 50 N. Y. S. R. 569, 21 N. Y. Supp. 775, 3 Misc. 18.

A passenger who is injured while in his seat, with his head on his arm, which rests on the window-sill of the car, by the car coming in contact with a wrecked car which had been left too near the track, is not guilty of contributory negligence; and it is error to so charge. *Winters v. Hannibal & St. J. R. Co.*, 39 Mo. 468.

492. Question of law for court.—

It is legal negligence for a passenger to ride in a fast-going passenger coach with his arm protruding out of the window and beyond the line of the body of the car. *Carrico v. West Virginia C. & P. R. Co.*, 52 Am. & Eng. R. Cas. 393, 35 W. Va. 389, 14 S. E. Rep. 12.

Where a passenger puts his elbow out of a car window voluntarily, without any qualifying circumstances impelling him to it, it is negligence *in se*, and should be so declared by the court. *Pittsburg & C. R. Co. v. McClurg*, 56 Pa. St. 294.—OVERRULING *New Jersey R. Co. v. Kennard*, 21 Pa. St. 203.—DISTINGUISHED IN *Barden v. Boston, C. & F. R. Co.*, 121 Mass. 426. QUOTED IN *Louisville & N. R. Co. v. Sickings*, 5 Bush (Ky.) 1; *Moakler v. Willamette Valley R. Co.*, 41 Am. & Eng. R. Cas. 135, 18 Oreg. 189. REVIEWED AND APPROVED IN *Pittsburg & C. R. Co. v. Andrews*, 39 Md. 329.—REVIEWED IN *Barton v. St. Louis & I. M. R. Co.*, 52 Mo. 253.

It is negligence *per se*, to be so declared by the court as matter of law, for a passenger to protrude his arm, hand, or elbow through the window of the car while in motion, beyond the outer edge of the window or outer surface of the car; and such negligence on his part, contributing proximately to an injury received by collision with an object passing near by, bars recovery for damages. *Georgia Pac. R. Co. v. Underwood*, 44 Am. & Eng. R. Cas. 367, 90 Ala. 49, 8 So. Rep. 116.—DISAPPROVING *Spencer v. Milwaukee & P. du C. R. Co.*, 17 Wis. 487. DISTINGUISHING *Chicago & A. R. Co. v. Pondrom*, 51 Ill. 333. EXPLAINING *Quinn v. South Carolina R. Co.*, 29 So. Car. 381, 7 S. E. Rep. 614.—NOT FOLLOWED IN *Schneider v. New Orleans & C. R. Co.*, 54 Fed. Rep. 466.

If, in an action brought by a passenger to recover damages for a personal injury from the swinging of an unfastened door of

* Liability for injury to passenger riding with arm on window-sill. see notes, 1 L. R. A. 682; 11 AM. & ENG. R. CAS. 106; 18 Id. 205.

another car standing upon a track parallel to that over which he is riding, it appears from the plaintiff's own testimony that his elbow extended through the open window, beyond the place where the sash would have been if the window had been shut, it is the duty of the court to rule that this is such carelessness as will prevent a recovery of damages by him, and to withdraw the case for the jury. *Todd v. Old Colony & F. R. R. Co.*, 7 Allen (Mass.) 207; affirming *Todd v. Old Colony & F. R. R. Co.*, 3 Allen 18.—DISTINGUISHED IN *Mayo v. Boston & M. R. Co.*, 104 Mass. 137; *Barden v. Boston, C. & F. R. Co.*, 121 Mass. 426.

493. Question of fact for jury.—

The question whether a passenger is guilty of contributory negligence by traveling upon a car with his arm projecting from the window, is a question of fact for the jury, and it is not error for the court to refuse to charge, as a matter of law, that he is guilty of contributory negligence. *Quinn v. South Carolina R. Co.*, 37 Am. & Eng. R. Cas. 166, 29 So. Car. 381, 7 S. E. Rep. 614, 1 L. R. A. 682.

Where a passenger sues for an injury received while riding with his elbow projecting beyond the car window, the question of whether he was guilty of contributory negligence in so riding should be left to the jury. *Spencer v. Milwaukee & P. du C. R. Co.*, 17 Wis. 487.

Where, in an action against the company to recover damages for an injured arm, there is a conflict of testimony as to how the plaintiff's arm came to be exposed, whether as stated by him, or by the witness for the defense, this is a question of fact to be determined exclusively by the jury. *Pittsburg & C. R. Co. v. Andrews*, 39 Md. 329, 10 Am. Ry. Rep. 485.

Where a passenger was riding on a car with his elbow resting on the window-sill and slightly projecting out of the window, but his hand and wrist were inside, and a stick of cord-wood fell from the pile corded or stacked near the track, through the open window at which he sat, striking in the palm of the hand, or near it, catching in the mouth of the coat-sleeve, and jammed the arm backward and injured it—*held*, that the facts were not such as the court could decide to be negligence in law by allowing a nonsuit, but were for the jury. *Moakler v. Willamette Valley R. Co.*, 41 Am. & Eng. R. Cas. 135, 18 Oreg. 189, 22 Pac. Rep. 948, 6

L. R. A. 656.—QUOTING *Todd v. Old Colony & F. R. R. Co.*, 3 Allen (Mass.) 18; *Indianapolis & C. R. Co. v. Rutherford*, 29 Ind. 83; *Pittsburg & C. R. Co. v. McClurg*, 56 Pa. St. 294.

Plaintiff's arm was injured while resting on an open car window when crossing a bridge. The bridge did not belong to the railroad company, but was so constructed that portions of it touched the sides of passing cars. The case was tried upon the theory that it was the duty of the company to guard its windows by screens, or some other means, whereby passengers could not put their arms beyond the window-sills. *Held*, that the company was liable if a passenger was careful and attentive to his safety; and whether he was or not was a question for the jury. *New Jersey R. Co. v. Kennard*, 21 Pa. St. 203.—DISTINGUISHED IN *Commonwealth v. Fleming*, 130 Pa. St. 138. NOT FOLLOWED IN *Indianapolis & C. R. Co. v. Rutherford*, 29 Ind. 82. OVER- RULED IN *Pittsburg & C. R. Co. v. McClurg*, 56 Pa. St. 294; *Meier v. Pennsylvania R. Co.*, 64 Pa. St. 225. QUOTED AND APPROVED IN *Chicago & A. R. Co. v. Pondrom*, 51 Ill. 333. REVIEWED AND DISAPPROVED IN *Pittsburg & C. R. Co. v. Andrews*, 39 Md. 329.

d. Riding in Baggage-car or Express-car.*

494. In baggage-car, generally.—

(1) *Minnesota*.—A passenger is not guilty of negligence, so as to exonerate the company, by going into and remaining in a baggage-car, where he is injured. *Jacobus v. St. Paul & C. R. Co.*, 20 Minn. 125 (Gil. 110).—FOLLOWED IN *Jones v. Chicago, St. P., M. & O. R. Co.*, 44 Am. & Eng. R. Cas. 357, 43 Minn. 279. REVIEWED IN *Atchison, T. & S. F. R. Co. v. Headland*, 18 Colo. 477.

The fact that a company has a rule prohibiting passengers being in its baggage-cars does not absolve it from the duty of care towards passengers who are in a baggage-car, if it habitually disregards the rule and permits passengers to ride in such cars.

* See also *ante*, 52.

Contributory negligence of passengers riding in baggage, mail, express, and freight cars, see notes, 47 AM. & ENG. R. CAS. 592; 16 L. R. A. 631.

Liability for injury to passengers while riding in dangerous positions, such as in baggage-car, on pilot, etc., see note, 55 AM. REP. 42.

Jones v. Chicago, St. P., M. & O. R. Co., 44 Am. & Eng. R. Cas. 357, 43 Minn. 279, 45 N. W. Rep. 444.—FOLLOWING *Jacobus v. St. Paul & C. R. Co.*, 20 Minn. 125.

(2) *Illinois—Texas*.—A passenger who leaves his seat in a passenger car and goes into the baggage-car, which is not intended for passengers and not safely fitted for their reception, without the invitation or direction of the company, is guilty of a high degree of negligence and cannot recover, unless the company were guilty of wanton or reckless misconduct. *Peoria & R. I. R. Co. v. Lane*, 83 Ill. 448.—EXPLAINING *Galena & C. U. R. Co. v. Yarwood*, 15 Ill. 468.—QUOTED IN *Chicago & N. W. R. Co. v. Rielly*, 40 Ill. App. 416.

A passenger on a train who, instead of occupying a coach provided for passengers, remains, without necessity therefor, in the baggage-car, knowing the fact that he is in more danger there than in a passenger coach, and, thus remaining, receives injury in the wreck of the train, which he would have avoided had he remained in the passenger coach, is guilty of contributory negligence, and cannot recover on account of injuries received under such circumstances. *Houston & T. C. R. Co. v. Clemmons*, 8 Am. & Eng. R. Cas. 396, 55 Tex. 88.—QUOTING *Hickey v. Boston & L. R. Co.*, 14 Allen (Mass.) 431.

495. — in violation of rules.—A passenger riding in a baggage-car, in violation of a known rule of the company, though by consent of the train managers, cannot recover for an injury received, where it appears he would not have been injured if he had been in the proper car. *Pennsylvania R. Co. v. Langdon*, 1 Am. & Eng. R. Cas. 87, 92 Pa. St. 21.—QUOTED IN *Atchison, T. & S. F. R. Co. v. Lindley*, 41 Am. & Eng. R. Cas. 72, 42 Kan. 714, 6 L. R. A. 646, 41 Alb. L. J. 92, 22 Pac. Rep. 703; *Downey v. Chesapeake & O. R. Co.*, 28 W. Va. 732. REVIEWED IN *Florida Southern R. Co. v. Hirst*, 30 Fla. 1; *Baltimore & O. R. Co. v. State*, 41 Am. & Eng. R. Cas. 126, 72 Md. 36.

The fact that a passenger is, when injured, in a baggage-car in which, by the rules of the company, passengers are not permitted to be, is not negligence on his part that will defeat his recovery, unless it contributed to or aggravated the injury. *Jones v. Chicago, St. P., M. & O. R. Co.*, 44 Am. & Eng. R. Cas. 357, 43 Minn. 279, 45 N. W. Rep. 444.

—REVIEWED IN *Florida Southern R. Co. v. Hirst*, 30 Fla. 1.

A passenger entitled to ride on a train, and who was smoking, entered the forward compartment of a combination car, which was arranged for persons smoking. The car was the rear car of the train, and the rear compartment of it was arranged for the carriage of baggage. He found every seat in the smoking compartment occupied, and passed into the baggage compartment. There was a rule of the company requiring those in charge not to permit passengers to ride in baggage-cars, but of this rule the passenger had no knowledge. He and other passengers had frequently before been permitted to ride therein without objection, and the conductor had accepted and punched their tickets while in that compartment, as he did on the occasion in question. By the company's negligence a train proceeding in the same direction, on the same track, ran into the rear of the train on which the passenger rode, and he was thereby injured. *Held*, that by taking his position in the baggage compartment under such circumstances the passenger took the risk of any injury from dangers inherent in the construction or use thereof for the purpose of carrying baggage, but that his conduct, even if it be considered as contributing to an injury received from extraneous causes, such as a collision, could not be deemed to have been negligent, and that a charge to that effect was not erroneous. *New York, L. E. & W. R. Co. v. Ball*, 53 N. J. L. 283, 21 Atl. Rep. 1052.

496. — with the consent of the conductor.—A passenger does not forfeit his right to recover from the railroad for a personal injury by riding in a baggage-car, contrary to the rules of the company, when it is by the implied consent of the conductor, and it does not add to the cause of the injury. *O'Donnell v. Allegheny Valley R. Co.*, 59 Pa. St. 239.—OVERRULED IN *Creed v. Pennsylvania R. Co.*, 86 Pa. St. 139. REVIEWED IN *Kentucky C. R. Co. v. Thomas*, 79 Ky. 160.

Though a passenger may know that it is more dangerous to ride in a baggage-car, yet if he rides there by permission of the conductor he may recover for an injury received through the gross carelessness of the company, though it appears afterward that he would not have been injured had he been in the passenger car, his want of care

not contributing to the injury. *Carroll v. New York & N. H. R. Co.*, 1 *Duer* (N. Y.) 571. —DISTINGUISHING *Munger v. Tonawanda R. Co.*, 4 N. Y. 349. —DISTINGUISHED IN *Higgins v. Hannibal & St. J. R. Co.*, 36 Mo. 413. FOLLOWED IN *Haley v. Earle*, 30 N. Y. 208.

497. — at the time of collision.—

The fact that a person injured was riding in the baggage-car, with the knowledge of the conductor, or that he was riding free, will not preclude him from a recovery for an injury caused by a collision, even though he might not or would not have been injured if he had remained in the passenger car. *Washburn v. Nashville & C. R. Co.*, 3 *Head* (Tenn.) 638. — DISTINGUISHED IN *Way v. Chicago, R. I. & P. R. Co.*, 64 Iowa 48, 52 Am. Rep. 431.

Plaintiff took his seat in a passenger car where there was plenty of room; he afterwards went forward into the baggage-car to smoke and was there at the time of the collision. The evidence tended to show that the baggage-car was a safer place than the passenger car. Defendant claimed that plaintiff in going into the baggage-car was guilty of such negligence as barred a recovery. *Held*, untenable; that if plaintiff's presence in that car, although unauthorized, in no way contributed to the injury, it furnished no defense, and that the question was properly submitted to the jury. *Webster v. Rome, W. & O. R. Co.*, 115 N. Y. 112, 21 N. E. Rep. 725, 23 N. Y. S. R. 778; *affirming* 40 Hun 161.

A passenger who was familiar with the construction of a road and the time of running trains, and knowing that there was but a single track, entered a smoking-car, but soon after leaving the station observed that a train in the opposite direction had not passed at the station as it should have done; and, being fearful of danger, went into the baggage compartment of the car prepared to jump out if the other train was seen approaching. Upon seeing it he jumped just before the trains collided, and was injured. *Held*, that the question of whether he exercised due care was proper for the jury. *Cody v. New York & N. E. R. Co.*, 151 Mass. 462, 7 L. R. A. 843, 24 N. E. Rep. 402.

A passenger, entitled to ride on a train, and who was smoking, entered the forward compartment of a combination car, which was arranged for persons smoking. The car was the rear car of the train, and the rear compartment of it was arranged for

the carriage of baggage. He found every seat in the smoking compartment occupied and passed into the baggage compartment. There was a rule of the railroad company requiring those in charge not to permit passengers to ride in baggage-cars; but of this rule the passenger had no knowledge. He and other passengers had frequently before been permitted to ride therein without objection, and the conductor had accepted and punched their tickets while in that compartment, as he did on the occasion in question. By the company's negligence a train, proceeding in the same direction on the same track, ran into the rear of the train on which the passenger rode, and he was thereby injured. *Held*, that by taking his position in the baggage compartment, under such circumstances, the passenger took the risk of any injury from dangers inherent in the construction or use thereof for the purpose of carrying baggage; but that his conduct, even if it be considered as contributing to an injury received from extraneous causes, such as a collision, could not be deemed to have been negligent, and that a charge to that effect was not erroneous. *New York, L. E. & W. R. Co. v. Ball*, 47 Am. & Eng. R. Cas. 586, 53 N. J. L. 283, 21 Atl. Rep. 1052.

498. In express-car.—Ordinarily it is the duty of a conductor to warn a passenger known to be occupying a dangerous position and to cause him to go into a passenger car, and his failure to do so may be equivalent to the consent of the company that the passenger may occupy that position. If the passenger takes his place in the express car without the knowledge or consent of the conductor, he will not be permitted to excuse himself upon the ground that the conductor ought to have discovered him and ordered him out. *Kentucky C. R. Co. v. Thomas*, 79 Ky. 160. —DISTINGUISHING *Louisville, C. & L. R. Co. v. Mahony*, 7 Bush (Ky.) 235. REVIEWING *O'Donnell v. Allegheny Valley R. Co.*, 59 Pa. St. 239; *Dunn v. Grand Trunk R. Co.*, 58 Me. 187; *Edgerton v. New York & H. R. Co.*, 39 N. Y. 227.

It is contributory negligence for a passenger to ride in an express car in violation of a known rule of the company, even with the permission, connivance, or knowledge of the conductor of the train, or without his protestation against it, when the conductor is cognizant of the rule and of its

infracton, if by such violation of the rule the passenger brings upon himself injury from which he would have escaped, notwithstanding that the negligence of the company produced the accident, had he remained in the passenger car set apart, and affording space for his accommodation. *Florida Southern R. Co. v. Hirst*, 52 Am. & Eng. R. Cas. 409, 30 Fla. 1, 11 So. Rep. 506. —DISTINGUISHING *Dunn v. Grand Trunk R. Co.*, 58 Me. 187. —REVIEWING *Houston & T. C. R. Co. v. Moore*, 49 Tex. 31; *Gulf, C. & S. F. R. Co. v. Campbell*, 76 Tex. 174; *Robertson v. New York & E. R. Co.*, 22 Barb. (N. Y.) 91; *Eaton v. Delaware, L. & W. R. Co.*, 57 N. Y. 382; *Pennsylvania R. Co. v. Langdon*, 92 Pa. St. 21; *Virginia Midland R. Co. v. Roach*, 83 Va. 375; *McVeety v. St. Paul, M. & M. R. Co.*, 45 Minn. 268.

If a company which has a rule prohibiting passengers from riding in the express car, or in other than the passenger cars, habitually permits passengers to ride in the express car it will incur the same responsibility to passengers for injuries received by them through the company's negligence when riding in the express car as if they were in the passenger car. *Florida Southern R. Co. v. Hirst*, 52 Am. & Eng. R. Cas. 409, 30 Fla. 1, 11 So. Rep. 506. —APPROVING *Houston & T. C. R. Co. v. Moore*, 49 Tex. 31. —REVIEWING *Prince v. International & G. N. R. Co.*, 64 Tex. 144; *Jones v. Chicago, St. P., M. & O. R. Co.*, 43 Minn. 279; *Waterbury v. New York C. & H. R. R. Co.*, 21 Blatchf. (U. S.) 314.

Though a passenger who, riding in an express car, receives an injury, knows at the time that there is a reasonable rule of the company prohibiting his riding there, cannot invoke the mere delinquency of the conductor in enforcing the rule as a bar to the company's claiming the protection of the rule, still a company may by its conduct abandon the rule or preclude itself from the protection thereunder. It may, by its conduct, have held out its employés in control of its trains as authorized, notwithstanding such a rule, to consent to plaintiff's riding in an express car; or its employés may have been accustomed to allow passengers to ride in the express car so generally and constantly that the officers of the company must be held to have known of and acquiesced in the violation of the rule; or there may have been such continued and habitual disregard of the rule by the em-

ployés as must have reasonably produced the belief that the company had practically abandoned its rule. There must be such conduct as in effect establishes the concurrence of the company in the disregard of the regulation. *Florida Southern R. Co. v. Hirst*, 52 Am. & Eng. R. Cas. 409, 30 Fla. 1, 11 So. Rep. 506.

Plaintiff went into the express car. While there, owing to the negligence of defendants' servants, the train was run into and plaintiff's arm was broken. The car in which he was, was not intended for passengers, but it appeared that they frequently went in there to smoke, and that the conductor had passed through it while plaintiff was there without making any objection. It was proved that notice that passengers were not allowed to ride upon the express car was usually up on the inside of each door of the passenger cars and on the door of the baggage-car, but not distinctly shown that it was there on that day. The jury found that the plaintiff was wrongfully in the car, but that he was not told where to go when he bought his ticket, nor did the conductor order him out; and so that he was not to blame. Held, that assuming plaintiff was aware of the notices, and nevertheless went into the baggage-car, defendants were not thereby excused under all circumstances; and that the jury were warranted here in finding that plaintiff did not so contribute as to prevent him from recovering, the collision having resulted entirely from defendants' gross negligence. *Watson v. Northern R. Co.*, 24 U. C. Q. B. 98.—REVIEWED IN *Dunn v. Grand Trunk R. Co.*, 58 Me. 187.

IV. CONNECTING CARRIERS.*

1. *Respective Duties and Liabilities.*

a. In General.

499. Liability of one carrier for injury on line of another.—Where

* See also CONNECTING LINES.

Rights of passengers traveling on through tickets, see note, 35 AM. REP. 708.

Right to stop over at termini of connecting lines on coupon tickets, see note, 21 AM. & ENG. R. CAS. 282.

Duty and liability of the several companies to persons traveling on through-coupon tickets, see 26 AM. & ENG. R. CAS. 263, *abstr.*

Through tickets regarded as separate contract over each road, see note, 2 L. R. A. 186.

Connecting carriers, liability of, in the carriage of passengers, see note, 37 AM. & ENG. R. CAS. 32.

there are several connecting lines, and plaintiff seeks to recover of one for an injury received upon another of the lines, he must establish a contract with the line he endeavors to hold, or that it had some interest in or control over the transportation of passengers by the line in default. *Kerrigan v. Southern Pac. R. Co.*, 41 Am. & Eng. R. Cas. 28, 81 Cal. 248, 22 Pac. Rep. 677.

The sale of a through ticket over two or more connecting lines of railroad is not evidence of a joint contract between such roads whereby one should become responsible for the default of another. *Felder v. Columbia & G. R. Co.*, 27 Am. & Eng. R. Cas. 264, 21 So. Car. 35, 53 Am. Rep. 656.

500. Joint and several liability.—Where a party contracts for transportation over a route composed of several railroads, for which he pays an entire sum and receives a through ticket or receipt, the contract is entire. If no partnership in fact exists between the roads he may treat the contract as entire or several, so far as the other parties are concerned. *Check v. Little Miami R. Co.*, 2 Disney (Ohio) 237.—REVIEWING *Hart v. Rensselaer & S. R. Co.*, 8 N. Y. 37.

If the agent at the starting point of a passenger, who sells him a through ticket, fails to disclose his principals, and contracts on their behalf, whether jointly or severally, he, or the company represented by him, may be treated as sole principal; but if the contract be in fact entire, and he is in fact dealing for others, who receive the benefits of the contract, the passenger may look to the real principals, and subject all who are interested in the joint contract. *Check v. Little Miami R. Co.*, 2 Disney (Ohio) 237.

b. The Initial Carrier.

501. Duty to carry person seeking transportation.—If a company has the power to contract for carriage of passengers beyond the terminus of its own line, and holds itself out to the public as a common carrier to a point beyond its own line, ready to contract and actually contracting for such carriage, it will be bound to carry any passenger offering himself to be carried, in common with others. *Wheeler v. San Francisco & A. R. Co.*, 31 Cal. 46.—DISTINGUISHED IN *Pittsburgh, C. & St. L. R. Co. v. Morton*, 61 Ind. 539.

While a company cannot be compelled to
2 D. R. D.—33.

transport beyond its *termini*, it is well settled that it may lawfully contract to carry passengers and property, over its own and other lines, to a destination beyond its route, and when such a contract is made it assumes all the obligations of a carrier over the connecting lines as well as its own. *Atchison, T. & S. F. R. Co. v. Roach*, 27 Am. & Eng. R. Cas. 257, 35 Kan. 740, 12 Pac. Rep. 93.

502. Liability for failure of connecting line to receive and carry.—A company selling a ticket over roads extending beyond its terminus is liable for the failure of the connecting carrier to transport the passenger, when the cause of the failure was the negligence of the agent of the initial carrier in not properly stamping the through ticket. *Griffin v. Utica & B. R. Co.*, 41 Hun (N. Y.) 448, 3 N. Y. S. R. 155.

503. Non-liability beyond its own line.—A company selling a through ticket is not liable for an injury to a passenger on a connecting line simply because an arrangement exists between the lines by which it is authorized to sell a through ticket, which authorizes the passenger to ride over the different roads without a change of cars, and because it accepts its share of the ticket money. Neither will the fact that the ticket sold is composed of coupons marked "not good if detached," and each bearing the name of the selling road, make it so liable. *Hartan v. Eastern R. Co.*, 114 Mass. 44.—DISTINGUISHING *Hill Mfg. Co. v. Boston & L. R. Co.*, 104 Mass. 122.

No action will lie in favor of a passenger for injuries caused by the negligence of a connecting line, against the original company which sold him the ticket for transportation. Ordinarily the first company is considered the agent merely of the latter. *Nashville & C. R. Co. v. Sprayberry*, 8 Baxt. (Tenn.) 341.

While the company selling a ticket may, by contract either express or implied, bind itself to be responsible for the entire route, the sale of the ticket merely does not establish this, nor is the *onus* upon the company of proving that it expressly limited its liability. If a partnership in fact appear as existing between the lines, the case will be different. *Nashville & C. R. Co. v. Sprayberry*, 8 Baxt. (Tenn.) 341.

If one of several companies composing a public line of travel, by agreement with the

others, receive fare and give a "through ticket" over the entire route, the company selling the ticket shall be regarded as the agent of the other companies when the ticket itself imports this and nothing else appears. *Nashville & C. R. Co. v. Sprayberry*, 9 Heisk. (Tenn.) 852, 20 Am. Ry. Rep. 55.—DISTINGUISHED IN *Louisville & N. R. Co. v. Weaver*, 16 Am. & Eng. R. Cas. 218, 9 Lea (Tenn.) 38.

The company selling the ticket may, by contract either expressed or to be fairly implied from its acts, bind itself to be responsible for the entire route; but this will not be held conclusively established from the sale of the ticket alone, nor throw upon the defendant the *onus* of proving that it expressly limited its liability. Otherwise if a partnership in fact appear. *Nashville & C. R. Co. v. Sprayberry*, 9 Heisk. (Tenn.) 852, 20 Am. Ry. Rep. 55.

504. — on connecting stage line.

—A railroad company advertised their terminus to be P., where stages would connect for C. They sold plaintiff a ticket through to C., and he was injured in the stage between P. and C. Defendants did not own or share in the profits of the stage line. Held, that they were not liable. (Two judges dissenting.) *Hood v. New York & N. H. R. Co.*, 22 Conn. 1.—APPROVED IN *Coates v. United States Exp. Co.*, 45 Mo. 238. FOLLOWED IN *Converse v. Norwich & N. Y. Transp. Co.*, 33 Conn. 166. NOT FOLLOWED IN *Cary v. Cleveland & T. R. Co.*, 29 Barb. (N. Y.) 35; *Nashua Lock Co. v. Worcester & N. R. Co.*, 48 N. H. 339.

The defendants in such a case are not estopped from showing their want of power to make a special contract to safely carry the plaintiff from their initial point through to C. *Hood v. New York & N. H. R. Co.*, 22 Conn. 502.—DISAPPROVED IN *Illinois C. R. Co. v. Copeland*, 24 Ill. 332; *Knapp v. United States & C. Exp. Co.*, 55 N. H. 348. FOLLOWED IN *Naugatuck R. Co. v. Waterbury Button Co.*, 24 Conn. 468. NOT FOLLOWED IN *Perkins v. Portland, S. & P. R. Co.*, 47 Me. 573. REVIEWED IN *Elmore v. Naugatuck R. Co.*, 23 Conn. 457.

505. Power to make through contract.*—A company as a carrier may con-

* Through contract for passenger transportation over connecting line, see note, 18 Am. & Eng. R. Cas. 345.

Effect of selling ticket to destination beyond initial carrier's line, see note, 42 Am. Rep. 664.

Liability of company selling through ticket

tract to carry passengers and freight beyond their own routes. *Wheeler v. San Francisco & A. R. Co.*, 31 Cal. 46.—QUOTING *Perkins v. Portland, S. & P. R. Co.*, 47 Me. 573. REVIEWING *Crouch v. London & N. W. R. Co.*, 25 Eng. L. & Eq. 287.—*Houston & T. C. R. Co. v. Hill*, 21 Am. & Eng. R. Cas. 263, 63 Tex. 381.

No private instructions given by the company to a general passenger agent, and not brought to the knowledge of the party contracting with him, as to the matter within the scope of his authority, would affect the right of such party to have the contract carried out and performed. *Houston & T. C. R. Co. v. Hill*, 21 Am. & Eng. R. Cas. 263, 63 Tex. 381.

A part owner of one of several lines for the transportation of passengers, running in connection over different portions of a route of travel, may contract as principal for the conveyance of a passenger over the whole route, and such contract may be established by the circumstances, notwithstanding the passenger receive tickets for the different lines signed by their separate agents. *Quimby v. Vanderbilt*, 17 N. Y. 306.—FOLLOWING *Hart v. Rensselaer & S. R. Co.*, 8 N. Y. 37.—APPLIED IN *Williams v. Vanderbilt*, 28 N. Y. 217, 4 Abb. App. Dec. 521, 29 Barb. 491. APPROVED IN *Coates v. United States Exp. Co.*, 45 Mo. 238. DISTINGUISHED IN *Fonseca v. Cunard Steamship Co.*, 153 Mass. 553; *Milnor v. New York & N. H. R. Co.*, 53 N. Y. 363. FOLLOWED IN *Buffett v. Troy & B. R. Co.*, 40 N. Y. 168. QUOTED IN *United States Exp. Co. v. Rush*, 24 Ind. 403; *Washington v. Raleigh & G. R. Co.*, 37 Am. & Eng. R. Cas. 25, 101 N. Car. 239, 1 L. R. A. 830, 7 S. E. Rep. 789. RECONCILED IN *Barker v. Coffin*, 31 Barb. (N. Y.) 556.

506. — independently of statutory authority.—Independent of any statute directly conferring the power, railroads have the inherent right, under their charters, to contract to carry persons, baggage, and goods beyond the *termini* of their own lines. *Illinois C. R. Co. v. Copeland*, 24 Ill. 332.—DISAPPROVING *Hood v. New York & N. H. R. Co.*, 22 Conn. 510, 24 Conn. 482.

507. — independently of authority expressly given in charter.—Although the power of a railroad company

for injury to passenger on connecting line, see note, 1 Am. St. Rep. 200.

to make a contract for the transportation of persons or property beyond their own lines is not expressly granted by the act of incorporation, it may be conferred by implication, as necessary to the proper and profitable exercise of the powers specially enumerated in the charter. *Perkins v. Portland, S. & P. R. Co.*, 47 Me. 573.—FOLLOWING *Noyes v. Rutland & B. R. Co.*, 27 Vt. 110. NOT FOLLOWING *Hood v. New York & N. H. R. Co.*, 22 Conn. 502.

And this applies to the transportation of passengers by carriers beyond their own lines, and beyond the limits of their respective states. *Wyman v. Chicago & A. R. Co.*, 4 Mo. App. 35.

A company chartered in California, with the usual powers of a common carrier, has the power to make valid contracts to carry passengers beyond the limit of its road, whether it be by land or water, so as to become liable for injuries to passengers through the negligence of independent connecting carriers. *Wheeler v. San Francisco & A. R. Co.*, 31 Cal. 46.

508. Contractual liability beyond its own line, generally.—(1) *United States*.—A company that contracts to carry passengers and their baggage beyond the terminus of their own road is liable for losses occurring on any part of the route. *Weed v. Saratoga & S. R. Co.*, 19 Wend. (N. Y.) 534.—DISTINGUISHED IN *Van Santvoord v. St. John*, 6 Hill (N. Y.) 157; *Reed v. United States Exp. Co.*, 48 N. Y. 462. QUOTED IN *Nashua Lock Co. v. Worcester & N. R. Co.*, 48 N. H. 339; *Cary v. Cleveland & T. R. Co.*, 29 Barb. (N. Y.) 35. REVIEWED IN *Gray v. Jackson*, 51 N. H. 9; *Dillon v. New York & E. R. Co.*, 1 Hilt. (N. Y.) 231; *Green v. New York C. R. Co.*, 12 Abb. Pr. N. S. (N. Y.) 479; *Farmers' & M. Bank v. Champlain Transp. Co.*, 23 Vt. 186.

A company may be thus bound, without any actual agreement with connecting lines, if, by their agents, they hold themselves out to be common carriers to a place beyond the limits of their own road. *Perkins v. Portland, S. & P. R. Co.*, 47 Me. 573.

A company may so issue tickets to places beyond its own line, and so control the transportation of its passengers, as to be held to have contracted for the entire distance, and in consequence be answerable in damages for negligence occurring on any one of the connecting lines. *Kerrigan v.*

Southern Pac. R. Co., 41 Am. & Eng. R. Cas. 28, 81 Cal. 248, 22 Pac. Rep. 677.

A carrier who enters into a special contract to transport passengers to a point beyond its own line, which can only be reached by another line, thereby constitutes the latter its agent in the performance of the contract, and will be held liable for any damages resulting from the negligence of such agent. *Washington v. Raleigh & G. R. Co.*, 37 Am. & Eng. R. Cas. 25, 101 N. Car. 239, 1 L. R. A. 830, 7 S. E. Rep. 789.—QUOTING *Quimby v. Vanderbilt*, 17 N. Y. 306.

(2) *England*.—The contract with a passenger on giving him a ticket between two places is the same, whether the journey is entirely over the company's own line or partly over the line of another company, and whether the passage over the other line is under an agreement to share profits or simply under running powers. *Thomas v. Rhymney R. Co.*, L. R. 6 Q. B. 266, 40 L. J. Q. B. 89, 19 W. R. 477, 24 L. T. 145. *Thomas v. Rhymney R. Co.*, L. R. 5 Q. B. 226, 39 L. J. Q. B. 226, 22 L. T. 297, 18 W. R. 668.—DISTINGUISHED IN *Wright v. Midland R. Co.*, L. R. 8 Ex. 137, 42 L. J. Ex. 89, 29 L. T. 436, 21 W. R. 460.

Where a company undertakes to carry a passenger to a place on another company's line, and the passenger is injured on the latter company's line by reason of its negligence, he has a right of action against the company from whom he bought the ticket. *Great Western R. Co. v. Blake*, 7 H. & N. 987, 8 Jur. N. S. 1013, 31 L. J. Ex. 346, 10 W. R. 388, 7 L. T. 94.—DISTINGUISHED IN *Wright v. Midland R. Co.*, L. R. 8 Ex. 137, 42 L. J. Ex. 89, 29 L. T. 436, 21 W. R. 460. FOLLOWED IN *Buxton v. North Eastern R. Co.*, L. R. 3 Q. B. 549, 37 L. J. Q. B. 258, 18 L. T. 795, 16 W. R. 1124, 9 B. & S. 824; *Thomas v. Rhymney R. Co.*, L. R. 6 Q. B. 266, 40 L. J. Q. B. 89, 24 L. T. 145, 19 W. R. 477.

509. Under Nebraska Comp. St. ch. 72, art. 1, sec. 3.—Plaintiff applied to an agent in the ticket office at the station at W., on defendant's road, for a ticket to E., on the Union Pac. R. R., a number of miles east of the eastern terminus of defendant's road, which was on the line of the Union Pac. R. R., and by such agent was furnished a single local ticket from W. to E. By direction of the agents in charge of the train she took her seat in the car, in which she

was carried to the junction of the two roads and on to E. without change. At E. plaintiff was injured while alighting from the train, the injury being caused by the alleged negligence of those in charge of the train. *Held*, that in such case the defendant would be liable under the provisions of § 3, art. 1, ch. 72, Comp. St., for the damages sustained. *Chollette v. Omaha & R. V. R. Co.*, 37 *Am. & Eng. R. Cas.* 16, 26 *Neb.* 159, 41 *N. W. Rep.* 1106.

510. Although contract was ultra vires.—Two companies, one chartered to build a road in Indiana and the other in Michigan, united their business and operated a third road connecting the two through Illinois. Plaintiff was injured on the Illinois road. The two companies defended on the ground that the contract to carry through Illinois was *ultra vires*. *Held*, having received the consideration from a passenger who was ignorant of the illegality of the contract, the two companies were jointly liable. *Bissell v. Michigan S. & N. I. R. Co.*, 22 *N. Y.* 258.—APPROVING Mayor of Norwich *v. Norfolk R. Co.*, 30 *Eng. L. & Eq.* 120. EXPLAINING *Coleman v. Eastern Counties R. Co.*, 10 *Beav.* 1.—APPLIED IN *Woodruff v. Erie R. Co.*, 16 *Am. & Eng. R. Cas.* 501, 93 *N. Y.* 609. APPROVED IN *Central R. & B. Co. v. Smith*, 76 *Ala.* 572. DISTINGUISHED IN *Way v. Chicago, R. I. & P. R. Co.*, 64 *Iowa* 48, 52 *Am. Rep.* 431; *St. Louis v. St. Louis Gaslight Co.*, 5 *Mo. App.* 484; *Joslyn v. Dow*, 19 *Hun (N. Y.)* 494. FOLLOWED IN *Stewart v. Erie & W. Transp. Co.*, 17 *Minn.* 372 (*Gil.* 348). QUOTED IN *Union Bridge Co. v. Troy & L. R. Co.*, 7 *Lans. (N. Y.)* 240. REVIEWED IN *Camden & A. R. Co. v. May's Landing & E. H. C. R. Co.*, 48 *N. J. L.* 530.

Defendant company ran a coach between its station and a village a mile away for the accommodation of passengers. The driver was furnished with tickets for sale on the railroad. Plaintiff was injured by the carelessness of the driver between the village and station, before he had purchased a ticket. The company attempted to evade liability on the ground that a contract to transport passengers by the coach was *ultra vires*. *Held*, that whether it was authorized to make such a contract or not, it was liable for negligence in the manner of carrying it out. *Buffett v. Troy & B. R. Co.*, 40 *N. Y.* 168; *affirming* 36 *Barb.* 420.—FOLLOWING *Hart v. Rensselaer & S. R. Co.*, 8

N. Y. 37; *Quimby v. Vanderbilt*, 17 *N. Y.* 306.

511. Effect of stipulations, etc., limiting liability to its own line.*—A company which sells and issues tickets to passengers over its own lines of road and lines of road of other companies (known as through tickets) is liable for the sure and safe transportation of such passengers to the point of destination, notwithstanding there may be indorsed or printed on the tickets so sold and issued a notice that the company issuing and selling such tickets shall not be liable except as to its own line of road. *Central R. Co. v. Combs*, 18 *Am. & Eng. R. Cas.* 298, 70 *Ga.* 533, 48 *Am. Rep.* 582.

Plaintiff purchased from the defendant a first-class railroad ticket, entitling her to ride over defendant's road and certain connecting lines. The ticket contained a provision "that in selling this ticket the H. E. & W. T. R. Co. acts only as agent, and is not responsible beyond its own line." After leaving defendant's road and while on a connecting line plaintiff was expelled from a first-class carriage and compelled to ride second-class. She brought action against the company selling her the ticket. *Held*, that the condition in the ticket exempted it from responsibility. *Harris v. Howe*, 39 *Am. & Eng. R. Cas.* 498, 74 *Tex.* 534, 12 *W. Rep.* 224.—APPROVING *Pennsylvania C. R. Co. v. Schwarzenberger*, 45 *Pa. St.* 208.—FOLLOWED IN *McCarn v. International & G. N. R. Co.*, 84 *Tex.* 352; *International & G. N. R. Co. v. Campbell*, 1 *Tex. Civ. App.* 509.

c. The Final or Intermediate Carrier.

512. Generally.—If a company unites with others to form a continuous route, the last road is liable to a passenger traveling on a through ticket for an injury received on its line, whether it results through the negligence of its immediate employes or through the negligence of another company with whom it has contracted for motive power. *Keep v. Indianapolis & St. L. R. Co.*, 3 *McCrary (U. S.)* 208, 9 *Fed. Rep.* 625.

A company receiving upon its track the cars of another company, placing them under the control of its agents and servants,

* See also *ante*, 330-341.

and drawing them by its locomotive over its own road to their place of destination, assumes towards the passengers coming upon its road in such cars the relation of common carriers of passengers and all the liabilities incident to that relation. *Schopman v. Boston & W. R. Corp.*, 9 *Cush. (Mass.)* 24.

If the deceased was lawfully on defendant's train and it had been operated by servants under its control, the defendant would be liable for an injury occasioned by the negligence of such servants; and this, too, irrespective of the company from which the ticket was purchased. *Smith v. St. Louis & S. F. R. Co.*, 29 *Am. & Eng. R. Cas.* 106, 85 *Mo.* 418, 55 *Am. Rep.* 380.—REVIEWING *Kelly v. Mayor of N. Y.*, 11 *N. Y.* 432; *Durst v. Burton*, 47 *N. Y.* 167.

513. Duty to honor ticket of preceding carrier.—The obligation of one carrier to honor tickets over its road sold by a connecting carrier is founded altogether upon arrangement or contract between the companies. In the absence of such arrangement there is no obligation on the part of either company to honor tickets issued by the other. *Oregon S. L. & U. N. R. Co. v. Northern Pac. R. Co.*, 51 *Am. & Eng. R. Cas.* 145, 51 *Fed. Rep.* 465.

514. Duty to give reasonable time for transfer.—Where two companies reaching a common point sell through tickets, and the train on one road leaves upon the arrival of the train on the other, it is their duty to give a reasonable time for the transfer of passengers and baggage. *Johnson v. West Chester & P. R. Co.*, 70 *Pa. St.* 357.

Where a passenger holding a through ticket had to change cars at a station and was injured in stepping from one train to the other, by reason of the outgoing train being already in motion, it was for the jury to say whether the danger of boarding the moving train was so apparent as to make it the duty of the passenger to desist. *Johnson v. West Chester & P. R. Co.*, 70 *Pa. St.* 357.—DISTINGUISHED IN *Denver, S. P. & P. R. Co. v. Pickard*, 18 *Am. & Eng. R. Cas.* 284, 8 *Colo.* 163. REVIEWED IN *Delaware & H. Canal Co. v. Webster*, 27 *Am. & Eng. R. Cas.* 160, 6 *Atl. Rep.* 841; *Carr v. Eel River & E. R. Co.*, 98 *Cal.* 366.

515. Liability while car is standing on side-track.—A passenger who has been carried on the line of a railway in a passenger car which that company switches

off upon the line of a connecting railway, sustains the relation of passenger to such connecting company during the time the car is stationary and he remains in it, if, according to the usual course of business, that company is accustomed to receive, at once, cars so delivered to it, couple them into its trains, and carry them over its own line. This is true whether the passenger at the time of being injured has procured a ticket or paid his fare for a passage over the connecting line or not. *Chattanooga, R. & C. R. Co. v. Huggins*, 52 *Am. & Eng. R. Cas.* 473, 89 *Ga.* 494, 15 *S. E. Rep.* 848.

516. Delay caused by intermediate carrier.—The line causing delay of a passenger upon a limited through ticket is liable to the passenger for damages resulting from such delay. *Gulf, C. & S. F. R. Co. v. Looney*, 52 *Am. & Eng. R. Cas.* 197, 85 *Tex.* 158, 19 *S. W. Rep.* 1039.

Plaintiff bought a railway ticket at Birmingham, Ala., for passage to Cameron, Tex., on the several connecting lines between the points. The ticket was limited as to time, and the limit had expired from fault of one of the lines before he reached the line of the defendant. Passage was refused by conductor on defendant's train on the ticket because it had expired before it was presented. Suit for damages for the refusal, etc. The petition alleged that the ticket was a joint undertaking on the part of all the lines of railway between Birmingham and Cameron. *Held*, upon such allegations, that the defendant would be responsible for the default of the connecting line causing the delay, at least to the extent of honoring the ticket when presented. *Gulf, C. & S. F. R. Co. v. Looney*, 52 *Am. & Eng. R. Cas.* 197, 85 *Tex.* 158, 19 *S. W. Rep.* 1039.—DISTINGUISHING *Auerbach v. New York C. & H. R. R. Co.*, 89 *N. Y.* 281.

2. Interpretation and Effect of Agreements.

517. Employment of common agents.—Where two connecting companies use a station jointly, or hire one person to discharge the duties of ticket agent for both, and such person sells a ticket over one of the roads, the other company is not responsible for the negligence of the connecting road. *Atchison, T. & S. F. R. Co. v. Cochran*, 41 *Am. & Eng. R. Cas.* 48, 43 *Kan.* 225, 7 *L. R. A.* 414, 23 *Pac. Rep.* 151.

By an agreement between the defendant and another company the defendant was to appoint an agent whose duty it was to receive and collect freight, to sell all passengers tickets, and to receive the revenues accruing from the joint operations of the two companies. *Held*, that by this agreement there was no partition of the agency as to the sales of through tickets over both roads, and that the defendant was responsible for the manner in which this agent discharged his duty in the sale of such tickets. *Northern C. R. Co. v. Scholl*, 16 Md. 331.

By the appointment of a common agent to receive the entire consideration and issue through tickets and checks over connecting lines, which they recognize and assume, the several companies are made aware that the contract is treated by the passenger as entire, and not several. *Check v. Little Miami R. Co.*, 2 *Disney (Ohio)* 237.

518. Arrangements not creating a partnership.—Where three companies constitute a through line, and the fare received for through tickets is accounted for by the first company to the other companies, according to a tariff established by each company for itself, and there is no division of profits or losses, such an arrangement is not a partnership involving joint liability. *Croft v. Baltimore & O. R. Co.*, 1 *MacArth. (D. C.)* 492.

The sale of a through ticket over the route formed by the connecting lines of several companies and the checking of baggage to the end of the route, without other evidence of the relations between the companies or the basis upon which through business was done by them, fails to show such a community of interest as would make them partners *inter sese*, or as to third persons; nor will such action make the last carrier liable for the negligence of the contracting carrier, or of any other carrier in the combination. *Atchison, T. & S. F. R. Co. v. Roach*, 27 *Am. & Eng. R. Cas.* 257, 35 *Kan.* 740, 12 *Pac. Rep.* 93.—DISTINGUISHING *Hart v. Rensselaer & S. R. Co.*, 8 *N. Y.* 37; *Texas & P. R. Co. v. Fort*, 9 *Am. & Eng. R. Cas.* 392, 1 *Tex. App. (Civ. Cas.)* 722; *Harp v. The Grand Era*, 1 *Woods (U. S.)* 184; *Texas & P. R. Co. v. Ferguson*, 9 *Am. & Eng. R. Cas.* 395, 1 *Tex. App. (Civ. Cas.)* 724.

Several companies entered into an arrangement for the sale of through coupon

tickets over the several roads, or for intermediate places. Plaintiff bought a ticket at one end of the through route from an agent who was appointed by each company separately, under an arrangement between the companies providing, among other things, for a division of the ticket money among the respective companies, in proper proportion, once a month. *Held*, that such arrangement did not constitute the several companies partners, so as to make the initial carrier liable for a loss of baggage occurring on the line of the second carrier. *Straiton v. New York & N. H. R. Co.*, 2 *E. D. Smith (N. Y.)* 184.—APPLIED IN *Louisville & N. R. Co. v. Weaver*, 16 *Am. & Eng. R. Cas.* 218, 9 *Lea (Tenn.)* 38.

519. Constituting one carrier the agent of the other.—Where a company trains, by an arrangement with another company, regularly enter and depart from the depot of the latter, and it intrusts to the latter the business of handling and checking the baggage of its passengers, and furnishes its own checks therefor, the latter company must be deemed the agent of the first-named company in respect to such business. *Ahlbeck v. St. Paul, M. & M. R. Co.*, 39 *Minn.* 424, 40 *N. W. Rep.* 364.—REVIEWED IN *Dean v. St. Paul Union Depot Co.*, 39 *Am. & Eng. R. Cas.* 360, 41 *Minn.* 360, 5 *L. R. A.* 442, 43 *N. W. Rep.* 54.—And see also *Nashville & C. R. Co. v. Sprayberry*, 8 *Baxt. (Tenn.)* 341, 9 *Heisk. (Tenn.)* 852, 20 *Am. Ry. Rep.* 55. *Washington v. Raleigh & G. R. Co.*, 37 *Am. & Eng. R. Cas.* 25, 101 *N. Car.* 239, 1 *L. R. A.* 830, 7 *S. E. Rep.* 789.

V. ENGLISH ACTS.

520. Carriers' Act.—Where a carrier contracts to carry a passenger and part of the journey is to be performed by sea, it is entitled to the protection of Carriers' Act, 11 Geo. IV. & 1 Wm. IV. c. 68. *Le Conteur v. London & S. W. R. Co.*, 6 *B. & S.* 961, *L. R.* 1 *Q. B.* 54, 35 *L. J. Q. B.* 40, 12 *Jur. N. S.* 266, 14 *W. R.* 80, 13 *L. T.* 325.—COMMENTED ON IN *Bergheim v. Great Eastern R. Co.*, 26 *W. R.* 301, *L. R.* 3 *C. P. D.* 221, 47 *L. J. C. P.* 318, 38 *L. T.* 160.

521. Cheap Trains Act.—The Cheap Trains Act 1883 empowers the board of trade, if it shall be of opinion that proper and sufficient workmen's trains are not provided for workmen going to and returning from their work, at such fares and at such

times between six o'clock in the evening and eight o'clock in the morning as appear to the board to be reasonable, to make an inquiry, or, if required by the railway company, to refer the matter to the railway commissioners for their decision. *In re Inquiry under Cheap Trains Act 1883*, 6 Ky. & C. T. Cas. 19.

522. Railway and Canal Traffic Act.*—The court has jurisdiction, under §§ 1, 2, 3 of the Railway and Canal Traffic Act 1854, to require a company to resume passenger traffic on a part of its line on which passenger traffic has been discontinued. *Winsford Local Board v. Cheshire Lines Committee*, 44 Am. & Eng. R. Cas. 274, 24 Q. B. D. 456, 7 Ky. & C. T. Cas. 72.—*REVIEWING South Eastern R. Co. v. Railway Com'rs*, 5 Q. B. D. 217, 6 Q. B. D. 586; *Dickson v. Great Northern R. Co.*, 18 Q. B. D. 176.

A company discontinued the carriage of passenger traffic over a branch line, a part of their railway system, alleging that they were unable to work such traffic otherwise than at a loss. *Held*, that it being proved that there was a substantial passenger traffic to be carried, the railway company were bound to afford facilities which should be reasonable under all the circumstances for the conveyance of that traffic. *Winsford Local Board v. Cheshire Lines Committee*, 44 Am. & Eng. R. Cas. 274, 24 Q. B. D. 456, 7 Ky. & C. T. Cas. 72.

A train is or is not within the Railways Regulation Act 1868, § 22 (which requires companies to provide communication between passengers and guard when a train runs twenty miles without stopping), according to the actual instructions as to stopping given to the company's servants. And therefore, where the cause of an accident to a train not provided with such means of communication was the breaking of a wheel-tire (without any negligence on the part of the company or its servants), and several minutes elapsed between the first shock felt by the passengers and the actual disaster, it was properly left to the jury to say, first, what was the effect of the company's timetables, taken together with the special instruction given to the servants, with regard

to the train in question; and, secondly, whether the absence of the statutory precaution was conducive to the accident. *Blamires v. Lancashire & Y. R. Co.*, 42 L. J. Ex. 182, L. R. 8 Ex. 283.

In cases where, having regard to the clause in the special acts, an exchange of passenger traffic between two companies, free to exchange at any junction between their lines, ought to be made at the junction which is most convenient for the public, the facts that one route is shorter than another, or one, by reason of curves or gradients, better adapted for fast traffic, or that at one junction there is a joint station while at another there are two separate stations, are all matters affecting the public convenience as to the place of interchange. *Great North of Scotland R. Co. v. Highland R. Co.*, 5 Ky. & C. T. Cas. 103.

The applicants had running powers over defendants' railway, and under statutory powers had altered and reconstructed the signals thereon in such a way as was necessary to enable defendants' railway to be worked on the block system. Upon complaint that defendants did not, according to their powers, afford all due and reasonable facilities for the receiving, forwarding, and delivering of passenger traffic upon their railway, in that they refused to work the signals which the applicants had reconstructed in such a manner as to enable the defendants' railway to be worked on the block system—*held*, that the working of such signals on defendants' railway was, under section 2 of the Railway and Canal Traffic Act 1854, a due and reasonable facility which defendants should afford for the receiving, forwarding, and delivering of passenger traffic, and that defendants, by refusing or omitting to work the signals, offered obstructions to the public desirous of using the applicants' and defendants' railway as a continuous line of communication. *Great Western R. Co. v. Bristol Port R. & P. Co.*, 5 Ky. & C. T. Cas. 94.

Upon a complaint that two companies had not established a proper through service via a junction, for traffic requiring to pass over a portion of each company's railway, and had not availed themselves of the junction for the interchange of passenger and goods traffic, and had not afforded all due and reasonable facilities for the through transmission of all descriptions of traffic between the two companies—*held*, under the cir-

* Force in America of English decisions as to the English Railway and Canal Traffic Act, see note, 29 AM. & ENG. R. CAS. 59.

"Fair interests" of railway company, see note, 29 AM. & ENG. R. CAS. 60.

cumstances of the case, taken in connection with the powers and duties of the companies under their private acts, that (1) the companies must afford to the public as reasonable facilities a train service of eight trains daily each way, to connect the two railways as a continuous line; (2) through booking between the stations on the two railways; (3) but that through carriages need not be provided as long as passengers could exchange from one train to another at the same station; (4) that the companies must interchange goods at the junction. *Toomer v. London, C. & D. R. Co.*, 3 Ry. & C. T. Cas. 79. *James v. Taff Vale R. Co.*, 3 Ry. & C. T. Cas. 540.

Two companies ran trains to A., and each had a station there. The stations were less than a mile apart and were connected by a line of railway belonging to one of such companies. Upon complaint that no passengers were conveyed on the railway between the two stations, although there was a continuous line, the court made an order enjoining both companies to afford at A. all due and reasonable facilities for receiving and forwarding by the railway of the one company all the passenger traffic arriving by the other, without any unreasonable delay, and so that no obstruction might be offered to the public desirous of using the said railways as a continuous line of communication between towns and places situated on the railways of the two companies respectively. *Maidstone Town Council v. South Eastern R. Co.*, 7 Ry. & C. T. Cas. 99.

The court further ordered, under § 14 of the Railway and Canal Traffic Act 1888, the two railway companies to make mutual arrangements for the purpose of carrying such order into effect, and further to submit to the court for approval a scheme for carrying such order into effect. *Maidstone Town Council v. South Eastern R. Co.*, 7 Ry. & C. T. Cas. 99.

Publication of by-laws under section 110 of the Railways Clauses Act 1845, see *Motteram v. Eastern Counties R. Co.*, 7 C. B. N. S. 58, 6 Jur. N. S. 583, 29 L. J. M. C. 59.

VI. LEASES, RUNNING POWERS, ETC.*

523. Liability of carrier owning road.—Where a company grants the use of its track to another company, the former is

liable for an injury to one of its passengers caused by the manner of running trains on the track by such other company. *Illinois C. R. Co. v. Barron*, 5 Wall. (U. S.) 90.—*Approving Nelson v. Vermont & C. R. Co.*, 26 Vt. 717; *McElroy v. Nashua & L. R. Corp.*, 4 Cush. (Mass.) 400. *Following Chicago, St. P. & F. du L. R. Co. v. McCarthy*, 20 Ill. 385; *Ohio & M. R. Co. v. Dunbar*, 20 Ill. 624; *Chicago & R. I. R. Co. v. Whipple*, 22 Ill. 105.—*Distinguished in Arrowsmith v. Nashville & D. R. Co.*, 57 Fed. Rep. 165. *Followed in Howard v. Delaware & H. Canal Co.*, 40 Fed. Rep. 195. *Quoted in McCoy v. Kansas City, St. J. & C. B. R. Co.*, 36 Mo. App. 445.

A company is liable for injuries received by a passenger at a station belonging to it, owing to the negligence of a porter on a platform which was exclusively allotted to the traffic of another company, which had running powers over the first company's line and which issued the ticket under which the passenger traveled. *Self v. London, B. & S. C. R. Co.*, 42 L. T. 173.

524. Liability of carrier using another's road.*—A railroad company which was operating its trains over the road of another company at the time when an accident occurred to a passenger, is liable at common law as a common carrier. *Eureka Springs R. Co. v. Timmons*, 40 Am. & Eng. R. Cas. 698, 51 Ark. 459, 11 S. W. Rep. 690.

One company using the road of another in the operation of its trains is responsible for accidents occurring to a passenger under such circumstances as would raise liability if it were operating a train over its own road. *Eureka Springs R. Co. v. Timmons*, 40 Am. & Eng. R. Cas. 698, 51 Ark. 459, 11 S. W. Rep. 690.

Where a carrier has the right to run his cars over the track of another company, but has no control or right beyond running such cars, he is not liable for an injury to one of his passengers while upon such other road, which is the result of the negligence of the operatives of the road and where he is free from negligence or fault. *Sprague v. Smith*, 29 Vt. 421.

525. Liability of lessee.—If a road be leased by authority of law, the lessor company is not liable for an injury to a pas-

* See also LEASES, RUNNING POWERS, AND WORKING AGREEMENTS.

* Injury to passengers where one company is running trains over track of another, see note, 10 AM. & ENG. R. CAS. 814.

senger caused by the negligence of the lessee in operating the road, though there be no express provision, either in the statute authorizing the lease or in the lease itself, releasing the lessor from liability. *Arrow-smith v. Nashville & D. R. Co.*, 57 Fed. Rep. 165.—*APPROVING* *Ditchett v. Spuyten Duyvil & P. M. R. Co.*, 67 N. Y. 425; *Miller v. New York, L. & W. R. Co.*, 125 N. Y. 118, 26 N. E. Rep. 35; *Nugent v. Boston, C. & M. R. Co.*, 80 Me. 62, 12 Atl. Rep. 797; *Briscoe v. Southern Kan. R. Co.*, 40 Fed. Rep. 274; *Virginia Midland R. Co. v. Washington*, 43 Am. & Eng. R. Cas. 688, 86 Va. 629, 10 S. E. Rep. 927. *DISAPPROVING* *Singleton v. South Western R. Co.*, 70 Ga. 464; *Harmon v. Columbia & G. R. Co.*, 28 So. Car. 401, 5 S. E. Rep. 835; *Hart v. Charlotte, C. & A. R. Co.*, 33 So. Car. 427, 12 S. E. Rep. 9. *DISTINGUISHING* *Ricketts v. Birmingham St. R. Co.*, 85 Ala. 600, 5 So. Rep. 353; *Rome & D. R. Co. v. Chasteen*, 88 Ala. 591, 7 So. Rep. 94; *Mahoney v. Atlantic & St. L. R. Co.*, 63 Me. 68; *Quested v. Newburyport & A. H. R. Co.*, 127 Mass. 204; *Illinois C. R. Co. v. Barron*, 5 Wall. (U. S.) 90; *Thomas v. West Jersey R. Co.*, 101 U. S. 71; *York & M. L. R. Co. v. Winans*, 17 How. (U. S.) 31; *Chicago & N. W. R. Co. v. Crane*, 113 U. S. 424, 5 Sup. Ct. Rep. 578; *Washington, A. & G. R. Co. v. Brown*, 17 Wall. (U. S.) 445; *Ohio & M. R. Co. v. Dunbar*, 20 Ill. 624; *Nelson v. Vermont & C. R. Co.*, 26 Vt. 717. *EXPLAINING* *Hanna v. Chattanooga & N. R. Co.*, 88 Tenn. 313, 12 S. W. Rep. 718.

A railway passenger traveling over a leased track has no contract relations with any other lessee of the track than the company that carries him; and if he is injured in consequence of the negligence of some other lessee in its use of the track, his only remedy is by an action in tort for the latter's breach of the duty it owes him to so use it as not to injure him. *Patterson v. Wabash, St. L. & P. R. Co.*, 18 Am. & Eng. R. Cas. 130, 54 Mich. 91, 19 N. W. Rep. 761.

526. Liability of carrier having running powers.—Where a company having running arrangements over the line of another company permits a person to travel on one of its trains, it is bound to make provision for his safety although he traveled under a ticket issued by the company owning the line. *Foulkes v. Metropolitan Dist. R. Co.*, L. R. 5 C. P. D. 157, 49 L. J. C. P. D. 361, 42 L. T. 345, 28 W. R. 526;

affirming L. R. 4 C. P. D. 267, 48 L. J. C. P. D. 555, 41 L. T. 95.—FOLLOWED IN *Hooper v. London & N. W. R. Co.*, 50 L. J. Q. B. 103, 43 L. T. 570, 29 W. R. 241, 45 J. P. 223.

The defendants had running powers between H., a station upon their own line, and R., a station of the S. company, over the line of that company. The defendants and the S. company divided the profits of the traffic between H. and R. The plaintiff took a return ticket from R. to H., which was issued to him by a clerk of the S. company. Upon the return journey from H. to R. he traveled in a train belonging to the defendants, and driven by their servants. Owing to the carriage being unsuited to the platform at R., which belonged to the S. company, the plaintiff sustained bodily injury. At the trial the jury found that the defendants had been guilty of negligence. *Held*, that an action lay against the defendants, for they, having permitted the plaintiff to travel by their train, were bound to make provision for his safety. *Foulkes v. Metropolitan Dist. R. Co.*, L. R. 5 C. P. D. 157, 49 L. J. C. P. D. 361. See *Self v. London, B. & S. C. R. Co.*, 42 L. T. 173, 3 Ry. & C. T. Cas. xiv.

527. Liability of trustees.—A person having the possession and control of, and actually operating, a railroad is liable for injuries to passengers or freight occasioned by his misconduct or negligence, or that of any of the operatives under his control, to the same extent that the railroad company would be were they in possession and running the road. This rule applies to lessees, to persons acting as trustees for mortgage creditors of the company, and also to persons in possession who are mere intruders. *Sprague v. Smith*, 29 Vt. 421.—QUOTED IN *Murphy v. Holbrook*, 20 Ohio St. 137. QUOTED AND FOLLOWED IN *Lyman v. Central Vt. R. Co.*, 59 Vt. 167.

VII. PROCEDURE.

1. In General.*

528. Right of action.†—A passenger who purchases a ticket for conveyance over a defendant company's railroad and is received by the defendant in a car run and operated by it for the purpose of carrying

* Actions against carriers for injuries sustained by passengers, see note, 43 AM. DEC. 355.
† See also *ante*, 118.

passengers, and who, while so on such car, is injured through the carelessness and negligence of the defendant, without fault or negligence on his part, is entitled to recover damages from the defendant for such injury, whether the defendant owned the car and engine or not. *Hannibal & St. J. R. Co. v. Martin*, 111 Ill. 219; *affirming* 11 Ill. App. 386.

Where a passenger is not in fault in starting on a particular train, he has a right of action against the company for damages arising from its refusal or failure to take him to his destination as agreed through its ticket agent. But whatever his remedy, he has no right, without paying additional fare, to stay on the train after he is notified by the conductor that it will not stop there; and the additional exaction will be an element of damage. *Lake Shore & M. S. R. Co. v. Pierce*, 3 Am. & Eng. R. Cas. 340, 47 Mich. 277, 11 N. W. Rep. 157.

Although no bodily injury, mental suffering, insult, oppression, or pecuniary loss be shown, and though these concomitants of damages are disclaimed, yet if the railroad company failed in its obligation by neglecting to deliver its passenger at B., the passenger acquired a technical right of recovery; but the rule of punitive damages does not apply. Hence, although the damages are only nominal, nevertheless the cause of the action should be sustained. *Thompson v. New Orleans, J. & G. N. R. Co.*, 50 Miss. 315.

The liability of a company for damages to a passenger, resulting from the negligent management of a train, should be commensurate only with the extent of its right to control. *Cunningham v. International R. Co.*, 51 Tex. 503.

The claim alleged that the servant of the plaintiff took a ticket and traveled by the L. T. & S. Railway; that the defendants, the G. E. R. Co., supplied the engines, drivers, and firemen for working the traffic of the L. T. & S. Railway, also the signalmen for working the said traffic at the S. Junction; that the L. T. & S. train, in which the servant traveled, came into collision with a train of the defendant company at the junction, through the negligence of the defendant's signalmen there; that the servant was hurt, whereby the plaintiff lost his services and was damaged. On demurrer—*held*, that the action was against independent wrong-doers, not parties to the

contract of carriage, for a pure tort, and could therefore be maintained. *Berringer v. Great Eastern R. Co.*, 4 C. P. D. 163, 3 Ry. & C. T. Cas. xiii.

529. — and how lost or waived.

—Where a passenger goes on a train and pays his fare to a certain place, and is afterward told by the conductor that the train will not go to the point to which he has paid his fare, and that he can either get off there or go to another intermediate point, he may leave the train and recover damages from the company; but if the conductor tenders back the fare for the incomplete part of the journey, after he has left the train, and he accepts it voluntarily, he thereby waives his right of action. *Florida Southern R. Co. v. Katz*, 28 Am. & Eng. R. Cas. 133, 23 Fla. 139, 1 So. Rep. 473.

A passenger entered a chair-car when his ticket only entitled him to passage in a first-class ordinary car. He was told by the conductor that he would have to pay an extra compensation or go into the other car. This he refused to do, and left the train, although requested not to do so, but to go into the other car. *Held*, having voluntarily left the train, and having sued for being unlawfully ejected from the chair-car, the fact that his ticket was not returned would not entitle him to damages. If he was entitled to a stop-over privilege he should have sued for a return of the passage money, and not for damages for being ejected. *Wright v. California C. R. Co.*, 78 Cal. 360, 20 Pac. Rep. 740.

530. Form of action—In tort or on contract.*—The contract of carriage created by the sale of a ticket entitles the passenger to admission to the cars and makes it the duty of the company to allow such admission under proper circumstances; and the refusal or neglect to perform this duty, as well as the negligent performance of it, furnishes a ground of action in tort. In such case both the nonfeasance and the misfeasance constitute a wrongful act, for which the remedy may be either by action on the contract or in tort. *Baltimore & O. R. Co. v. Carr*, 71 Md. 135, 17 Atl. Rep. 1052.

Where a carrier is sued for a failure to let a passenger off at his destination, the courts

* See also *ante*, 118.

Form of action where passenger is injured, see notes, 16 AM. & ENG. R. CAS 309; 11 *Id.* 101.

are inclined to consider the action as founded in tort, unless a special contract very clearly appears to be made the gravamen and object of the complaint. Where a declaration alleges that after acquiring the right to travel on defendant's cars by contract, and while lawfully in the enjoyment of that right, "plaintiff was compelled" to leave said cars at a distance from the place of destination, the action will be considered in tort, and the contract as stated but an inducement to the action, merely showing that plaintiff was lawfully on the cars. *New Orleans, J. & G. N. R. Co. v. Hurst*, 36 Miss. 660.—DISTINGUISHED IN *Thompson v. New Orleans, J. & G. N. R. Co.*, 50 Miss. 315. QUOTED IN *Galveston, H. & S. A. R. Co. v. Roemer*, 1 Tex. Civ. App. 191; *Purcell v. Richmond & D. R. Co.*, 108 N. Car. 414. REVIEWED IN *Dawson v. Louisville & N. R. Co.*, (Ky.) 11 Am. & Eng. R. Cas. 134.

Plaintiff desiring to sue a foreign railroad corporation doing business in the province for personal injury and loss of luggage, obtained an order under 49 Vict. c. 35, § 32, providing that service of process may be allowed out of the province when the action is on contract or judgment, and the defendant has assets within the province. The declaration was on an implied contract to safely carry plaintiff and his luggage, but by reason of the negligence of defendant it failed to do so. *Held*, that this was an action on contract within the meaning of the law. *Shaw v. Canadian Pac. R. Co.*, 5 Man. 198.—DISAPPROVING *Fleming v. Manchester, S. & L. R. Co.*, 26 W. R. 741. DISTINGUISHING *Tatton v. Great Western R. Co.*, 8 W. R. 606.

531. Parties—Who may sue—Master.—A company is not liable as a carrier, at the suit of a master, for personal injuries sustained through its negligence by his servant, whereby the master lost the benefit of the servant's services. *Alton v. Midland R. Co.*, 19 C. B. N. S. 213, 11 Jur. N. S. 672, 34 L. J. C. P. 292, 13 W. R. 918.

532. Who may be sued, generally.*—Where the trains of a company are made up by the employés of another railroad company, and on the track of the latter, and

cars used to make up the same belong to other companies, if the use of the cars and tracks and labor in making up such trains is to enable such first-named company to exercise its function and perform its duties as a common carrier, such cars, tracks, and servants, so far as the rights of its passengers who may receive an injury are concerned, must be regarded as the cars, tracks, and servants of the company so using the same. *Hannibal & St. J. R. Co. v. Martin*, 111 Ill. 219; *affirming* 11 Ill. App. 386.

Where the contractors for the transportation of the mails negligently unload the mail-bags upon the station platform or sidewalk in such a manner as to cause injury to one, who recovers judgment therefor against the company, the company may maintain an action for indemnity against the contractors, the relation of the parties *inter se* not being that of joint tort-feasors. *Old Colony R. Co. v. Slavens*, 38 Am. & Eng. R. Cas. 382, 148 Mass. 363, 19 N. E. Rep. 372.

Two companies, one chartered to build a road in Indiana and the other in Michigan, united their business and operated a third road connecting the two through Illinois. Plaintiff was injured on the Illinois road. *Held*, that the two companies were jointly liable. *Bissell v. Michigan S. & N. I. R. Co.*, 22 N. Y. 258.—FOLLOWED IN *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30; *Buffett v. Troy & B. R. Co.*, 40 N. Y. 168.

533. Carrier sustaining contractual relation to passenger.—A company is responsible for an injury sustained by a passenger in its cars in consequence of the careless management of a switch, by which another company connects with and enters upon its road, although the switch is provided by the proprietors of the other road and attended by one of its servants, at their expense. *McElroy v. Nashua & L. R. Corp.*, 4 Cush. (Mass.) 400.—APPROVED IN *Illinois C. R. Co. v. Barron*, 5 Wall. (U. S.) 90.

Where a passenger is carried to the end of one road and is put off on a platform used jointly by another road and the road carrying him, and he is injured by reason of the improper construction or insufficient lighting of the platform, he may sue the company bringing him there, regardless of whether it owns the platform or not. *Wabash, St. L. & P. R. Co. v. Wolff*, 13 Ill. App. 437.

* See also *ante*, 500.

Liability to passenger on sleeping-car, of both sleeping-car company and railroad company, see excellent note, 21 L. R. A. 289.

See also SLEEPING AND PALACE CAR COMPANIES.

If a passenger in a car standing on a side-track is injured by the car being struck by the car of another corporation, through the negligence of a brakeman in the employ of such corporation, in connecting the two cars for the purpose of carrying out a contract between the corporations for their joint benefit, an action may be maintained by the injured person against the corporation owning the car in which he was a passenger. *White v. Fitchburg R. Co.*, 18 Am. & Eng. R. Cas. 140, 136 Mass. 321.

534. Carrier other than one carrying passenger.*—A passenger on one road may recover for injuries by another road, where the tracks cross, caused by negligently backing its cars against the one in which the passenger is, regardless of whether the company carrying him is itself free from negligence or not. *Pittsburgh, C. & St. L. R. Co. v. Spencer*, 21 Am. & Eng. R. Cas. 478, 98 Ind. 186.

535. Where negligence of two carriers concurs.†—Where a passenger riding on the conveyance of one carrier is injured by a collision with the conveyance of another carrier, caused by the concurrent negligence of the servants of both parties, each carrier is severally liable to pay him the full amount of damage occasioned him by the injury, or a joint action may be sustained against both carriers. *Wabash, St. L. & P. R. Co. v. Shacklet*, 12 Am. & Eng. R. Cas. 166, 105 Ill. 364.—APPLIED IN *Pullman Palace Car Co. v. Laack*, 143 Ill. 242. APPROVED IN *Little v. Hackett*, 116 U. S. 366. DISAPPROVED IN *Thorogood v. Bryan*, 8 C. B. 115. FOLLOWED IN *Noyes v. Boscawen*, 64 N. H. 361.

536. Conductor on road owned by crown.—A conductor on a railroad belonging to the crown is liable to a passenger for injuries received through his negligence while getting on a train. *Hall v. McFadden*, 21 New Brun. 586.

2. Pleading; ‡ Defenses.

a. Declaration; Complaint; Petition.

537. Interpretation.—Where a passenger sues for personal injuries caused by

* See also *ante*, 508-510.

† Right of one injured through concurrent negligence of two carriers to maintain joint action against both, see note, 38 AM. REP. 514. See also COLLISIONS, 6.

‡ Pleading in action for injury to passenger, see PLEADINGS, 15, 25, 116.

Pleading breach of contract with passenger, see PLEADINGS, 98, 120.

his car becoming derailed, stating in the complaint that he became a passenger and where he was to be carried, this does not qualify another averment that he was to be carried from K. to G.; nor will proof that his journey began and was to end beyond those places affect his condition as a passenger. *Wabash Western R. Co. v. Friedman*, 41 Ill. App. 270.

Where the complaint seeks a recovery for sickness and bodily and mental suffering of the plaintiff wife, and for mental suffering and expense and trouble on the part of the plaintiff husband growing out of the sickness of the wife, alleged to have been caused by the negligence of defendant's servants in directing plaintiffs to leave a train of passenger cars before they had reached their destination, the action is in tort for the negligence, and not upon the contract of carriage, notwithstanding averments which show a contract relation between the parties, and that defendant "wholly disregarded its duty in the premises, and its contract and obligations to and with the plaintiffs." *Brown v. Chicago, M. & St. P. R. Co.*, 3 Am. & Eng. R. Cas. 444, 54 Wis. 342, 11 N. W. Rep. 356, 911, 41 Am. Rep. 41.—FOLLOWED IN *Terre Haute & I. R. Co. v. Buck*, 18 Am. & Eng. R. Cas. 234, 96 Ind. 346, 49 Am. Rep. 168.

538. Necessary allegations, generally.—Where a party sues a company for a failure or refusal to carry him as a passenger, his declaration is bad unless it contains an averment that he offered to pay his fare, or was ready and willing to do so. *Day v. Owen*, 5 Mich. 520.

Where a passenger sues a company for personal injuries, it is not necessary to aver in his complaint his age. *Galveston, H. & S. A. R. Co. v. Thornsberry*, (Tex.) 17 S. W. Rep. 521.

But the complaint should allege a contract of carriage upon a specific day. *Conley v. Richmond & D. R. Co.*, 52 Am. & Eng. R. Cas. 490, 109 N. Car. 692, 14 S. E. Rep. 303. See also *Flint & P. M. R. Co. v. Stark*, 38 Mich. 714.

539. In complaint for assault.—A complaint alleged that the plaintiff, while riding upon a freight train by the invitation and permission of the conductor, was, without being in fault, assaulted by one of the defendant's servants and thrown from the train and under its wheels, and that the other servants of the defendant, with knowledge

of his assailant's intention, did not interfere to protect him from injury. *Held*, that the complaint does not state facts sufficient to constitute a cause of action, no facts being alleged to show that the relationship of carrier and passenger existed, nor to remove the presumption that the defendant's freight trains were confined exclusively to the transportation of freight. *Held* also, that what his assailant's duties were, and what he was engaged in at the time of the assault, should have been averred. *Smith v. Louisville, E. & St. L. R. Co.*, 124 Ind. 394, 24 N. E. Rep. 753.—DISTINGUISHING *Lucas v. Milwaukee & St. P. R. Co.*, 33 Wis. 41, 14 Am. Rep. 735; *Creed v. Pennsylvania R. Co.*, 86 Pa. St. 139, 27 Am. Rep. 693.

540. Alleging that plaintiff was rightfully on train.—A petition for the recovery of damages for an injury caused by a company to a passenger, which does not affirmatively state that such passenger was rightfully on the company's cars, is fatally defective. *Whitehead v. St. Louis, I. M. & S. R. Co.*, 22 Mo. App. 60.

Where a passenger sues for personal injuries while upon the cars, it is sufficient to aver in the declaration that he was on the cars with the permission of the company, and with the knowledge of the servants of the company in charge of the cars. *Lamert v. Chicago & A. R. Co.*, 9 Ill. App. 388.

A complaint against a company averred that, "being on one of defendant's trains, the servants of defendants, while said train was in motion, ordered and compelled plaintiff to jump from said train, the coaches of which passed over his limbs, whereby he was injured; that said injuries were committed and perpetrated upon him by the carelessness and negligence of defendant's servants;" that plaintiff was himself without fault or negligence. *Held*, not sufficiently specific as to what right plaintiff had on the train, and as to the negligence of the defendant's servants. *Pennsylvania Co. v. Dean*, 18 Am. & Eng. R. Cas. 188, 92 Ind. 459.

541. Alleging locality of accident.—A complaint in an action to recover for personal injuries sustained by a passenger, which alleges a contract to transport the plaintiff over the line of defendant's road, but does not specifically allege that the point at which the accident occurred is between the place of departure and that to which defendant contracted to carry plain-

tiff, is sufficient on demurrer, if it appears from the complaint that plaintiff received the injuries complained of while being carried under the contract. *International & G. N. R. Co. v. Underwood*, 34 Am. & Eng. R. Cas. 570, 67 Tex. 589, 4 S. W. Rep. 216.

If it appears that, at a particular place, stones have been repeatedly thrown at the passenger trains, and that this was known to the company, it might be required to take such precautions at that spot as would prevent a continuance of the offense; but a declaration by a plaintiff injured under such circumstances, which does not describe the locality definitely and aver that the injuries were received there, cannot be said to raise that question. *Missemer v. Philadelphia & R. R. Co.*, 17 Phila. (Pa.) 172.

542. Alleging negligence, generally.—(1) *Rules stated.*—In an action by a passenger to recover damages for injuries alleged to have been occasioned by the negligence of the company defendant, the plaintiff must in his complaint charge the company defendant with negligence, and must also aver that he himself was without fault or negligence, or state such facts as will clearly show that he was without fault or negligence in the premises. *Cincinnati, W. & M. R. Co. v. Peters*, 6 Am. & Eng. R. Cas. 126, 80 Ind. 168.

In an action to recover damages for personal injuries, general averments of negligence are sufficient, without defining the *quo modo*, or specifying the particular acts of diligence omitted, when simple negligence constitutes a cause of action, as where the person injured was a passenger; but where the complaint does not show whether he was a passenger, an employé, or a mere trespasser, it will be presumed that he was a trespasser, who can only recover for injuries caused by reckless, wanton, or intentional negligence, and such negligence must be alleged, or must be shown by the facts stated. *Ensley R. Co. v. Chewning*, 50 Am. & Eng. R. Cas. 46, 93 Ala. 24, 9 So. Rep. 458.—DISAPPROVING *Alabama & F. R. Co. v. Waller*, 48 Ala. 459.—FOLLOWED IN *Kansas City, M. & B. R. Co. v. Burton*, 53 Am. & Eng. R. Cas. 115, 97 Ala. 240, 12 So. Rep. 88.

It is not necessary for plaintiff to allege the particular cause of the accident when seeking to recover damages alleged to have been sustained in consequence of the negligence or want of skill of the carrier's ser-

vants in carrying plaintiff as a passenger. *Carmanty v. Mexican Gulf R. Co.*, 5 La. Ann. 703.

(2) *Sufficient allegations.*—In an action on the case for negligent injury, it is sufficient if the declaration sets out between plaintiff and defendant the relation of passenger and carrier, the circumstances out of which the particular duty arose, and the breach of that duty. *Richmond City R. Co. v. Scott*, 44 Am. & Eng. R. Cas. 418, 86 Va. 902, 11 S. E. Rep. 404.

In an action by a passenger for a personal injury received at night while alighting from a train at a station poorly lighted, it is not necessary to aver in direct language that the plaintiff was in danger, which was known to the company's employés. It is sufficient to aver generally such facts as will warrant the conclusion of such danger. *Galveston, H. & S. A. R. Co. v. Thornsberry*, (Tex.) 17 S. W. Rep. 521.

In an action for injuries sustained in jumping from a car while moving rapidly, it is sufficient to aver that by and through the negligence, unskillfulness, and default of the company's servants in conducting and managing the car, and for the want of due care and attention to their duty, it became and was unfit for the plaintiff to remain in the car, and his life and limbs were then and there greatly jeopardized and endangered, and in order to get out of such danger and to preserve his life and limbs he was obliged to jump from the car, whereby he was greatly hurt, wounded, etc., without alleging specifically the circumstances which rendered it unsafe and dangerous to remain in the car, or by what means or how his life and limbs were endangered. *Eldridge v. Long Island R. Co.*, 1 Sandf. (N. Y.) 89.

Plaintiff, a passenger, entered the passenger coach, and, the weather being warm, took off his coat and laid it across the back of his seat. In one of the pockets, in a pocketbook, was the sum of \$240, the property of plaintiff. Near the end of the bridge crossing Galveston Bay the car was overturned, as alleged, through the gross carelessness of the company and its servants; plaintiff was thrown from his seat, and the coat thrown out of his coach. It was afterward found and returned to plaintiff, but the money was gone, and it is alleged that the money was lost to plaintiff without his fault or neglect. *Held*, the petition was good against a general demurrer.

Bonner v. Grumbach, 2 Tex. Civ. App. 482, 21 S. W. Rep. 1010.

(3) *Insufficient allegations.*—A passenger buying a ticket to D. station on defendant's road was told by the ticket agent to take a particular train. She did accordingly. The train proved to be an express, not allowed by the regulations of the company to stop at D., but she did not know this until informed of it by the conductor after the train had started. She told him of the direction the agent had given her, and insisted on being left off at D. He took up her ticket, but refused to stop at D., and took her to the next stopping place beyond. In an action against the company—*held*, that the plaintiff ought to have counted on the negligent misdirection of the ticket agent, not on the refusal of the conductor to stop, for he could not have done otherwise. *Marshall v. St. Louis, K. C. & N. R. Co.*, 18 Am. & Eng. R. Cas. 248, 78 Mo. 610.—QUOTED IN *McGinnis v. Missouri Pac. R. Co.*, 21 Mo. App. 399.

543. Certainty—Definiteness.—(1) *Good.*—A charge in a complaint by a passenger against a railroad is sufficient which charges that he was injured by the derailing and overturning of a car through the gross negligence, carelessness, and default of the company, its agents, servants, and employés, without alleging the particular acts constituting the negligence. *Gulf, C. & S. F. R. Co. v. Smith*, (Tex.) 11 S. W. Rep. 1104.

Where a passenger sues for a personal injury alleged to have been caused by the defendant's negligence, averments in the complaint that "without any fault, carelessness, or negligence on his part" the car in which plaintiff was riding was, "by and through the fault, carelessness, and negligence of the defendant, its agents, and employés," thrown from the track, whereby plaintiff was injured, is sufficient on demurrer as to the allegation of negligence; but a motion to make more specific as to the allegation of negligence should have been sustained. *Cincinnati, H. & D. R. Co. v. Chester*, 57 Ind. 297.—DISTINGUISHED IN *Wabash R. Co. v. Savage*, 28 Am. & Eng. R. Cas. 288, 110 Ind. 156. FOLLOWED IN *Ohio & M. R. Co. v. Craycraft*, 5 Ind. App. 335.

Where a passenger sues for an injury received about the time he was attempting to get on the train, an averment in his complaint to the effect that while he was waiting at defendant's depot to take a train de-

defendant "carelessly and negligently ran and propelled one of its cars upon and against plaintiff, whereby he was injured," is sufficiently definite as to the negligent act complained of. The particular circumstances, showing the conduct of the company's servants in propelling the car, need not be alleged. *McCarthy v. New York C. & H. R. R. Co.*, 24 N. Y. S. R. 924, 6 N. Y. Supp. 560.

(2) *Bad*.—A count alleging that the plaintiff was in the railroad car of the defendant and was thrown therefrom by the carelessness of the defendant, is too general in its description of the mode of the injury. *Central R. Co. v. Van Horn*, 38 N. J. L. 133, 13 Am. Ry. Rep. 36.—DISTINGUISHING *Indianapolis, P. & C. R. Co. v. Keely*, 23 Ind. 133.

544. Alleging negligence in management of trains.—Where a complaint for an injury to the plaintiff shows that he was rightfully upon the train of the defendant as a passenger, and alleges that the servants and agents of the defendant wrongfully struck and threw the plaintiff from the cars, it will sufficiently show that the wrong complained of was committed by the servants of the defendant in their employment of running the train of cars. *Pittsburgh, C. & St. L. R. Co. v. Theobald*, 51 Ind. 246.

A declaration stating that the train of the defendant approached, "at very great and negligent speed," the car occupied by the plaintiff and others as passengers of the defendant, and that "being negligently and carelessly operated and run by the defendant," it "came with such great force against the car" that the plaintiff was thrown violently forward and injured, etc., sets forth a good cause of action. *Chattanooga, R. & C. R. Co. v. Huggins*, 52 Am. & Eng. R. Cas. 473, 89 Ga. 494, 15 S. E. Rep. 848.

A petition is sufficiently specific in its averments of the acts constituting the negligence, which charges that "the defendant, by and through its servants, agents, and employés in charge of and managing said train, negligently and unskillfully ran and managed the same in such a way as to cause the said train and the car in which the said plaintiff was being conveyed as to check its speed very suddenly and to jolt and pitch the same suddenly and with great force backward and forward in such manner and with such force as to cast and throw said plaintiff out of said car and upon the platform, and from said

platform onto the track of said railroad, under the said cars and train, by means and by reason of which said cars and train ran upon and over the left arm and left leg of the plaintiff." *Coudy v. St. Louis, I. M. & S. R. Co.*, 27 Am. & Eng. R. Cas. 282, 85 Mo. 79.

A declaration that the plaintiff was a servant in the employment of one K., a contractor with the defendants for keeping their road in repair; that in performing said repairs certain carriages and engines, under the management of defendant's servants, were used to transport materials and convey workmen employed by K.; that the plaintiff, being one of such workmen, became a passenger in one of these carriages to be carried from his place of work to his residence; that it was defendants' duty to use proper care in the management of said train, but by their negligence it came into collision with another train, whereby the plaintiff was injured—is sufficient to show defendants liable. *Torpy v. Grand Trunk R. Co.*, 20 U. C. Q. B. 446.—QUOTING *Degg v. Midland R. Co.*, 1 H. & N. 773.—DISTINGUISHED in *Graham v. Toronto, G. & B. R. Co.*, 23 U. C. C. P. 541. REVIEWED IN *Blackmore v. Toronto St. R. Co.*, 38 U. C. Q. B. 172.

545. — violently jerking train.—In an action for an injury received by the plaintiff while a passenger on one of defendant's trains, the complaint alleged that when the train stopped at the plaintiff's destination she was notified by the servants of the company to alight, and that she went out upon the platform, but could not get off where the train had then stopped, and was told by the servants of the company to remain on the platform; that while she was thus upon the platform, in the dark, with a child in her arms, without giving her time to return into the cars the train was negligently started with a violent jerk, which caused the car door to violently close upon and injure her finger. The complaint alleged that the plaintiff was without fault. *Held*, that the complaint showed actionable negligence on the part of the defendant, and that it was good against a motion to dismiss; that it did not appear from the averments of the complaint that the plaintiff was guilty of contributory negligence; and that the plaintiff was not negligent in going upon the platform and placing her finger in a position where it was liable to be in-

jured if the door closed upon it, it not appearing that she placed her hand there voluntarily and independently of the sudden motion of the train. *Kentucky & I. Bridge Co. v. Quinkert*, 2 Ind. App. 244, 28 N. E. Rep. 338.

546. — failure to stop train.*—(1) Generally.—In an action by a passenger for carrying him past the station to which he had purchased a ticket, it is necessary that he aver in his complaint that the train upon which he took passage was one which, by its running arrangements, under the rules and regulations of the company should have stopped at such station, or that by a special contract the company had agreed to carry him to that station on that train. *Ohio & M. R. Co. v. Hatton*, 60 Ind. 12.—FOLLOWED IN *Ohio & M. R. Co. v. Swarthout*, 67 Ind. 567.

A declaration alleged as follows: Plaintiff was a passenger on defendant's train and had paid his fare to a given point, where defendant's agents agreed to put him safely off, but, after having promised to slack up, they negligently directed plaintiff to get off while the train was in motion; seeing that he was about to be carried beyond his destination, and thinking he might safely jump, under promise of defendant's agent to slack up, and his notice to get off, plaintiff stepped from the train. Finding that he would be hurled against the track if he let loose, he retained his hold on the car, trusting that the speed would be lessened; but, though defendant's agents saw plaintiff's situation, the speed of the train was negligently increased, causing plaintiff to be dragged, etc. *Held*, that a cause of action was set out, and a demurrer to the declaration was properly overruled. *Central R. Co. v. Smith*, 69 Ga. 268.

Where the plaintiff alleged in his complaint, and offered testimony tending to show that he purchased a ticket from defendant's agent and at a regular station before the time advertised for the arrival and departure of its trains at that place, and was in readiness to get aboard, but the train ran by, making no effort to stop, although it had room in its cars for plaintiff—*held*: (1) that the complaint set forth a cause of action in tort, of which the superior court had juris-

diction; (2) that the plaintiff was entitled to an instruction that, if the jury found the facts alleged to be true, he would be entitled to punitive damages, in the absence of sufficient excuse shown by the defendant. *Purcell v. Richmond & D. R. Co.*, 47 Am. & Eng. R. Cas. 457, 108 N. Car. 414, 12 S. E. Rep. 954, 956.

(2) *At proper place.*—A petition which states that the plaintiff, while a passenger on a moving train, was directed by the conductor, or some other employé of the company, to jump off on reaching its stopping place, and that by reason of obeying such direction the plaintiff was permanently injured, is not open to fatal objection on the ground that it does not state that the "other employé" was authorized by the defendant to give such directions to passengers. *Wilburn v. St. Louis, I. M. & S. R. Co.*, 36 Mo. App. 203.

Complaint in two paragraphs for an injury to a passenger. In the first paragraph the duty of the company to use due care and diligence to carry the plaintiff to her destination was alleged, and the breach of duty complained of was that the plaintiff, having been carried safely to the proper station in a box-car, was required by the conductor to jump from the car to the ground, no steps being provided for the safe descent of passengers, whereby plaintiff was injured. The second paragraph was like the first, except that nothing was said as to the kind of car in which the plaintiff was transported, nor as to the want of steps for descent, nor as to any order by the conductor. In this paragraph the breach of duty was alleged to consist in stopping the train before the car which the plaintiff was in had reached the platform of the depot, by reason of which plaintiff was compelled to jump from the car, etc. *Held*, that both paragraphs stated a good cause of action, and *held* also, that it is not necessary for the pleader to aver the nature of the contract or the duties of the carrier in such cases, but the court will judicially take notice of the duties which are annexed by law to the contract to carry. *Evansville & C. R. Co. v. Duncan*, 28 Ind. 441.

A declaration which alleges that plaintiff's son, being taken seriously ill while from home, was placed on a train of defendant as a passenger, with a ticket, in charge of the conductor, who, with full knowledge of his condition and of the necessity of his speedily

* Failure to stop train at station and take on a passenger. Sufficiency of complaint, see 47 AM. & ENG. R. CAS. 460, *abstr.*

reaching home, promised to take care of him and to assist him from the train if necessary, but that he wholly neglected this; that the youth, while unconscious, was taken past his destination and was put off in the night at a place where there were no accommodations, and where he remained without attention for forty hours, being finally sent home; and that, as the result of the neglect and exposure, he shortly afterwards died—states a good cause of action. *Weightman v. Louisville, N. O. & T. R. Co.*, 70 Miss. 563, 12 So. Rep. 586.—DISTINGUISHING *Sevier v. Vicksburg & M. R. Co.*, 61 Miss. 8. QUOTING *Conolly v. Crescent City R. Co.*, 41 La. Ann. 57; *Louisville, C. & L. R. Co. v. Sullivan*, 81 Ky. 624.

547. — management of hand-car.

—A petition alleging that hand-cars were sometimes used by the company to transport employes, and that plaintiff, with others, took passage on one at the invitation of the company's agent, to go to a place where the corpse of a man had been found on the railroad track, plaintiff being one of the jury of inquest, and that by the negligence of the company's servants in the management of said car he was injured, states a good cause of action, not subject to demurrer. *Prince v. International & G. N. R. Co.*, 21 Am. & Eng. R. Cas. 152, 64 Tex. 144.—DISTINGUISHED IN *International & G. N. R. Co. v. Cock*, 68 Tex. 713. REVIEWED IN *Florida Southern R. Co. v. Hirst*, 30 Fla. 1.

548. Alleging failure to provide facilities for alighting.—The petition alleged that the company neglected to provide "proper lights and accommodations for passengers at its freight depot;" that plaintiff, being unable from the darkness of the night to see where he alighted from the car, fell, and injuries to his person were occasioned by the neglect. *Held*, that on general demurrer the petition was sufficient. *Stewart v. International & G. N. R. Co.*, 2 Am. & Eng. R. Cas. 497, 53 Tex. 289.

Allegations in the complaint that plaintiff was well known to defendant to be a lady in a delicate state of health, rendering it dangerous for her to alight from its train without a footstool which it was defendant's custom to provide, but which it failed to provide on the occasion in question, and that by reason of the train stopping short of the customary place plaintiff was compelled to jump to the ground and thereby received

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the injuries complained of—sufficiently allege negligence on the part of defendant. *Madden v. Port Royal & W. N. C. R. Co.*, 52 Am. & Eng. R. Cas. 286, 35 So. Car. 381, 14 S. E. Rep. 713.—CRITICISING *Renneker v. South Carolina R. Co.*, 20 So. Car. 222; *Simms v. South Carolina R. Co.*, 27 So. Car. 271.

549. Allegations as to condition of track.—The complaint averred that the defendant did not use due care, diligence, and skill in carrying the plaintiff; but, on the contrary, the track of the railroad was in bad condition and repair, and the defendant, by its servants, etc., negligently, unskilfully, and carelessly ran its train of cars, whereby, etc. *Held*: (1) on demurrer, that the averment of the condition of the track was not too general; (2) that if defendant desired a more particular description of the condition of the track, a motion to make the averment more specific should have been made; (3) that in such an action, an act, the doing of which is complained of, and that such act was negligently done, must be alleged, and that the above averment of the condition of the track, and the manner in which the train was run, sufficiently stated an act, and that it was negligently done; (4) that when the act complained of is sufficiently stated, it is only necessary to aver that such act was negligently done, without setting out in detail the particulars of the negligence. *Ohio & M. R. Co. v. Selby*, 47 Ind. 471, 8 Am. Ry. Rep. 177.—REVIEWED IN *Woodward v. Oregon R. & N. Co.*, 18 Oreg. 289.

550. Negating contributory negligence.—(1) *When necessary.*—A complaint for an injury suffered by a passenger should contain an allegation that the plaintiff did not contribute to the injury. *Jeffersonville R. Co. v. Hendricks*, 26 Ind. 228.—REVIEWED IN *Cincinnati, W. & M. R. Co. v. Peters*, 6 Am. & Eng. R. Cas. 126, 80 Ind. 168.

A complaint which does not aver generally that the plaintiff was without fault, and alleges the facts to be that at the station the train slackened speed so that the plaintiff could have alighted without damage if there had been a platform; that it was dark, windy, and raining, and the plaintiff had never been at the station; that the conductor informed him of arrival at the place and ordered him to alight, and, relying entirely on this order, he stepped off as

directed, and by reason of there being no platform, as he supposed there was, he fell under the cars and was injured, is bad on demurrer, because it does not show that the plaintiff was free from contributory negligence. *Cincinnati, W. & M. R. Co. v. Peters*, 6 Am. & Eng. R. Cas. 126, 80 Ind. 168. — RECONCILING *Pennsylvania Co. v. Hoagland*, 78 Ind. 203. REVIEWING *Frenzel v. Miller*, 37 Ind. 1; *Mackey v. New York C. R. Co.*, 27 Barb. (N. Y.) 528; *Jeffersonville R. Co. v. Hendricks*, 26 Ind. 228; *Jeffersonville R. Co. v. Swift*, 26 Ind. 459. — DISTINGUISHED IN *Terre Haute & I. R. Co. v. Buck*, 18 Am. & Eng. R. Cas. 234, 96 Ind. 346, 49 Am. Rep. 168.

Where a passenger sues for an injury in alighting from a car at night, an averment in his complaint to the effect that when they arrived at his destination the conductor informed plaintiff and directed him to follow, and he (the conductor) would light him off the train; that he followed the conductor to the platform, when the conductor held his lantern and told him that the train had stopped and for him to step off; that in obedience to the directions of the conductor he stepped off the car as carefully as he could, and without any fault or negligence on his part, but was thrown under the car and injured, is sufficient. *Cincinnati, W. & M. R. Co. v. Peters*, 6 Am. & Eng. R. Cas. 126, 80 Ind. 168. — DISTINGUISHED IN *Pittsburgh, C. & St. L. R. Co. v. Conn*, 104 Ind. 64.

(2) *When not necessary*.—The petition need not allege that plaintiff was at the time exercising due care, and not guilty of negligence contributing to the injuries received. *Lloyd v. Hannibal & St. J. R. Co.*, 53 Mo. 509, 12 Am. Ry. Rep. 474. — FOLLOWING *Thompson v. North Mo. R. Co.*, 51 Mo. 190. — FOLLOWED IN *Petty v. Hannibal & St. J. R. Co.*, 88 Mo. 306.

In an action for injuries received from the falling of an upper berth in a "free emigrant car" while she was away from her seat warming herself at the stove, it is not necessary for plaintiff to plead and prove the necessity for leaving her seat, as contributory negligence is a matter for the defense to establish. *Northern Pac. R. Co. v. Hess*, 48 Am. & Eng. R. Cas. 91, 2 Wash. 383, 26 Pac. Rep. 866.

Where the complaint showed the plaintiff to have been a passenger rightfully upon the car, and rightfully at the proper place,

and under the proper circumstances, proceeding by the usual means to leave the car, which had stopped at the station where she was entitled and required to alight, and that she was only prevented from doing so by the fact that the train did not wait there a sufficient time, and she was injured by the sudden stopping and starting of the train, the complaint was not subject after verdict to the objection that it did not show that the plaintiff was free from negligence. *Ohio & M. R. Co. v. Smith*, 5 Ind. App. 560, 32 N. E. Rep. 809. — REVIEWING *Bedford, S. O. & B. R. Co. v. Rainbolt*, 99 Ind. 551.

A. alleged that he was riding on the platform of one of the cars of the company defendant, in accordance with a custom on the part of the company to permit passengers to stand there, and was thrown to the ground by the wilful and reckless act of the engineer in starting the train with a jerk. *Held*, that the company was liable for such an act on the part of its servant, and that the act being alleged to be wilful, no allegation of freedom from contributory negligence was necessary. *Indiana, B. & W. R. Co. v. Burdge*, 18 Am. & Eng. R. Cas. 192, 94 Ind. 46.

Plaintiff could not recover save by showing a wilful injury. *Indiana, B. & W. R. Co. v. Burdge*, 18 Am. & Eng. R. Cas. 192, 94 Ind. 46.

551. Rule where contributory negligence appears from allegations.

—A declaration alleging that the conductor of a passenger train agreed with plaintiff to stop the train for him to get off at a point where there was no regular station, but at which defendant's road crossed another railroad at grade; that plaintiff paid his fare to this point, and that on reaching the same the train only slowed up and did not stop, so that plaintiff, "in order to keep from being carried beyond his destination, was compelled to get from the moving train," and in so doing was seriously injured, does not set forth a cause of action, it appearing from these allegations that plaintiff's injury was caused by his own voluntary act in taking a dangerous risk, if the train was moving so rapidly as to make leaving it unsafe; or if not, that the injury must have resulted from a mere accident, or from plaintiff's own carelessness in getting off. *Barnett v. East Tenn., V. & G. R. Co.*, 87 Ga. 766, 13 S. E. Rep. 904.

A count in a declaration which sets forth that plaintiff put his hand three inches out of the car window, and it struck against the bridge through which the train was passing, is insufficient on demurrer. *Richmond & D. R. Co. v. Scott*, 52 *Am. & Eng. R. Cas.* 405, 88 *Va.* 958, 14 *S. E. Rep.* 763.

552. Duplicitly.—A petition for personal injuries is not duplicitous because it alleges in one count that plaintiff was thrown from the car without fault on his part, and in another that he was injured by voluntarily attempting to leave the train. *Gulf, C. & S. F. R. Co. v. Buford*, 2 *Tex. Civ. App.* 115, 21 *S. W. Rep.* 272.

A complaint which alleges that a company carelessly, negligently, wilfully, and wantonly refused to stop its train so that plaintiff, a passenger thereon, might safely alight therefrom, but obliged the plaintiff to jump from the car while it was in rapid motion, may state two distinct causes of action—one for exemplary damages and one for actual damages; but no motion having been made to require a separate statement and election of these two causes of action, the plaintiff was entitled to proceed for actual damages. *Thomas v. Charlotte, C. & A. R. Co.*, 38 *So. Car.* 485, 17 *S. E. Rep.* 226.

553. Evidence admissible—Variance.*—While it is a familiar rule of law that the allegations and proofs as to material matters must correspond, yet the time as to when a passenger was injured is not a material matter, and proof may be introduced to show that the injury occurred at a time different from that alleged in the complaint. *St. Louis, I. M. & S. R. Co. v. Edwards*, 3 *Tex. App. (Civ. Cas.)* 410.

An averment that defendants undertook and promised to convey plaintiff as a passenger upon their cars from "West Urbana to Tolono" is supported by proof showing the undertaking was to carry plaintiff from "Champaign City to Tolono," it appearing that West Urbana and Champaign City are one and the same place. *Illinois C. R. Co. v. Sutton*, 53 *Ill.* 397.

Under a count which alleges that at the time and the place of the accident the car in which plaintiff was riding being thrown from the track and overturned, the rails on

the track were old, worn, and unsound, and the cross-ties rotten and unsound, "that the train was running at a great rate of speed, and that said accident was caused by the gross negligence of defendant in running said train at such rate of speed over said rails, and in using and permitting to be used said old and worn rails and said rotten and unsound cross-ties after they had become unfit for use," the averment of negligence not being confined to the rate of speed at which the train was running, the defendant cannot claim a verdict on the ground that there is no evidence showing an improper rate of speed, especially where it appears that the cars, after leaving the rails, ran three hundred yards before they were stopped—a fact which is, of itself, some evidence that they were running at a high rate of speed. *Alabama G. S. R. Co. v. Hill*, 93 *Ala.* 514, 9 *So. Rep.* 722.

In an action for a personal injury caused by the alleged negligence of defendant's engineer in backing his train with such force against the caboose in which plaintiff was riding as to throw him against a desk, where the petition charged that the engineer carelessly and negligently ran the engine—held, that if an omission to sound the bell and whistle was a careless running of the engine under the circumstances, then such omission might be proved without being particularly pleaded. *Winter v. Central Iowa R. Co.*, 80 *Iowa* 443, 45 *N. W. Rep.* 737.

Plaintiff alleged that she received her injury in jumping from the train while in motion, but that she was guilty of no negligence contributory thereto. Held, that under the latter averment plaintiff was entitled to prove that she jumped from the train with the consent of the person in charge thereof, which fact would relieve her of any liability under Acts 16th Gen. Assem. Iowa, ch. 148, § 2, providing that if any person, not an employé or officer of the law, in discharge of his duty, shall get upon or off any locomotive or car while in motion, without the consent of the person in charge, he shall be guilty of a misdemeanor. *Raben v. Central Iowa R. Co.*, 31 *Am. & Eng. R. Cas.* 45, 74 *Iowa* 732, 34 *N. W. Rep.* 621.

Where the complaint alleged that the plaintiff "was compelled and forced by the agents of said defendant to get off defendant's train while in motion, and before said train had reached the usual place at the

* See also *post*, 561-569.

Variances in actions for injuries to passengers, see PLEADING, 140.

depot," and that injuries sustained by him were produced by the negligence of defendant's agents "in compelling and forcing" him to get off the train, the gravamen of the action is the alleged force, and it is not sustained by evidence merely that, when the train was approaching the platform at the depot, the conductor came towards him in the car, crying out the name of the station, and saying, "We have got no time; hurry up," and that this was repeated by the conductor several times while the plaintiff was making his egress from the car, and before he stepped from the moving train; such words not being susceptible of a construction which would impute to the conductor any purpose to force or compel the plaintiff to prematurely alight from the train, or to put himself in the slightest peril in leaving it. *South & N. Ala. R. Co. v. Schauffer*, 21 Am. & Eng. R. Cas. 405, 75 Ala. 136.—QUOTED IN *Highland Ave. & B. R. Co. v. Winn*, 93 Ala. 306.

b. Plea; Answer; Defenses.

554. Plea—Answer.—In an action against a carrier for negligence in its transportation of passengers, where an agreement on the part of the plaintiff that he will assume all risks is relied upon as a defense, it must be specially pleaded. *Citizens' St. R. Co. v. Twiname*, 30 Am. & Eng. R. Cas. 616, 111 Ind. 587, 10 West. Rep. 824, 13 N. E. Rep. 55.

When one is permitted to take a caboose in a freight train for the purpose of transportation, by the consent of the agents in charge of the train, he is presumed to be there of right; and in a petition to recover damages for an injury received while so being transported, it is not necessary that he should set out the rules of the company and allege a compliance therewith. If there has been a known violation of the rules of the company by the plaintiff, that is a matter of defense, and must be asserted by the defendant. *Whitehead v. St. Louis, I. M. & S. R. Co.*, 39 Am. & Eng. R. Cas. 410, 99 Mo. 263, 11 S. W. Rep. 751.

It cannot be inferred, as a conclusion of law, that getting on a passenger train at a place other than the platform was negligence of the passenger contributing to an injury received while entering the car, in consequence of a violent and negligent starting of the train. An answer stating such fact is, therefore, bad on demurrer.

Stoner v. Pennsylvania Co., 21 Am. & Eng. R. Cas. 340, 98 Ind. 384, 49 Am. Rep. 764.—QUOTING *Lafayette & I. R. Co. v. Sims*, 27 Ind. 59.

555. Matters of defense, generally.*—Where a passenger leaps from a train when an accident occurs, and sues for the injuries received thereby, it is competent for the company to show in defense that the passenger's carelessness or culpable negligence prior to the accident caused the injury. *Galena & C. U. R. Co. v. Fay*, 16 Ill. 558.

The company cannot relieve itself of responsibility for injuries received by a passenger where it is shown that their rules were not enforced, but their observance left discretionary with the passenger. *Britton v. Atlanta & C. A. L. R. Co.*, 18 Am. & Eng. R. Cas. 391, 88 N. Car. 536, 43 Am. Rep. 749.

Though the gate-keeper, refusing to let plaintiff pass, may have been mistaken as to the departure of the train in fact, or as to his duty under the rules and regulations of the depot, yet if the circumstances were such, at the time the plaintiff presented himself at the gate, as to entitle him to admission to the train then being still in the depot and before it had started, such mistake of the gate-keeper could afford no defense to the right of the plaintiff to recover. *Baltimore & O. R. Co. v. Carr*, 71 Md. 135, 17 Atl. Rep. 1052.

A company otherwise liable for an injury to a passenger cannot avoid liability by showing that it did not own the track. *Eureka Springs R. Co. v. Timmon*, 40 Am. & Eng. R. Cas. 698, 51 Ark. 459, 11 S. W. Rep. 690.

556. Intervening agency contributing to injury.—Where the result of an injury is such as might have been expected

* Act of God as a defense, see *ante*, 6, 158.

Act of public enemy as a defense, see *ante*, 177.

Defenses to actions for injuries to the spine, see note, 21 Am. & Eng. R. Cas. 451.

Excuse for overshooting station, see *ante*, 264.

Limitation of liability as a defense, see *ante*, 330-341, 511.

Passenger's own negligence as a defense, see *ante*, 157, 342-498.

Release by injured passenger, see *RELEASE*, II.

Want of knowledge of fellow-passenger's dangerous character as a defense in action for failure to protect passenger, see *ante*, 322.

to occur in the ordinary or natural course of events, the carrier is not relieved from responsibility although there may have been some intervening agency contributing to the result. *Terre Haute & I. R. Co. v. Buck*, 18 Am. & Eng. R. Cas. 234, 96 Ind. 346, 49 Am. Rep. 168.—DISAPPROVING *Krach v. Heilman*, 53 Ind. 517; *Collier v. Early*, 54 Ind. 559; *Ryan v. New York C. R. Co.*, 35 N. Y. 210; *Fairbanks v. Kerr*, 70 Pa. St. 86, 10 Am. Rep. 664. DISTINGUISHING *Scheffer v. Washington City, V. M. & G. S. R. Co.*, 105 U. S. 249. OVERRULING *Pullman Palace Car Co. v. Barker*, 4 Colo. 344.

It is no answer to an action by a passenger against a carrier that the negligence or trespass of a third party contributed to the injury, whether the action be upon contract or in tort. So held, where a loaded wagon blocked the track and a passenger train was delayed thereby, causing another train to run into it and injure a passenger. *Eaton v. Boston & L. R. Co.*, 11 Allen (Mass.) 500.

557. Traveling on Sunday.*—The adjudications of the supreme court of Massachusetts, holding that a person engaged in travel on the Sabbath day contrary to the statute of the state, being thus in the act of violating a criminal statute, cannot recover against a railroad upon whose road he travels for the negligence of its servants, establish a local law of that state which will be followed by the federal courts in actions arising therein. *Bucher v. Cheshire R. Co.*, 34 Am. & Eng. R. Cas. 389, 125 U. S. 555, 8 Sup. Ct. Rep. 974.—DISTINGUISHING *Philadelphia, W. & B. R. Co. v. Havre de Grace Steam Towboat Co.*, 23 How. (U. S.) 209. FOLLOWING *Stanton v. Metropolitan R. Co.*, 14 Allen (Mass.) 485; *Bosworth v. Swansey*, 10 Metc. (Mass.) 363; *Jones v. Andover*, 10 Allen (Mass.) 18.

A company engaged to carry plaintiff and others to a certain place on Sunday morning to attend religious services in connection with laying a corner-stone. They were taken out, but the company failed to send a train for their return in the evening, and they were compelled to stay out all night, and suit was brought to recover damages.

* Injuries to passengers on Sunday, see notes, 23 AM. & ENG. R. CAS. 434; 18 *Id.* 403.

Recovery for injury to passenger or employé as affected by Sunday laws, see very full note, 2 L. R. A. 521.

Violation of Sunday law as a defense to action for death of passenger, see DEATH BY WRONGFUL ACT, 161; SUNDAY, 4, 5.

Held, that railroad companies are not required to carry passengers on Sunday, therefore the action could not be based upon a breach of its public duty as a common carrier. It might be sustained as a breach of the special contract to carry, but that would prevent the recovery of damages for mental distress or suffering. *Walsh v. Chicago, M. & St. P. R. Co.*, 42 Wis. 23, 15 Am. Ry. Rep. 71.—QUOTING *Hamlin v. Great Northern R. Co.*, 1 H. & N. 408.—DISTINGUISHED IN *Brown v. Chicago, M. & St. P. R. Co.*, 3 Am. & Eng. R. Cas. 444, 54 Wis. 342, 41 Am. Rep. 41. REVIEWED IN *Alabama & V. R. Co. v. Hanes*, 69 Miss. 160.

558. Traveling for an illegal purpose.—Where persons are traveling for an illegal purpose on a train, and the railroad is a participator in such purpose, the rule *in pari delicto*, etc., will apply in a suit against the company for negligence and consequent injury to one of the persons so carried. *Redd v. Muscogee R. Co.*, 48 Ga. 102, 11 Am. Ry. Rep. 390.

Where an officer of the Confederate army, while absent from service, took passage in a railroad train for the purpose of reporting to his general commanding, and while on his way received personal injuries through the negligence of the agents of the company—*held*, the journey of the officer being for an illegal purpose, he could not recover against the company. *Turner v. North Carolina R. Co.*, 63 N. Car. 522.

559. Passenger's fraud.*—(1) *Non-payment of fare.*—Where a husband knowingly induces a conductor to carry him and his wife without paying fare, contrary to the rules of the company and the instructions to the conductor, it is a fraud upon the company which will preclude a recovery by the wife for any injury sustained whilst being so carried. *Toledo, W. & W. R. Co. v. Brooks*, 81 Ill. 292.

No recovery can be had for a personal injury to a passenger or for his death, caused by mere negligence, when he knowingly and fraudulently induces the conductor to disregard his duty and defraud the company out of the amount of his fare for his own profit. *Toledo, W. & W. R. Co. v. Brooks*, 81 Ill. 245.—REVIEWED IN *Atchison, T. & S. F. R. Co. v. Headland*, 18 Colo. 477.

Where a child enters a caboose with her mother, for the purpose of taking passage,

* See also *ante*, 18.

and is small but of the age to pay fare, and is injured by a sudden jar in making up the train, before any conductor had entered the caboose to demand or receive fares, there is no ground for the defense that she was fraudulently trying to conceal her age and thus get a free ride. *Illinois C. R. Co. v. Axley*, 47 Ill. App. 307.

Prepayment of fare is not necessary to create the relation of carrier and passenger. So a carrier by boat cannot avoid liability for injuries to one who goes on the boat as a passenger, meaning to pay fare. The carrier can only end the relation of carrier and passenger by demanding that the party either pay or leave the boat. *Bartlett v. New York & S. B. F. & S. T. Co.*, 25 J. & S. 348, 29 N. Y. S. R. 357, 8 N. Y. Supp. 309; *affirmed* in 130 N. Y. 659, *mem.*, 41 N. Y. S. R. 951.

(2) *Riding on another's non-transferable ticket.**—One who is injured by the negligence of a company while traveling on one of its trains upon a commutation ticket issued to another person, and by its terms non-transferable, has no remedy against the company. *Way v. Chicago, R. I. & P. R. Co.*, 64 Iowa 48, 52 Am. Rep. 431, 19 N. W. Rep. 828.—*DISTINGUISHING* *Bissell v. Michigan S. & N. I. R. Co.*, 22 N. Y. 308; *Washburn v. Nashville & C. R. Co.*, 3 Head (Tenn.) 638; *Jacobus v. St. Paul & C. R. Co.*, 20 Minn. 125; *Pennsylvania R. Co. v. Books*, 57 Pa. St. 346; *Wilton v. Middlesex R. Co.*, 107 Mass. 108; *Flint & P. M. R. Co. v. Weir*, 37 Mich. 111; *Dunn v. Grand Trunk R. Co.*, 58 Me. 192; *Edgerton v. New York & H. R. Co.*, 39 N. Y. 227; *Gregory v. Burlington & M. R. R. Co.*, 10 Neb. 250; *Great Northern R. Co. v. Harrison*, 10 Ex. 376. *QUOTING* *Toledo, W. & W. R. Co. v. Beggs*, 85 Ill. 80. *REVIEWING* *Union Pac. R. Co. v. Nichols*, 8 Kan. 505.

560. Disease or ill health of passenger.†—Invalids as well as persons in robust health are entitled to the highest degree of care on the part of carriers. A passenger who receives injury through a carrier's negligence may recover for all the ill effects which naturally and necessarily follow the injuries in

the condition of health in which such passenger was at the time; and it is no answer in an action for damages, to say that the injuries would not have occurred, or would not have been so great, had the passenger been in good health. *Owens v. Kansas City, St. J. & C. B. R. Co.*, 33 Am. & Eng. R. Cas. 524, 95 Mo. 169, 15 West. Rep. 88, 8 S. W. Rep. 350.—*APPROVING* *Allison v. Chicago & N. W. R. Co.*, 42 Iowa 274.—*FOLLOWING* *Brown v. Hannibal & St. J. R. Co.*, 66 Mo. 588.—*Purcell v. St. Paul City R. Co.*, 52 Am. & Eng. R. Cas. 611, 48 Minn. 134, 50 N. W. Rep. 1034, 16 L. R. A. 203.

A company is liable for injuries to a passenger who at the time is afflicted with an incurable disease, which would have caused death in course of time, but where death is hastened by the injuries; and if the passenger dies from the disease it will not be assumed, as a matter of law, that the injuries did not hasten death by impairing the passenger's strength and ability to resist disease. *Louisville & N. R. Co. v. Jones*, 34 Am. & Eng. R. Cas. 417, 83 Ala. 376, 3 So. Rep. 902.

A diseased passenger suffering with consumption who is wrongfully injured in alighting from a train and so injured that a hemorrhage results, may recover damages from the railroad company, although the latter's servants may not have had reason to apprehend such a result. *Louisville, N. A. & C. R. Co. v. Wood*, 113 Ind. 544, 570, 12 West. Rep. 303, 16 N. E. Rep. 197, 14 N. E. Rep. 572.

The fact that defendant's servants did not know the delicate state of health of the plaintiff wife at the time of the alleged wrong does not relieve defendant from liability for the actual direct consequences of such wrong. *Brown v. Chicago, M. & St. P. R. Co.*, 3 Am. & Eng. R. Cas. 444, 54 Wis. 342, 11 N. W. Rep. 356, 911, 41 Am. Rep. 41.—*APPROVING* *Stewart v. Ripon*, 38 Wis. 591; *Oliver v. Town of La Valle*, 36 Wis. 592.

Where one had been injured by the negligence of the employes of a railroad company, and, while suffering from the injury received another, by an accident to a train upon the road of the same company—held, that he could recover for the latter injury, although a person well and sound might have suffered no ill effects therefrom. *Allison v. Chicago & N. W. R. Co.*, 42 Iowa 274.

*See also *ante*, 20.

†See also *ante*, 113, 145.

Aggravation of injury by a previous disease or feebleness, see 33 AM. & ENG. R. CAS. 530, *abstr.*

3. Evidence.*

a. Admissibility.

561. Generally.—(1) *What is admissible.*—In an action for negligence against a railroad it is error to reject any evidence tending to prove that plaintiff, although in the service of the company, was by the original contract a daily passenger on their road, and that he was not out of place at the time of the injury. *O'Donnell v. Allegheny R. Co.*, 50 Pa. St. 490.—FOLLOWED IN *Catawissa R. Co. v. Armstrong*, 49 Pa. St. 186.

Evidence that it was the custom and usage of defendant to carry passengers on its freight trains was admissible as tending to show that the relation of carrier and passenger existed. *McGee v. Missouri Pac. R. Co.*, 31 Am. & Eng. R. Cas. 1, 92 Mo. 208, 10 West. Rep. 282, 4 S. W. Rep. 739.

In an action for injury from collision evidence may be given that one part of plaintiff's business "was dealing in land, that he had a quantity of land on hand, and to show the value of the business and the profits arising therefrom." *Pennsylvania R. Co. v. Dale*, 76 Pa. St. 47.—FOLLOWING *Hanover R. Co. v. Coyle*, 55 Pa. St. 396.

Where a party is injured in alighting from a moving train, by being propelled forward some distance along the station platform and coming in contact with a truck, evidence that the truck was not in its usual place is admissible. *Chicago & A. R. Co. v. Fisher*, 31 Ill. App. 36.

In an action for carrying a passenger beyond her place of destination, there being evidence of failure to stop the train at the place, that she was landed where no conveyance could be procured, and that she then walked in the night a distance of five miles—she was not allowed to prove further that the walk occupied three hours over dusty roads;

*Evidence as to boarding and leaving trains while in motion, see EVIDENCE, 33.

Evidence of increased precaution after accident, see EVIDENCE, 84-88.

Evidence of negligence in starting train, see EVIDENCE, 65.

Opinions of passengers as to speed of train, see WITNESSES, 129.

†Admissibility of evidence as to similar accidents at other stations, see 47 AM. & ENG. R. CAS. 528, *abstr.*

Relevancy of evidence that conductor sitting near plaintiff was not injured, see 52 AM. & ENG. R. CAS. 623, *abstr.*

Exhibiting injured parts at trial, see 33 AM. & ENG. R. CAS. 532, *abstr.*

that in crossing a creek she got her clothing and feet wet; that she was chased by dogs, and otherwise frightened, and that the weather was hot and sultry, in consequence of which she became and remained sick for some time. *Held*, that the evidence was admissible. *Cincinnati, H. & I. R. Co. v. Eaton*, 18 Am. & Eng. R. Cas. 254, 94 Ind. 474, 48 Am. Rep. 179.—FOLLOWED IN *Lake Erie & W. R. Co. v. Close*, 5 Ind. App. 444.

(2) *What is not.*—Whether a company has violated a statute in failing to retain an old depot as the point of arrival and departure of trains cannot be raised in a suit against the company for failing to carry the purchaser of a ticket to the old depot. *Martindale v. Kansas City, St. J. & C. B. R. Co.*, 60 Mo. 508.—FOLLOWED IN *Kinealy v. St. Louis, K. C. & N. R. Co.*, 69 Mo. 658.

Where a passenger on a sleeping-car is injured by the falling down of an upper berth upon him and he sues the railroad company and not the sleeping-car company, being entitled only to compensatory damages, evidence as to his poverty, or as to the number and ages of his children, is irrelevant. *Pennsylvania Co. v. Roy*, 1 Am. & Eng. R. Cas. 225, 102 U. S. 451.—APPLIED IN *Dayharsh v. Hannibal & St. J. R. Co.*, 103 Mo. 570. DISTINGUISHED IN *Southern Pac. Co. v. Rauh*, 49 Fed. Rep. 696, 7 U. S. App. 84, 1 C. C. A. 416.

Plaintiff was passenger on an excursion train and claimed to have been injured by being crowded off, the negligence charged being a failure on the part of the company to provide sufficient accommodations. *Held*, that proof of the extent which the excursion had been advertised, and the general understanding in the neighborhood as to the number of excursionists expected, was inadmissible, in the absence of evidence to show that the company knew of the extent of the advertising, or of such neighborhood understanding. *Chicago & A. R. Co. v. Fisher*, 31 Ill. App. 36.

562. To show willful misconduct.—S. bought a ticket on the V. & M. R., between A. station and L. station, and took passage at the former place for the latter. The train failed to stop at L. but took S. to a station beyond his destination. He sued the company for damages. On the trial S. testified that he asked the conductor in charge of the train referred to if he would stop for him to get off at his gate, it not being a station, and that the conductor

replied, "No, sir! I won't stop for you there, or anywhere else." This testimony was objected to as incompetent. *Held*, that it was admissible in determining the question whether the train was run by L. station wilfully or inadvertently. *Vicksburg & M. R. Co. v. Scanlan*, 63 Miss. 413.

563. To show condition of track or roadbed.—In an action by a passenger for a personal injury caused by a car being thrown off the track in consequence of a worn-out rail, evidence that the general condition of that portion of the road which included the place of the accident had long been bad and that the rails had been in use a great many years is admissible, both to show the defect in the rail and that the company had been negligent in not repairing. *Vicksburg & M. R. Co. v. Putnam*, 27 Am. & Eng. R. Cas. 291, 118 U. S. 545, 7 Sup. Ct. Rep. 1.—REFERRED TO IN *McKeigue v. Janesville*, 68 Wis. 50, 31 N. W. Rep. 298.

In a suit for damages to a passenger caused by negligence and the unsafe condition of the cars, roadbed, rails, cross-ties, etc., it is not error to allow proof as to the condition of the track for a short distance on either side of the place of the accident; and it is competent to show that the section boss permitted part of his road to be in bad condition, in determining his negligence and want of skill. *Nashville, C. & St. L. R. Co. v. Johnson*, 15 Lea (Tenn.) 677.

In an action for death alleged to have been caused by the derailment of a freight train by reason of the unsafe condition of the track and cross-ties, where the defendant has sought to prove the condition of its road not only at the place of injury but also along the entire track in and about such place, the plaintiff may not only show the defective condition of the road at the place of the injury but likewise for several hundred feet on each side of it, beginning at the point of derailment. *Ohio Valley R. Co. v. Watson*, (Ky.) 58 Am. & Eng. R. Cas. 418, 21 S. W. Rep. 244.

Where a passenger sues for an injury and alleges in the complaint that it was caused by a defective track, and it appears that his car left the track where it was in good condition, but ran a considerable distance before it turned over, which produced the injury, it is competent to show a defect in the track anywhere, if it con-

tributed to the injury. *Union Pac. R. Co. v. Hand*, 7 Kan. 380, 1 Am. Ry. Rep. 548.

Where it was in evidence that the cars of defendant ran off the track between A. and B., which points were twenty-five miles apart—*held*, that evidence was admissible to show that the witness had passed over the same road two days before the plaintiff received the injury, and that at some point on the road witness had felt a severe jar, and that on the day the cars ran off witness was in the cars and predicted that at a point ahead the passengers would feel a severe jar, and that the prediction was verified, although the point at which the jar occurred was not shown to be the point at which the cars ran off. *Hedges v. Wilmington & W. R. Co.*, 73 N. Car. 558.

564. To show absence of plaintiff's negligence.—In an action by plaintiff for personal injuries sustained in jumping from defendant's moving passenger train, because of the improper conduct of the conductor, it was relevant for plaintiff to explain to the jury the reason for such an act on his part. *Spohn v. Missouri Pac. R. Co.*, 101 Mo. 417, 14 S. W. Rep. 880.

Evidence tending to show that passengers to and from another railroad usually passed over certain defective steps to a platform, was admissible to show that plaintiff, when injured, was not endeavoring to enter the cars by a dangerous and unfrequented place. *McDonald v. Chicago & N. W. R. Co.*, 29 Iowa 170.

At the trial in a case where plaintiff sued to recover for injury sustained while jumping off a train on which he had gotten to get some change that was coming to him from the conductor, evidence was offered to the effect that the conductor told plaintiff to get off the train, after returning the money, as quickly as possible, but without attempting to stop the train; but the getting off was not under compulsion. *Held*, that the evidence was admissible, both as affecting the negligence of the conductor and the contributory negligence of plaintiff. *Pittsburgh, C. & St. L. R. Co. v. Krouse*, 30 Ohio St. 222, 15 Am. Ry. Rep. 298.

Five empty passenger cars were standing upon the siding opposite a station; the incoming train passed by the station on the main track and, after reaching the switch, was backed down upon the side-track and coupled to the stationary cars. After the incoming train had reached the station,

upon which from a hundred to a hundred and twenty-five people were waiting to take the train, the plaintiff tried to get into one of the stationary cars, upon the platform of which four or five people were standing, and was injured. *Held*, in an action to recover damages for the injuries, that evidence that the doors of the stationary cars were locked was competent, as the locked doors may have prevented the plaintiff from getting on board the train earlier, and the crowd of passengers may have led him to hurry when he did try to get in. *Dawson v. Boston & M. R. Co.*, 156 Mass. 127, 30 N. E. Rep. 466.

565. Habits and competency of conductor.—Where a passenger sues for an injury received by reason of a coal train colliding with a passenger train on which he is, evidence is admissible to show the character of the conductor in charge of the coal train. *Pennsylvania R. Co. v. Books*, 57 Pa. St. 339.—DISTINGUISHED IN *Way v. Chicago, R. I. & P. R. Co.*, 64 Iowa 48, 52 Am. Rep. 431.

Proof that the conductor of the coal train was in the habit of being intoxicated, raises a presumption of negligence. *Pennsylvania R. Co. v. Books*, 57 Pa. St. 339.—DISTINGUISHED IN *Philadelphia City Pass. R. Co. v. Henrice*, 4 Am. & Eng. R. Cas. 544, 92 Pa. St. 431, 37 Am. Rep. 699. DOUBTED IN *Williams v. Missouri, Pac. R. Co.*, 109 Mo. 475.

566. Usual and customary occurrences.—Where a passenger sues for an injury received, as he claims, by reason of the cars not stopping at the station a reasonable time to enable him to get off, which is denied by the company, it is proper to allow evidence of what was the usual and customary time for trains to stop at that place. *Fuller v. Naugatuck R. Co.*, 21 Conn. 557.

Plaintiff sued for a personal injury received in attempting to get on a train which slowed but did not stop at the station. At the trial he offered to prove by his own evidence that before the time of the accident he had got on and off cars at the same place when they did not slow up any more than at the time of the accident; and that he had knowledge that they frequently did not stop, but merely slowed down, as they did at the time of the accident. *Held*, that it was error to reject the evidence. *Phillips v. Rensselaer & S. R. Co.*, 57 Barb. (N. Y.) 644.

Evidence that occasionally a passenger would get off on the north side of the company's trains, cannot affect the rights and duties of the passenger, when it is not shown that the company consented to or had knowledge of such practice; nor is such testimony admissible. *Drake v. Pennsylvania R. Co.*, 137 Pa. St. 352, 20 Atl. Rep. 994.—FOLLOWING *Pennsylvania R. Co. v. Zebe*, 33 Pa. St. 318, also 37 Pa. St. 420.

567. Res gestæ.—The facts that a passenger on a train was injured in an attempt to escape from an expected accident, and that those who remained in the car escaped without injury, are circumstances to be considered by the jury in determining whether the injured party acted as a man of ordinary prudence; but where he has acted with reasonable prudence upon the probabilities of an effort to escape, it cannot be said that the attempt to escape constituted contributory negligence, nor does the inquiry depend upon the result of the attempt to escape. *Mitchell v. Southern Pac. R. Co.*, 87 Cal. 62, 25 Pac. Rep. 245.

In such a case it is error to exclude evidence of the actions of other passengers who remained in the car, and as to whether or not any of them were injured. Such evidence is competent, as a part of the *res gestæ*, to show what they deemed prudent conduct. But such error is cured by the admission of undisputed evidence showing that there were only a few passengers in the car besides the plaintiff, and that they all remained in their seats until the car was overturned, and all escaped unhurt. *Mitchell v. Southern Pac. R. Co.*, 87 Cal. 62, 25 Pac. Rep. 245. *Twomley v. Central Park, N. & E. R. R. Co.*, 69 N. Y. 158, 18 Am. Ry. Rep. 113.

Evidence of the acts of passengers and of the outcries of them and bystanders was admissible as part of the *res gestæ* and as showing that plaintiff was actuated by reasonable apprehension in jumping from the car. *Kleiber v. People's R. Co.*, 52 Am. & Eng. R. Cas. 531, 107 Mo. 240, 17 S. W. Rep. 946.

Where a passenger sues for damages for personal injuries caused by a fall whilst alighting from a train, a declaration made by him immediately after the train passed, while he lay on the platform where he fell, is admissible as a part of the *res gestæ*. *Pennsylvania R. Co. v. Lyons*, 41 Am. &

Eng. R. Cas. 154, 129 *Pa. St.* 113, 18 *Atl. Rep.* 759.

In an action to recover for injuries alleged to have been occasioned by defective steps in the end of a platform, beyond which the train had been backed during a stop for supper, and which the plaintiff was descending to enter the car, evidence that the passenger-room was filled with tobacco smoke, crowded and offensive, was admissible as a part of the transaction and as tending to show that plaintiff was justified in leaving the room and seeking the cars before the train had returned in front thereof. *McDonald v. Chicago & N. W. R. Co.*, 29 *Iowa* 170.

Where a passenger sues to recover for injuries received, admissions of certain employés of the company, made long after the accident, touching defects in the track tending to produce the injury, and as to the liability of the company, are not admissible as part of the *res gesta*. *Mobile & O. R. Co. v. Klein*, 43 *Ill. App.* 63.

568. Books of rules—Diagrams—Officers' reports.—On the trial of an action on the case to recover damages sustained by a passenger through the alleged fault of the servants of the defendant corporation, it was claimed that the fault consisted in whole or in part of the violation of the established rules of the company. *Held*, that a book containing the rules and regulations of the company, and intended for the use of their employés, to direct them in the discharge of their duties, was admissible in evidence. *Hobbs v. Eastern R. Co.*, 66 *Me.* 572, 19 *Am. Ry. Rep.* 210.

A passenger sued for an injury received by an engine on a side-track running into the car on which the passenger was. The company alleged error in the trial court in allowing plaintiff to give evidence that after the injury a stop-block was placed upon the side-track so as to prevent further accidents. The facts were that a map had been prepared of the scene of the accident, and an engineer, who was called as a witness, was asked if the map was correct, whereupon he replied that the map showed the stop-block, which was not there at the time of the accident; but before the map was put in evidence, by direction of the court the representation of the stop-block was ordered stricken off. *Held*, that the mere statement of the engineer as to its appearance on the map was not sufficient to sus-

tain the position of the company. *Stouter v. Manhattan R. Co.*, 38 *N. Y. S. R.* 162, 3 *Silv. Sup. Ct.* 472.

In an action by a passenger to recover for an alleged defect in the track, a report of the superintendent to his company is evidence to show the bad condition of the track. *Vicksburg & M. R. Co. v. Putnam*, 27 *Am. & Eng. R. Cas.* 291, 118 *U. S.* 545, 7 *Sup. Ct. Rep.* 1.—REVIEWED AND DISTINGUISHED IN *Carroll v. East Tenn., V. & G. R. Co.*, 41 *Am. & Eng. R. Cas.* 307, 82 *Ga.* 452.

569. Immaterial facts.—In an action for a personal injury received in alighting from a car, the mere fact that the platform where plaintiff alighted was higher than that at another station of the road was immaterial. *Nichols v. Dubuque & D. R. Co.*, 27 *Am. & Eng. R. Cas.* 183, 68 *Iowa* 732, 28 *N. W. Rep.* 44.

The question whether a cattle-guard was properly situated and constructed is immaterial, where the defendant is chargeable with negligence on the facts stated, independently of that question. *Hartwig v. Chicago & N. W. R. Co.*, 1 *Am. & Eng. R. Cas.* 65, 49 *Wis.* 358, 5 *N. W. Rep.* 865.

On the trial of an action for an injury to the plaintiff in alighting from a train, the plaintiff, on cross-examination, stated that he was not out of the cars between two stations named, and was not on the platform at an intermediate station. The court refused to allow a witness of the defendant to testify that he saw plaintiff get off the train at such intermediate station on the evening he was injured and remain off until the train had started, and then run alongside of it and climb on while it was in motion. *Held*, that the refused testimony was inadmissible as primary evidence, as it tended to raise a collateral and immaterial issue, and that it was not competent as impeaching testimony, as the matter sought to be contradicted was immaterial, and drawn out by the defendant on cross-examination. *Lake Erie & W. R. Co. v. Morain*, 140 *Ill.* 117, 29 *N. E. Rep.* 869; affirming 36 *Ill. App.* 632.

b. Sufficiency.

570. Generally.—To entitle a person injured by an accident happening to a train of cars on which he is a passenger to recover damages he must establish affirmatively (1) that he was guilty of no negligence

which contributed to the injury, and (2) that the company was guilty of such negligence. The negligence of the defendant is the gist of the action, and the absence of negligence on the part of the plaintiff is equally important. *Deyo v. New York C. R. Co.*, 34 N. Y. 9.—FOLLOWING *Steves v. Oswego & S. R. Co.*, 18 N. Y. 422; *Wilds v. Hudson River R. Co.*, 24 N. Y. 430, 29 N. Y. 315; *Johnson v. Hudson River R. Co.*, 20 N. Y. 71; *Spencer v. Utica & S. R. Co.*, 5 Barb. 337.—APPLIED IN *Maverick v. Eighth Ave. R. Co.*, 36 N. Y. 378. FOLLOWED IN *Fredricks v. Northern C. R. Co.*, 157 Pa. St. 103. QUOTED IN *Griffith v. Utica & M. R. Co.*, 43 N. Y. S. R. 835.

That a rail was broken before a passenger train reached it cannot be sufficiently shown by evidence that another train passed over the road a short time before. *McPadden v. New York C. R. Co.*, 44 N. Y. 478.

Plaintiff, a female passenger, testified that she was injured by being thrown down just as she had placed her feet on the car platform, by a sudden jolt or jar in the movement of the train. She was corroborated as to the jolt or jar by four other witnesses. The company produced five witnesses who testified that there was no jolt or jar of the train, but only a slight tremor caused by taking off the air-brakes, which was unavoidable, besides other evidence that no motion could have occurred except the slight tremor. *Held*, that the evidence was sufficient to justify submitting the question of negligence to the jury, and it was not error to refuse a nonsuit. *Cook v. Long Island R. Co.*, 47 N. Y. S. R. 200; *affirmed in* 138 N. Y. 642, *mem.*, 53 N. Y. S. R. 930.—REVIEWING *Dillon v. Manhattan R. Co.*, 16 N. Y. S. R. 767; *Bartholomew v. New York C. & H. R. R. Co.*, 102 N. Y. 717, 2 N. Y. S. R. 490.

A person injured while in an express car of a passenger train had, up to six weeks prior to the accident out of which the action arose, been an express messenger, and had run on the same train with the conductor of the colliding passenger train, but had left such employment, and at the time of the accident was engaged in other business not connected with the railroad. On boarding the train he went into the passenger car. He had funds sufficient to pay his fare, but the conductor, who, there was evidence to show, was aware of these facts, omitted, without fault of the party, to ask him for

his fare, and gave as a reason for this omission that he thought the party was in the employ of the express company. *Held*, that the evidence did not justify a conclusion that the party was attempting to obtain a ride without paying fare, and to this end was practising a fraud or imposition on the conductor or the company by passing himself off as an express messenger returning to his "run." *Florida Southern R. Co. v. Hirst*, 52 Am. & Eng. R. Cas. 409, 30 Fla. 1, 11 So. Rep. 506.

571. To prevent disturbance of verdict.—Although it may be conceded that the evidence greatly preponderates against the plaintiff on the question of contributory negligence in alighting from a moving train, yet if there is also substantial testimony tending to show that the defendant's train did not halt long enough to enable the plaintiff to alight with safety, a finding for the plaintiff cannot be disturbed on account of such preponderating evidence, unless there is a strong legitimate inference of prejudice or mistake on the part of the jury. *Jackson v. St. Louis, I. M. & S. R. Co.*, 29 Mo. App. 495.—FOLLOWED IN *Duggan v. Wabash Western R. Co.*, 46 Mo. App. 266.

Where a passenger claims that he was injured by the sudden starting of the train when he was about to alight, if there is evidence which will warrant the jury in finding a want of proper care, a judgment for plaintiff will not be disturbed, though there is a conflict of evidence as to whether the train could be started suddenly or not. *Atchison, T. & S. F. R. Co. v. Frier*, (Tex. Civ. App.) 22 S. W. Rep. 6.

Plaintiff fell while alighting from the train and sustained injuries, to recover damages for which he brought an action against the company, charging them with negligence in respect to the lighting of the station and the provision of safe means of transit of passengers from the cars to the platform. The evidence on these points being contradictory, and the jury having found for defendant, the court refused to disturb their verdict. *Curwin v. Windsor & A. R. Co.*, 9 Nov. Sc. 493.—QUOTING *Bridge v. Grand Junction R. Co.*, 3 M. & W. 244.

When the appellee reached the car platform the train was moving, and he was told that it would not stop again at Longview, his destination, and he was advised to get

off, and he stepped off and was injured. The testimony was conflicting as to who advised him to get off. He said it was the brakeman. The train was moving at about eight miles per hour. The evidence being conflicting, the court cannot say that the trial court erred in refusing to grant a new trial. *Texas & P. R. Co. v. Bagwell*, 3 Tex. Civ. App. 256, 22 S. W. Rep. 829.

For evidence held sufficient to sustain a verdict of damages against a railway company for failure and refusal to transport a passenger upon application and tender of charges, see *Houston & T. C. R. Co. v. Rand*, (Tex.) 9 Am. & Eng. R. Cas. 399.

572. To show negligence on part of carrier, generally.—(1) *What is sufficient.*—Carriers being held to extraordinary diligence to prevent injuries to passengers, evidence of slight neglect is sufficient to fix liability for an injury. *Crawford v. Georgia R. Co.*, 62 Ga. 566.

The presumption that the injury was caused by the negligence of the carrier, which is raised upon proof that the plaintiff was injured while being carried as a passenger, is itself evidence sufficient to sustain a verdict in accordance therewith, and is a fact which the jury must consider in determining its verdict, and which, in the absence of any other evidence in reference to the negligence, necessitates a verdict in favor of the plaintiff. *Bush v. Barnett*, 96 Cal. 202, 31 Pac. Rep. 2.

To authorize a recovery of damages for injuries received by a passenger on one of its trains, there must be reasonable evidence of negligence on the part of the defendant; but when the thing causing the injury is shown to be under the control of the defendant, and the accident is such as, in the ordinary course of business, would not happen if reasonable care was used, it affords, in the absence of explanation by the defendant, sufficient evidence that the accident arose from want of care on its part. *Breen v. New York C. & H. R. R. Co.*, 34 Am. & Eng. R. Cas. 523, 109 N. Y. 297, 16 N. E. Rep. 60, 14 N. Y. S. R. 835; affirming 40 Hun 638, mem.—FOLLOWING *Holbrook v. Utica & S. R. Co.*, 12 N. Y. 236.

(2) — *illustrations.*—It is evidence of negligence that the train was run over a rail known to have been defective and fractured. *Pym v. Great Northern R. Co.*, 2 F. & F. 619.

As the train on which plaintiff was a passenger was pulled into the depot, the engine was cut loose from the cars, and plaintiff rose to his feet to put on his overcoat in preparation for leaving the car. The cars ran on through the depot and struck a "bumper" with great force, throwing plaintiff down and injuring him. *Held*, sufficient evidence of negligence to warrant a verdict for damages. *Wylde v. Northern R. Co.*, 14 Abb. Pr. N. S. (N. Y.) 213.

Plaintiff got on a freight train which only occasionally carried passengers, paid his fare, and was carried five miles beyond his destination and put off at another station, from which he was compelled to walk back. He was afflicted with rheumatism, and was exposed to inclement weather in walking back. *Held*, on demurrer to the evidence, that he was entitled to recover damages. *Mobile & O. R. Co. v. McArthur*, 43 Miss. 180.—DISTINGUISHED IN *Thompson v. New Orleans, J. & G. N. R. Co.*, 50 Miss. 315.

The evidence showed that the accident was caused by the train running into a freight car which was standing on the track. It appeared that the freight car had been left on a siding the day before and had been blown onto the main track by a strong wind. There was no evidence that the brakes on the car had been properly set, and there was a conflict of evidence as to the force of the wind and whether it was strong enough to have blown the car if the brakes had been properly set. *Held*, sufficient evidence of negligence on the part of the company to justify a submission of the case to the jury. *Bowles v. Rome, W. & O. R. Co.*, 12 N. Y. S. R. 457.—FOLLOWING *Webster v. Rome, W. & O. R. Co.*, 40 Hun (N. Y.) 161.

(3) *What is insufficient.*—A recovery against a company for negligent injuries received while alighting from a train cannot be sustained where all the allegations of the complaint as to ownership or possession as lessee by defendant of the train and tracks, or employment by it of those in charge thereof, are denied in the answer, and there is no evidence as to those facts, and it is uncontroverted that the train, at the time of the accident, was on the tracks of another company which ran trains between the same points as defendant. *Kunzmann v. New York & R. B. R. Co.*, 6 Misc. (N. Y.) 440, 27 N. Y. Supp. 132, 58 N. Y. S. R. 584.

Where the defendant's evidence estab-

lishes the fact that the caboose of a freight train stopped at the platform and remained a length of time ample for passengers to get off and on—which defeats his (plaintiff's) right to recover—and there is nothing in plaintiff's testimony tending to contradict such fact, a demurrer to plaintiff's case should be sustained. *Hays v. Wabash R. Co.*, 51 Mo. App. 438.

A passenger was left at a station where it was announced that the train would stop 20 minutes for supper. There was a conflict of evidence as to whether the train did stop 20 minutes, but there was no conflict but that full and fair notice was given by the conductor for "all aboard." *Held*, not sufficient to sustain a verdict in favor of the passenger. *Texas Trunk R. Co. v. Mullins*, (Tex. App.) 18 S. W. Rep. 790.

Plaintiff entered defendant's passenger train at a station and walked down the aisle of a car, carrying a satchel in her hand and looking for a seat. While so walking she stumbled over two satchels in the aisle, and fell and was injured. None of defendant's employés were in the car at the time. The car was lighted so that a person could, by looking, see whether there were any obstructions in the aisle. *Held*, that evidence of the above facts did not tend to show any negligence on the part of defendant or its employés, and that a nonsuit was properly granted. *Stimson v. Milwaukee, L. S. & W. R. Co.*, 44 Am. & Eng. R. Cas. 381, 75 Wis. 381, 44 N. W. Rep. 748.

573. To show wilful negligence or misconduct.*—Using inferior machinery, and failing to use reasonable precautions to provide against accidents, might authorize the jury to find against the company as for wilful neglect. *Claxton v. Lexington & B. S. R. Co.*, 13 Bush (Ky.) 636, 17 Am. Ry. Rep. 12.

Where a gateman, in refusing to accept a return coupon, assigned as a reason for so doing that the date looked as if it had been rubbed out on purpose, and then referred the passenger to the ticket receiver, and the plaintiff returned, saying he could not find the receiver's office, and the gateman himself had time before the departure of the train, and without neglecting his other duties, to have reported the case to the receiver, and he failed or refused to do so—*held*, that these facts in themselves would

not warrant the jury in finding that the gateman acted with a wanton or reckless indifference to the plaintiff's rights; that in saying that the date looked as if it had been rubbed out on purpose, such language might be construed as an insinuation, at least, that the date had been rubbed out by the plaintiff; but from the evidence it did not seem that the language was so used, nor that it was understood by the plaintiff as being used, in an offensive or insulting manner; and that it was the duty of the gateman to stand at the gate until the departure of the train, and it would have been a breach of duty to have left the gate for this or any like purpose. *Northern C. R. Co. v. O'Conner*, 52 Am. & Eng. R. Cas. 176, 76 Md. 207, 16 L. R. A. 449, 24 Atl. Rep. 449.

Such facts would not warrant the jury in allowing not only such damages as they may find to have been the direct and immediate consequences of the defendant's refusal to admit the plaintiff to its train, but, in addition thereto, such other damages as they may believe he has suffered in his person and feelings. *Northern C. R. Co. v. O'Conner*, 52 Am. & Eng. R. Cas. 176, 76 Md. 207, 16 L. R. A. 449, 24 Atl. Rep. 449.—DISTINGUISHING *Philadelphia, W. & B. R. Co. v. Rice*, 64 Md. 63.

574. To show negligence in management of train.—The fact that a carriage door is improperly fastened is evidence of negligence, even when the train was not moving at the time when the accident happened. *Richards v. Great Eastern R. Co.*, 28 L. T. 711.

Suit was brought to recover for the death of a passenger who was killed by being thrown from the car platform to the ground. The proof showed that through the negligence of the company's servants the passenger was induced to go to the platform by hearing his station called before it was reached, and upon discovering his mistake the train suddenly started and threw him to the ground before he could return. *Held*, the jury having been properly instructed as to the law, both as to the care the company should exercise and as to the care that the passenger should exercise to avoid injury to himself, that there was evidence to support a verdict against the company. *Texas & P. R. Co. v. Evans*, 2 Tex. Unrep. Cas. 318.

In a suit for damages caused to a passenger from personal injuries inflicted by the

* See also *ante*, 562.

alleged negligence of the employés on a train, it was shown that both the train and road belonged to the company, though the road had not been formally received from the contractors who constructed it. The engineer, conductor, and employés were, when the accident occurred, employed and paid by the company, and could be discharged on complaint of the contractor. *Held*: (1) that these facts, unexplained, would make the company liable for the negligence of the engineer and its other employés on the train; (2) that if the train was run by the company with its own employés for the purpose of transporting construction material for the contractors, the company would be responsible to any one not an employé for injury received by the negligence of those operating the train, even though the contractors had the right to determine when, where, and to what extent supplies should be transported, and to that extent had the control of the company's train and employés; (3) it would seem that, even if the employés operating the train, who were employed and could be discharged by the company alone, were yet operating the train in transporting supplies according to the directions and subject to the will of the contractors, they would still be the servants of the company, which would be responsible in damages for their negligence. *Burton v. Galveston, H. & S. A. R. Co.*, 21 *Am. & Eng. R. Cas.* 218, 61 *Tex.* 526.—DISAPPROVED IN *Powell v. Virginia Constr. Co.*, 88 *Tenn.* 692, 13 *S. W. Rep.* 691.

575. To show knowledge or consent of carrier.—In an action for injury to a passenger, in order to prove negligence on the part of the company in maintaining its line in an insecure state, whereby a heavy fall of rain washed away an embankment, it must be shown that the company knew, or ought to have known, that its line was in an insecure state, and in the absence of testimony to that effect a verdict for the plaintiff is against the weight of the evidence. *Withers v. North Kent R. Co.*, 27 *L. J. Ex.* 417; *nom. Withers v. Great Northern R. Co.*, 1 *F. & F.* 165.

Where a passenger sues for personal injuries while alighting from a train at night, proof that the grounds were so poorly lighted that plaintiff could not see the ground or distinguish objects about him, and that when another passenger, just

ahead of plaintiff, asked the conductor whether the train stopped long enough for passengers to get off, he replied in a flippant manner that it seemed not, is sufficient to justify the submission of the case to the jury on the questions of plaintiff's danger and whether such danger was known to the company's employés. *Galveston, H. & S. A. R. Co. v. Thornsberry, (Tex.)* 17 *S. W. Rep.* 521.

A passenger was riding on the rear platform of a caboose at night when approaching his destination, and while there a conductor took his ticket but said nothing to him. Plaintiff testified that some one told him the train would only "slow up" at the station, and he would have to jump off; but both the conductor and brakeman testified that they did not tell him so. Plaintiff was a railroad man of nine years' experience, though at the time riding as a passenger. The train did check its speed, and the conductor testified that it would have stopped had he not already discovered that plaintiff had jumped off. *Held*, that the evidence failed to show any knowledge or consent to his jumping off on the part of the company, but did show contributory negligence preventing a recovery for injuries received in jumping off. *Herman v. Chicago, M. & St. P. R. Co.*, 79 *Iowa* 161, 44 *N. W. Rep.* 298.

576. To prove or disprove contributory negligence.—The facts that a passenger seated himself in defendant's car, paid his fare to the conductor when requested, and remained seated until the train left the track, sufficiently show his freedom from contributory negligence. *Louisville, N. A. & C. R. Co. v. Miller, (Ind.)* 58 *Am. & Eng. R. Cas.* 304, 37 *N. E. Rep.* 343.

Proof that a plaintiff was standing up in a caboose-car which was provided with seats and was thrown down by a sudden jerk or start of the train, is some proof of contributory negligence, and the case should be submitted to the jury, though he had left his seat but for a moment to pick up a bottle of medicine for a disabled passenger, which had dropped to the floor. *Wallace v. Western N. C. R. Co.*, 34 *Am. & Eng. R. Cas.* 553, 98 *N. Car.* 494, 2 *Am. St. Rep.* 346, 4 *S. E. Rep.* 503.

Plaintiff's evidence was to the effect that he was jolted off a train on which he was a passenger and struck a moving freight

train and was injured. All the other evidence showed that he was injured while attempting to wrongfully mount a moving freight train, and was thereby injured. *Held*, that he was not entitled to recover. *Missouri Pac. R. Co. v. Texas & P. R. Co.*, 34 *Fed. Rep.* 92.

577. To show defendant a carrier of passengers.—In an action for personal injuries to a passenger he offered evidence to show that the company was duly chartered, organized, and had constructed its road, which was then in operation; that he had purchased a ticket on a connecting road to a point on defendant's road, which ticket was recognized by defendant's conductor. *Held*, that the evidence was enough to submit to the jury that defendant was a common carrier. *Bixby v. Montpelier & St. J. R. Co.*, 49 *VI.* 123, 17 *Am. Ry. Rep.* 140.

578. — or that train was a passenger train.—Where the liability of a company for a personal injury to a passenger depends upon whether the train on which he rode was in fact a passenger train, proof that the conductor had permitted persons to ride on two or three former occasions, and had collected fare, is not sufficient to establish the fact that it was a passenger train. The evidence should show that the train carried passengers frequently or habitually. *Lucas v. Milwaukee & St. P. R. Co.*, 33 *Wis.* 41.

Where the liability of a company for an injury to a passenger depends upon whether the train was a passenger train or not, evidence of two witnesses that they had a short time before traveled on the same train and paid fare, is competent evidence, but not sufficient to establish the fact. *Lucas v. Milwaukee & St. P. R. Co.*, 33 *Wis.* 41.

579. To show physical pain and mental anguish.—Where it is alleged that by reason of the injuries sustained plaintiff has become permanently disabled and a cripple for life, and will never recover from the effects thereof, and that he was greatly injured, cut, bruised, and wounded internally and externally about his hip and spine, and is wholly unable to attend to the transaction and performance of his usual and necessary business, and has so continued from the time of the accident to that of the suit, the law infers that physical pain and mental suffering resulted therefrom.

Texas & P. R. Co. v. Curry, 21 *Am. & Eng. R. Cas.* 448, 64 *Tex.* 85.

580. To show a custom.—Where a party sues for an injury received in attempting to get on a moving train, proof that trains usually slowed up at that place is not sufficient to show a custom on the part of the company to receive passengers on moving trains, where there is evidence to show that the trains slowed up for other purposes and where there is nothing to show that passengers ever got on or off at such times by invitation or direction of the train employés. *Denver, S. P. & P. R. Co. v. Pickard*, 18 *Am. & Eng. R. Cas.* 284, 8 *Colo.* 163, 6 *Pac. Rep.* 149.

c. Presumptions; Prima-facie Evidence.

581. Generally.*—In regard to all the obligations which a carrier assumes toward passengers, including the making and maintaining of a suitable track, furnishing comfortable and safe cars, and running them regularly and safely; and of so adjusting its time-tables that trains will be liable to pass each other without injury, and furnishing safe and ready passageways to and from its trains—the law presumes that they will be properly discharged; and a passenger has a right to presume that these obligations will be discharged, and govern his action accordingly, unless he is informed or notified to the contrary. *Gonzales v. New York & H. R. Co.*, 39 *How. Pr. (N. Y.)* 407.

Riding in a passenger car raises a presumption that the person is there as a passenger by invitation or permission. *Bryant v. Chicago, St. P., M. & O. R. Co.*, 58 *Am. & Eng. R. Cas.* 15, 53 *Fed. Rep.* 997, 4 *C. C. A.* 146. *Gillingham v. Ohio River R. Co.*, 51 *Am. & Eng. R. Cas.* 222, 35 *W. Va.* 588, 14 *L. R. A.* 798, 14 *S. E. Rep.* 243. *Creed v. Pennsylvania R. Co.*, 86 *Pa. St.* 139. *Atchison, T. & S. F. R. Co. v. Headland*, 18 *Colo.* 477, 33 *Pac. Rep.* 185. *Pennsylvania R. Co.*

*Presumption of knowledge of rules, see *ante*, 67.

Presumption of negligence on part of carrier, see 52 *AM. & ENG. R. CAS.* 249, *abstr.*

Presumption that one is a passenger, see *ante*, 22.

What passenger must prove to raise a presumption of negligence, see note, 62 *AM. DEC.* 681.

Rule as to what constitutes *prima-facie* evidence of negligence in actions resting on contract, as breach of contract to safely carry passenger, etc., see note, 2 *L. R. A.* 821.

v. Books, 57 Pa. St. 339. *People v. Douglass*, 87 Cal. 281, 25 Pac. Rep. 417. But compare *Snyder v. Natchez, R. R. & T. R. Co.*, 44 Am. & Eng. R. Cas. 278, 42 La. Ann. 302, 7 So. Rep. 582.

Where a party is injured while on a train and it is a disputed question whether he is a passenger or an employé of the company, the fact that he is riding on an employé's pass raises a presumption that he is a servant of the company, but this presumption may be rebutted. *Pennsylvania R. Co. v. Books*, 57 Pa. St. 339.

Where one has been carried as a passenger for many hours, and the conductor has given him a check, which is found upon his person after he is killed through the company's negligence, it will be presumed that he was lawfully on the train; and this presumption is not overcome by the fact that a non-transferable pass, issued to another person, is found on his body, but where there is no evidence that he had procured it fraudulently, or was attempting to travel on it. *Louisville, N. A. & C. R. Co. v. Thompson*, 27 Am. & Eng. R. Cas. 88, 107 Ind. 442, 8 N. E. Rep. 18, 9 N. E. Rep. 357, 57 Am. Rep. 120.

The presumption is that a stranger riding upon a freight train is not legally a passenger and is not lawfully upon the train; and no liability for negligence can be imposed upon the company as to him, unless the special circumstances of the case rebut this presumption. *Eaton v. Delaware, L. & W. R. Co.*, 57 N. Y. 382, 7 Am. Ry. Rep. 67.—APPLIED IN *Morris v. Brown*, 111 N. Y. 318, 18 N. E. Rep. 722, 19 N. Y. S. R. 355, 7 Am. St. Rep. 751. REVIEWED IN *Atchison, T. & S. F. R. Co. v. Headland*, 18 Colo. 477; *Florida Southern R. Co. v. Hirst*, 30 Fla. 1.

Passenger is presumed to have knowledge of rules posted on the door of a car. *Macon & W. R. Co. v. Johnson*, 38 Ga. 409.

Stopping a railway train at an unusual place renders the company presumptively in the wrong to that extent, and the burden of explaining the neglect is cast upon it. *Memphis & C. R. Co. v. Whitfield*, 44 Miss. 466.—REVIEWED IN *Dawson v. Louisville & N. R. Co.*, (Ky.) 11 Am. & Eng. R. Cas. 134.

Proof that a train always stopped at a station or that it habitually stopped there when it was the destination of a passenger on board sufficiently proves *prima facie* a regulation requiring it to do so. *Sira v.*

Wabash R. Co., 58 Am. & Eng. R. Cas. 538, 115 Mo. 127, 21 S. W. Rep. 905.

The fact that a passenger was carried beyond her destination does not, of itself, establish a presumption that the company had failed in the performance of its duty; and the burden of proof is upon her to establish an allegation in the declaration that the train did not stop long enough to enable her, by the use of reasonable diligence, to leave the cars in safety. *Heves v. Philadelphia, W. & B. R. Co.*, 76 Md. 154, 24 Atl. Rep. 325.

Where that which causes the accident is under the management of the carrier, and the accident such as would not ordinarily happen, the accident, if unexplained, is reasonable evidence of negligence; but where, from the character of the accident, it appears that it could not have happened without improper exposure on the part of the passenger, it does not raise the presumption of negligence. *Miller v. St. Louis R. Co.*, 5 Mo. App. 471.

582. Mere proof of injury.*—Every one that undertakes the business of a carrier of persons is bound to know all the hazards to which it is exposed, and that by the exercise of reasonable skill and proper care the traveler can be carried in safety; when, therefore, a passenger is injured, the presumption is that it has been occasioned by negligence. *Saltonstall v. Stockton, Taney* (U. S.) 11; affirmed in 13 Pet. (U. S.) 181.

Justice, as well as the principles of evidence adopted in analogous cases, requires that any disaster by which a passenger suffers should be *prima facie* evidence of negligence in the carrier, and should make it necessary for him, in order to exonerate himself from damages, to show the contrary. *Saltonstall v. Stockton, Taney* (U. S.) 11; affirmed in 13 Pet. (U. S.) 181.

The law presumes, in the absence of all explanation, that an injury suffered at the hands of a carrier was the result of the carrier's fault, and casts on him the burden of overcoming that presumption, or of show-

* When mere proof of an accident injuring the plaintiff will raise a presumption of negligence on the part of the company, see notes, 44 Am. & Eng. R. Cas. 351; 30 Id. 621; 16 Id. 314; 6 Id. 418; 43 Am. Dec. 363; 62 Id. 680; 43 Am. Rep. 73. See also 47 Am. & Eng. R. Cas. 492, *abstr.*; 58 Id. 294, *abstr.*

Presumption of negligence where passenger is injured while about to get on or off train, see note, 15 L. R. A. 38.

ing that the injury could not have been prevented by proper care and diligence. *Louisville & N. R. Co. v. Jones*, 34 Am. & Eng. R. Cas. 417, 83 Ala. 376, 3 So. Rep. 902.—LIMITED IN *Georgia Pac. R. Co. v. Love*, 91 Ala. 432.—*Laing v. Colder*, 8 Pa. St. 479.—DISTINGUISHED IN *Hayman v. Pennsylvania R. Co.*, 34 Am. & Eng. R. Cas. 478, 118 Pa. St. 508, 10 Cent. Rep. 835, 11 Atl. Rep. 815, 20 W. N. C. 466; *Herstine v. Lehigh Valley R. Co.*, 151 Pa. St. 244. FOLLOWED IN *Long v. Pennsylvania R. Co.*, 147 Pa. St. 343.

If the carrier seeks to absolve himself from liability by showing that the injury resulted from some unavoidable accident, or from some cause beyond the power of human care or foresight to prevent, such defense is an affirmative one upon his part, which he is required to establish by a preponderance of evidence. *Bush v. Burnett*, 96 Cal. 202, 31 Pac. Rep. 2.

But carelessness or negligence which does not conduce to the injury will not sustain the action if there were proper carefulness and skill at that point of the road where the accident happened. *Tennery v. Pippinger*, 1 Phila. (Pa.) 543.

The mere fact that a passenger was injured does not raise the presumption of negligence so as to shift the burden of proof on the defendant, where the evidence clearly shows the cause of the accident. *Keller v. Hestonville, M. & F. Pass. R. Co.*, 149 Pa. St. 65, 24 Atl. Rep. 159, 1 Pa. Dist. 197.

But mere proof of an accident, which is the result of a defective track or apparatus, raises a presumption of negligence. So where it appeared that an accident was the result of a misplaced switch or a spreading of the rails, it is correct to charge that the fact of the accident occurring is "of itself presumptive evidence of negligence on the part of the defendants." *Curtis v. Rochester & S. R. Co.*, 18 N. Y. 534; *affirming* 20 Barb. 282.—EXPLAINING *Holbrook v. Utica & S. R. Co.*, 12 N. Y. 236.—DISAPPROVED IN *Central Pass. R. Co. v. Kuhn*, 86 Ky. 578, 6 S. W. Rep. 441. REVIEWED IN *Brehm v. Great Western R. Co.*, 34 Barb. (N. Y.) 256; *Fredericks v. Northern C. R. Co.*, 157 Pa. St. 103.

Upon proof of an injury to a passenger, no presumption against either the carrier or passenger arises. It is incumbent upon the plaintiff to go further and show not simply the injury, but that it was the result of

some negligence of the carrier. *East Tenn. V. & G. R. Co. v. Mitchell*, 11 Heisk. (Tenn.) 400.—QUOTED IN *Louisville & N. R. Co. v. Manchester Mills*, 88 Tenn. 653, 14 S. W. Rep. 314.

While the mere happening of the accident to a passenger train does not necessarily make out a *prima-facie* case of negligence in the carrier, it is nevertheless evidence to be considered by the court or jury in determining whether or not negligence existed. In many instances the mishap is of such a nature as in itself, when unexplained, affords satisfactory proof of the fact. We think this is such a case. *Bonner v. Grumbach*, 2 Tex. Civ. App. 482, 21 S. W. Rep. 1010.

583. Proof of injury while on train, generally.*—If a passenger be injured during the progress of his trip, the law presumes that the carrier has been guilty of negligence; i. e., when the plaintiff proves that he took passage on defendant's train, paid his fare, and received an injury, he has made out a *prima-facie* case, and the burden of proof then shifts to the defendant to explain the circumstances of the injury. *Carter v. Kansas City Cable R. Co.*, 42 Fed. Rep. 37. *Galena & C. U. R. Co. v. Yarrowood*, 17 Ill. 509. *Zemp v. Wilmington & M. R. Co.*, 9 Rich. (So. Car.) 84.—QUOTING *Hegeman v. Western R. Corp.*, 16 Barb. (N. Y.) 353. REVIEWING *Kerwhaker v. Cleveland, C. & C. R. Co.*, 3 Liv. Law Mag. 341; *Carpus v. London & B. R. Co.*, 3 Railw. Cas. 692; *Beers v. Housatonic R. Co.*, 19 Conn. 566; *Felder v. Louisville, C. & C. R. Co.*, 2 McMull. (So. Car.) 403; *Herring v. Wilmington & R. R. Co.*, 10 Ired. (N. Car.) 402.—DISTINGUISHED IN *Worthington v. Central Vt. R. Co.*, 64 Vt. 107. QUOTED IN *Joyner v. South Carolina R. Co.*, 29 Am. & Eng. R. Cas. 258, 26 So. Car. 49, 1 S. E. Rep. 52. REVIEWED IN *Dunn v. Grand Trunk R. Co.*, 58 Me. 187.

When a passenger on a train is injured owing to a landslide, a presumption of negligence on the part of the company arises, and the burden is upon it to show that the slide was the result of causes beyond its control. *Gleeson v. Virginia Midland R.*

* Presumption of negligence where passenger is injured by collision of carriage with other objects, see note, 15 L. R. A. 37.

Various illustrations of accidents which injure passengers sufficient to support a presumption of negligence, see note, 62 AM. DEC. 682.

Co., 47 Am. & Eng. R. Cas. 513, 140 U. S. 435, 11 Sup. Ct. Rep. 859.

If a passenger seated in a car is injured by a collision, or by a defect in any part of the machinery, a *prima-facie* case of negligence is established, and the *onus* of disproving it is cast upon the company. But where a train has come to a stop, and a passenger, on stepping from the lowest step of the platform of the cars to the ground, fractures her knee-cap, without any apparent external cause, no presumption of negligence is raised. *Delaware, L. & W. R. Co. v. Naphys*, 1 Am. & Eng. R. Cas. 52, 90 Pa. St. 135.—FOLLOWED IN *Philadelphia & R. R. Co. v. Anderson*, 6 Am. & Eng. R. Cas. 407, 94 Pa. St. 351, 39 Am. Rep. 787.

An accident befalling a passenger while on board a train and in the course of his journey raises no presumption of negligence on the part of the company unless the accident is connected in some way with the means of transportation. *Herstine v. Lehigh Valley R. Co.*, 151 Pa. St. 244, 25 Atl. Rep. 104.—DISTINGUISHING *Laing v. Colder*, 8 Pa. St. 479. REVIEWING *Spear v. Philadelphia, W. & B. R. Co.*, 119 Pa. St. 61.

The mere fact that the aisle of a passenger car is obstructed by the personal baggage of some passenger, over which another passenger stumbles and is injured, does not of itself raise a presumption of negligence on the part of the company. *Stimson v. Milwaukee, L. S. & W. R. Co.*, 44 Am. & Eng. R. Cas. 381, 75 Wis. 381, 44 N. W. Rep. 748.—DISTINGUISHING *Kirst v. Milwaukee, L. S. & W. R. Co.*, 46 Wis. 489; *Muster v. Chicago, M. & St. P. R. Co.*, 61 Wis. 325.

584. Proof of injury coupled with absence of contributory negligence.—An injury to a passenger while on a train, and while in the exercise of ordinary care himself, is *prima-facie* evidence of the liability of the railroad company. *New Jersey R. & T. Co. v. Pollard*, 22 Wall. (U. S.) 341.—APPLIED IN *Georgia Pac. R. Co. v. Love*, 91 Ala. 432. REVIEWED IN *Atchison, T. & S. F. R. Co. v. Walton*, 3 N. Mex. 319.—*George v. St. Louis, I. M. & S. R. Co.*, 1 Am. & Eng. R. Cas. 294, 34 Ark. 613. *Yeomans v. Contra Costa S. Nav. Co.*, 44 Cal. 71. *Guffey v. Hannibal & St. J. R. Co.*, 53 Mo. App. 462.

But this legal presumption may be repelled by proving that the injury resulted from inevitable accident, or that it was caused by something against which no

human foresight and prudence could provide. *Sullivan v. Philadelphia & R. R. Co.*, 30 Pa. St. 234. *Meier v. Pennsylvania R. Co.*, 64 Pa. St. 225.—DISTINGUISHED IN *Hayman v. Pennsylvania R. Co.*, 34 Am. & Eng. R. Cas. 478, 118 Pa. St. 508, 10 Cent. Rep. 835, 11 Atl. Rep. 815, 20 W. N. C. 466; *Hawkins v. Front St. Cable R. Co.*, 3 Wash. 592. QUOTED IN *Topeka City R. Co. v. Higgs*, 34 Am. & Eng. R. Cas. 529, 38 Kan. 375.

The *prima-facie* liability of the carrier, arising from the mere fact of the accident, is conditioned upon the exercise of reasonable care on the part of the passenger. *Tuley v. Chicago, B. & Q. R. Co.*, 41 Mo. App. 432.

Where the cause of the accident was as well known to plaintiff as to the company, the presumption of negligence arising from the mere fact that one is injured while a passenger in the care of a carrier company, has no application. *Fearn v. West Jersey Ferry Co.*, 143 Pa. St. 122, 22 Atl. Rep. 708.—DISTINGUISHING *Neslie v. Second & T. St. Pass. R. Co.*, 113 Pa. St. 300.

585. Proof of injury occasioned in management of train.—Where a passenger is injured during the time when he is such, and therefore under the protection of the railroad company, and the injury is inflicted by a train of cars running on its track and under the control and management of its servants, the company ought to be required to show that it used on the occasion the degree of care which the law imposes upon it. And in such case the occurrence of the accident is *prima-facie* evidence of negligence on the part of the company, throwing upon it the *onus* of rebutting the presumption by proving there was no negligence. *Philadelphia, W. & B. R. Co. v. Anderson*, 44 Am. & Eng. R. Cas. 345, 72 Md. 519, 20 Atl. Rep. 2.

Where in an action for an injury received while the company was operating its train the occurrence of the injury through the mistake of the carrier is shown, a presumption of negligence arises against the latter which casts upon it the burden of showing that the accident happened notwithstanding the exercise on its part of the high degree of care which the law imposes on it. *Coudy v. St. Louis, I. M. & S. R. Co.*, 27 Am. & Eng. R. Cas. 282, 85 Mo. 79.—QUOTING *Scott v. London Dock Co.*, 10 Jur. N. S. 1107.

Under the provisions of section 3, art. 1, ch. 72, Nebraska Comp. St., it is only necessary to a right of recovery to show that the person injured was at the time being transported as a passenger over the defendant's line of railroad, and that the injury resulted from the management or operation of said railroad. A presumption thereupon arises that such management or operation was negligent, and it can be met only by showing that the injury arose from the criminal negligence of the party injured, or that the injury complained of was the result of the violation of some express rule or regulation of said company actually brought to the notice of the party injured. *Missouri Pac. R. Co. v. Baier*, 37 Neb. 235, 55 N. W. Rep. 913. *Union Pac. R. Co. v. Porter*, 58 Am. & Eng. R. Cas. 289, 38 Neb. 226, 56 N. W. Rep. 808.

Where an injury is chargeable to the manner of coupling a car, a presumption of negligence on the part of the company does not arise if the accident is to the passenger and not to the car. *Herstine v. Lehigh Valley R. Co.*, 151 Pa. St. 244, 25 Atl. Rep. 104.

580. Proof of injury attributable to instrumentalities of transportation.*—If one is injured by the breaking down or upsetting of the vehicle used in the transportation, or by the colliding of one train with another, or by the train running off the track from some defect in the road-bed, in these, and in other like cases, the evidentiary facts in themselves create a presumption of negligence on the part of the carrier, and he must show that the accident happened in spite of the exercise by him and his servants of the greatest degree of care and diligence practicable under the circumstances. *Baltimore & O. R. Co. v. State*, 21 Am. & Eng. R. Cas. 202, 63 Md. 135. *Mobile & O. R. Co. v. Thomas*, 42 Ala. 672. *Pittsburg, C. & St. L. R. Co. v. Thompson*, 56 Ill. 138, 3 Am. Ry. Rep. 454. —FOLLOWED IN North Chicago St. R. Co. v. Cotton, 140 Ill. 486. —*Central Pass. R. Co. v. Kuhn*, 32 Am. & Eng. R. Cas. 16, 86 Ky. 578, 6 S. W. Rep. 441. —FOLLOWING Louisville & N. R. Co. v. Ritter, 85 Ky. 368. REVIEWING Louisville & P. R. Co. v. Smith, 2 Duv. (Ky.) 556. —*Baltimore & O. R. Co. v.*

Wightman, 29 Gratt. (Va.) 431, 17 Am. Ry. Rep. 351. *Baltimore & O. R. Co. v. Noell*, 32 Gratt. (Va.) 394.

When an injury occurs to a passenger, by reason of the giving way of a bridge under the passing train, proof of the casualty is *prima-facie* evidence of negligence in the location or construction of the bridge, or in both its location and construction. So, too, where the subversion of the bridge appears to have been occasioned by an unusual flood or freshet. Otherwise where the injury occurs from causes entirely foreign to the apparatus or operations of the road. *Kansas Pac. R. Co. v. Miller*, 2 Colo. 442, 20 Am. Ry. Rep. 245. —APPLYING *Brehm v. Great Western R. Co.*, 34 Barb. (N. Y.) 256.

Proof that the injury occurred from the breaking, giving way, or improper working of the vehicle or any of the machinery or appliances employed in carrying the passenger, makes a *prima-facie* case of negligence on the part of the carrier. *Wilson v. Northern Pac. R. Co.*, 26 Minn. 278, 37 Am. Rep. 410, 3 N. W. Rep. 333.

Where a car-wheel, while in operation, breaks and thereby a passenger is injured, negligence in the company will be presumed, but this may be rebutted. *Toledo, W. & W. R. Co. v. Beggs*, 85 Ill. 80.

The fact that a railway track has given way amounts to *prima-facie* evidence of its insufficiency, in an action for an injury to a passenger alleged to have arisen from the improper construction of the railway; this evidence may become conclusive from the absence of any proof on the part of the company to rebut it. *Great Western R. Co. v. Fawcett*, 1 Moore P. C. C. N. S. 101, 9 Jur. N. S. 339, 11 W. R. 444, 8 L. T. 31. —QUESTIONED IN *Czeck v. General S. Nav. Co.*, L. R. 3 C. P. 14, 17 L. T. 246.

While in many cases the mere fact of injury to a passenger on a railway car raises the presumption of a want of care, as where the injury results from defective track, cars, machinery or motive-power, yet where a passenger in a railway car is injured by the act of a third party over whom the company has no control, the burden of proof is upon the passenger to show not only that he was not guilty of contributory negligence, but that the company was guilty of negligence, and that thereby the injury was caused. *Federal St. & P. V. R. Co. v. Gibson*, 11 Am. & Eng. R. Cas. 142, 96 Pa. St.

* Presumption of negligence where injuries result from defects in train, see note, 15 L. R. A. 35.

83.—FOLLOWED IN *Hawkins v. Front St. Cable R. Co.*, 3 Wash. 592.

The legal presumption has no application in a case in which the injuries complained of were received by a passenger while passing in the course of his journey from the station to a ferry, and were caused by pushing his hand through the glass of a swing-door at the entrance to the ferry landing, such door being no part of the machinery employed for the carriage of passengers, and being constructed in the same way as swinging-doors to be met with in any place of business. *Hayman v. Pennsylvania R. Co.*, 34 Am. & Eng. R. Cas. 478, 118 Pa. St. 508, 10 Cent. Rep. 835, 11 Atl. Rep. 815, 20 W. N. C. 466.—DISTINGUISHING *Laing v. Colder*, 8 Pa. St. 479; *Meier v. Pennsylvania R. Co.*, 64 Pa. St. 226; *Philadelphia & R. R. Co. v. Anderson*, 94 Pa. St. 358.

The presumption has no application to a case where a passenger is injured through being struck in the eye by a piece of coal while sitting at a window and whilst another train is passing the train upon which he is traveling—at all events, when the employees of both trains testify that they knew nothing of the accident. *Pennsylvania R. Co. v. MacKinney*, 37 Am. & Eng. R. Cas. 153, 124 Pa. St. 462, 17 Atl. Rep. 14.—DISTINGUISHING *Christie v. Griggs*, 2 Camp. 79; *Stokes v. Saltonstall*, 13 Pet. (U. S.) 181; *Ware v. Gay*, 11 Pick. (Mass.) 109; *Hipsley v. Kansas City, St. J. & C. B. R. Co.*, 27 Am. & Eng. R. Cas. 287, 88 Mo. 348; *Feital v. Middlesex R. Co.*, 109 Mass. 398; *Edgerton v. New York & H. R. Co.*, 39 N. Y. 229; *Sullivan v. Philadelphia & R. R. Co.*, 30 Pa. St. 234; *Cleveland, C., C. & I. R. Co. v. Walrath*, 8 Am. & Eng. R. Cas. 371, 38 Ohio St. 461; *Pittsburgh & C. R. Co. v. Pillow*, 76 Pa. St. 510; *Spear v. Philadelphia, W. & B. R. Co.*, 119 Pa. St. 61; *Memphis & O. R. Packet Co. v. McCool*, 8 Am. & Eng. R. Cas. 390, 83 Ind. 392; *Laing v. Colder*, 8 Pa. St. 481; *Holbrook v. Utica & S. R. Co.*, 12 N. Y. 236; *Philadelphia & R. R. Co. v. Anderson*, 94 Pa. St. 351.—APPLIED IN *Fredericks v. Northern C. R. Co.*, 157 Pa. St. 103. DISTINGUISHED IN *Thomas v. Philadelphia & R. R. Co.*, 148 Pa. St. 180. FOLLOWED IN *Long v. Pennsylvania R. Co.*, 147 Pa. St. 343.

In an action for the death of a passenger upon a train, it appeared that the accident was the result of a rock becoming detached

and falling upon the train while passing a point where a hill descended precipitously to the track. The cut for the railroad extended upward thirty-three feet, and above it was the natural hill. The rock which fell started at about one hundred feet from the top of the hill, bounded down some forty feet, struck, again bounded twenty or thirty feet, making four bounds before it struck the train, and caused the death of the passenger. *Held*, that the cause of the accident was not connected with either the means and appliances of transportation, or the construction of the road, and that therefore no presumption of negligence arose against the company. *Fleming v. Pittsburgh, C., C. & St. L. R. Co.*, 158 Pa. St. 130, 27 Atl. Rep. 858.—DISTINGUISHING *Sullivan v. Philadelphia & R. R. Co.*, 30 Pa. St. 234; *Spear v. Philadelphia, W. & B. R. Co.*, 119 Pa. St. 68; *Gleeson v. Virginia Midland R. Co.*, 140 U. S. 435. QUOTING *Thomas v. Philadelphia & R. R. Co.*, 148 Pa. St. 183.

587. Proof of derailment.—Where a car is thrown from the track, whereby a passenger is injured, the presumption is that the accident resulted either from the fact that the track was out of order, or the train badly managed, or both, and the *onus* is on the company to show it was not negligent in any respect. *Peoria, P. & J. R. Co. v. Reynolds*, 88 Ill. 418, 21 Am. Ry. Rep. 324. *Chicago, P. & St. L. R. Co. v. Lewis*, 48 Ill. App. 274. *Sawyer v. Hannibal & St. J. R. Co.*, 37 Mo. 240.

Where, in an action by a passenger for damages for injuries caused by the derailment of a train, the evidence shows that the plaintiff was injured without any fault on his part, a *prima-facie* case is made out for him, and the *onus* is cast upon the defendant of relieving itself from responsibility by showing that the injury was the result of an accident which the utmost skill, foresight, and diligence could not have prevented. *Hipsley v. Kansas City, St. J. & C. B. R. Co.*, 27 Am. & Eng. R. Cas. 287, 88 Mo. 348.—REVIEWING *Lenon v. Chanslor*, 68 Mo. 341.—DISTINGUISHED IN *Pennsylvania R. Co. v. MacKinney*, 37 Am. & Eng. R. Cas. 153, 124 Pa. St. 462.

The mere fact that a passenger is injured

* Derailment of cars raises a presumption of negligence, see note, 47 AM. & ENG. R. CAS. 499.

by a train running off the track is not of itself presumptive evidence of negligence on the part of the company, without proof of the circumstances under which the accident occurred. *San Antonio & A. P. R. Co. v. Robinson*, 73 Tex. 277, 11 S. W. Rep. 327.—QUOTING *Western Transp. Co. v. Downer*, 11 Wall. (U. S.) 135.

The happening of an accident to a passenger does not make a *prima-facie* case of negligence, but the derailment of a passenger car is evidence of negligence in the company, in the absence of explanation showing that the accident happened without the fault of the railway company; and instructions asking a finding for the defendant upon a state of facts which ignore the accident would have been on the weight of evidence and were properly refused. *For-dyce v. Withers*, 1 Tex. Civ. App. 540, 20 S. W. Rep. 766.

588. Proof of injury by act of servants.—Where it is shown that a passenger is injured through the act of the carrier's servant, a presumption of the servant's negligence attaches and casts the burden of proving due care on the carrier. *Memphis & O. R. Packet Co. v. McCool*, 8 Am. & Eng. R. Cas. 390, 83 Ind. 392, 43 Am. Rep. 71.—CRITICISING *Federal St. & P. V. Pass. R. Co. v. Gibson*, 96 Pa. St. 83. QUOTING *Pittsburgh, C. & St. L. R. Co. v. Williams*, 74 Ind. 462.

Where injury is sustained by any one while upon a railway company's train as a passenger, it is treated as *prima-facie* evidence of negligence on the part of the company. This rule applies not only to defects in machinery but also to the acts of the servants engaged in operating the machinery. *Kentucky & I. Bridge Co. v. Quinkert*, 2 Ind. App. 244, 28 N. E. Rep. 338.

When a passenger upon the train of a company is injured by a direct act of one of the company's servants in suddenly opening a closet door, the statute (Code, § 3033) presumes the servant was negligent in performing the act, unless the contrary affirmatively appears; but the presumption may be rebutted by other evidence. *Murphy v. Atlanta & W. P. R. Co.*, 89 Ga. 832, 15 S. E. Rep. 774.

589. Presumptive proof of contributory negligence.—For a passenger to jump upon or off a moving train is *prima-facie* negligence; if injured thereby, it is incumbent on him, in an action against the

railroad, to prove a reasonable excuse for the act. *Shannon v. Boston & A. R. Co.*, 23 Am. & Eng. R. Cas. 511, 78 Me. 52, 2 Atl. Rep. 678.

And it is not sufficient to rebut the presumption that the trainmen acquiesced in the action of the passenger, or that the company violated its duty or contract in not stopping the train, or that to remain on the train would subject the passenger to trouble or inconvenience; but to excuse such an act and free the plaintiff from the charge of contributory negligence there must be a coercion of circumstances which did not leave the passenger in the free and untrammelled possession of his faculties and judgment. *Solomon v. Manhattan R. Co.*, 3 N. Y. S. R. 636.—QUOTING *Burrows v. Erie R. Co.*, 63 N. Y. 556.

No legal presumption of negligence on the part of the passenger arises from the fact of his being in a car not intended for the use of passengers when an accident happens. *Creed v. Pennsylvania R. Co.*, 86 Pa. St. 139.

590. Rebutting presumption of negligence.—It may in many instances require but slight evidence to rebut the presumption of negligence the law raises against the company as a carrier of passengers, but it always remains till removed by the proof, which may be that offered by either side. *Western & A. R. Co. v. Abbott*, 74 Ga. 851. See also *Sullivan v. Philadelphia & R. R. Co.*, 30 Pa. St. 234.

A loaded freight train had been placed by the employes of a company on a side-track, with the brakes set tight and the switch set to throw the cars off should anything happen. A boy turned the switch so as to let the cars onto the main track and opened the brakes, thus starting the cars, which, reaching the main track, collided with an approaching passenger train and caused the injury complained of. *Held*, that the presumption of negligence which arose from the fact of the injury was rebutted by proof that such injury was the result of the wilful, criminal trespass of a stranger; that the highest inquiry that could legitimately be conducted by the jury was whether or not there was any negligence on the part of the defendant in the precautions taken against such an accident, and that a finding in favor of the company was conclusive as to the question of its negligence. *Fredericks v. Northern C. R. Co.*, 58 Am. & Eng. R. Cas.

91, 157 Pa. St. 103, 27 Atl. Rep. 689.—APPLYING *Curtis v. Rochester & S. R. Co.*, 18 N. Y. 534; *Pennsylvania R. Co. v. MacKinney*, 37 Am. & Eng. R. Cas. 153, 124 Pa. St. 462. QUOTING *Deyo v. New York C. R. Co.*, 34 N. Y. 9.

In an action by an express messenger for injuries sustained in a railroad accident, proof that the engine collided with a bull upon the track near a bridge; that the tender broke loose from the express car, which went through the bridge; and that plaintiff was injured by the fall of the car, makes a *prima-facie* case of liability on the part of the railway company that is not overcome by proof that the animal came upon the track without knowledge of the company's employés; to rebut the presumption of negligence it should be further shown that the company, or its servants, exercised due care to keep the animal off the track and to prevent a collision with it. *Fordyce v. Jackson*, 56 Ark. 594, 20 S. W. Rep. 528, 597.

The presumption of contributory negligence which arises upon proof that a passenger was riding in a dangerous place, as on the car platform, at the time of an injury, may be overcome by proof that the car was so crowded that he could not go in a safer place; but it is not overcome by showing that the conductor knew he was in an unsafe place and did not take steps to remove him, where the danger of so riding was equally apparent to both. *Ward v. Central Park, N. & E. R. R. Co.*, 11 Abb. Pr. N. S. (N. Y.) 411, 42 How. Pr. (N. Y.) 289.—APPLYING *Clark v. Eighth Ave. R. Co.*, 36 N. Y. 135; *Sheridan v. Brooklyn City & N. R. Co.*, 36 N. Y. 39.

d. Burden of Proof.*

501. On plaintiff, generally.—Iowa act of 1876, ch. 148, § 2, making it a misdemeanor to get on or off a moving train, does not forbid the act when done by the consent of the conductor; but where one injured in doing so sues the company for damages, the burden of proof is on him to show that he had the conductor's assent. *Raben v. Central Iowa R. Co.*, 31 Am. & Eng. R. Cas. 45, 74 Iowa 732, 34 N. W. Rep. 621.

In an action against a carrier by a passen-

* Burden of proving contributory negligence of passenger, see *ante*, 361.

Burden of proof in actions for negligently injuring passengers, see note, 62 AM. DEC. 679.

ger, where the plaintiff's proof shows the act of God as a possibly sufficient cause, the proof of the accident does not throw the burden on defendant. *Gillespie v. St. Louis, K. C. & N. R. Co.*, 6 Mo. App. 554.

When a person enters a freight train forbidden to take passengers, though habitually accustomed to do so, the burden of proof is upon him to show the custom and justify his action. *Burke v. Missouri Pac. R. Co.*, 51 Mo. App. 491.

The burden of proving ignorance of rules pasted on the door of a car is upon him who disclaims knowledge. *Macon & W. R. Co. v. Johnson*, 38 Ga. 409.

Where a rule exists providing that freight and passengers will be carried on separate trains, and there are no cars attached to the trains except freight cars, the burden of proving the consent of the road would be cast upon the parties claiming damages for injury to one taking passage on such freight train. *Houston & T. C. R. Co. v. Moore*, 49 Tex. 31.—REVIEWED IN *Florida Southern R. Co. v. Hirst*, 30 Fla. 1.

Where a passenger, who knows of a rule requiring him to ride in the passenger cars, rides in an express car or other place on the train which cannot be regarded as intended for accommodation of passengers, but naturally suggests that it was not intended for them, and is injured, the burden is upon him to prove that he was justified in riding in such prohibited place. *Florida Southern R. Co. v. Hirst*, 52 Am. & Eng. R. Cas. 409, 30 Fla. 1, 11 So. Rep. 506.—REVIEWING *Houston & T. C. R. Co. v. Moore*, 49 Tex. 31.

502. To show negligence on part of defendant.—A passenger suing for an injury while on a train has the burden to prove that the injury was the result of the negligence of the company. *Holbrook v. Utica & S. R. Co.*, 12 N. Y. 236; *affirming* 16 Barb. 113.—DISTINGUISHED IN *Indianapolis & C. R. Co. v. Rutherford*, 29 Ind. 82. FOLLOWED IN *Button v. Hudson River R. Co.*, 18 N. Y. 248; *Curran v. Warren C. & M. Co.*, 36 N. Y. 153, 34 How. Pr. 250.—*Buck v. Manhattan R. Co.*, 15 Daly (N. Y.) 550, 10 N. Y. Supp. 107, 32 N. Y. S. R. 51; *affirmed* in 134 N. Y. 589, *mem.*, 45 N. Y. S. R. 934. *Williams v. Holland*, 22 How. Pr. (N. Y.) 137.

Where a passenger claims that a rail was broken before the train reached it, the burden is on him to prove it. *McPadden v.*

New York C. R. Co., 44 N. Y. 478; *reversing* 47 Barb. 247.

In order to render a company liable for a personal injury to a passenger, caused by his alarm and apprehension of danger leading him to leave a place of safety for one of peril, it is not sufficient, merely, that he became alarmed by reason of appearances produced wholly or in part by the company, but it must appear that that which produced the alarm, and through it the injury, was negligence of the company or its servants. The burden is upon the plaintiff to prove this negligence. *Chicago, R. I. & P. R. Co. v. Felton*, 33 Am. & Eng. R. Cas. 533, 125 Ill. 458, 15 West. Rep. 41, 17 N. E. Rep. 765; *reversing* 24 Ill. App. 376.—EXPLAINED IN *St. Louis & S. F. R. Co. v. Murray*, 55 Ark. 248.

Although the burden of proof is on the plaintiff to show that the injury was occasioned by the negligence of the defendant, yet he discharges this burden and makes out a *prima-facie* case by showing that the accident happened through the failure of some of the means used by the carrier in making the transit. *Baltimore & O. R. Co. v. State*, 21 Am. & Eng. R. Cas. 202, 63 Md. 135.

In an action to recover damages for personal injuries, plaintiff alleged that he was injured by a severe shock caused by defendant's employes permitting a car which they were coupling to strike the train in which he was seated with more violence than was necessary to move the springs and effect the coupling. Defendant maintained that the coupling was made in a proper manner. *Held*, that the burden of establishing the negligence of the company was on the plaintiff. *Hershe v. Lehigh Valley R. Co.*, 151 Pa. St. 244, 25 Atl. Rep. 104.

593. To disprove contributory negligence.—The burden rests upon one seeking to recover for injuries arising from the negligence of a carrier to aver and prove his own freedom from contributory negligence. *Bonce v. Dubuque St. R. Co.*, 53 Iowa 278, 5 N. W. Rep. 177.—FOLLOWING *Patterson v. Burlington & M. R. Co.*, 38 Iowa 279; *Murphy v. Chicago, R. I. & P. R. Co.*, 45 Iowa 661.

If it appear that a passenger was riding in a place of hazard, as upon the car platform, at the time the injuries for which he sues were received, the burden of proof is cast upon him to show that he was free from

negligence himself. *Ward v. Central Park, N. & E. R. R. Co.*, 11 Abb. Pr. N. S. (N. Y.) 411, 42 How. Pr. (N. Y.) 289.—APPROVING *Clark v. Eighth Ave. R. Co.*, 36 N. Y. 135. FOLLOWING *Solomon v. Central Park, N. & E. R. R. Co.*, 1 Sweeney (N. Y.) 298.

594. On defendant to rebut presumption of negligence.—The burden of proof is upon a company to remove the presumption of negligence which arises from the happening of an accident which causes injury to a passenger. *Louisville, N. A. & C. R. Co. v. Hendricks*, 128 Ind. 462, 28 N. E. Rep. 58.—QUOTING *Louisville, N. A. & C. R. Co. v. Jones*, 108 Ind. 551.—*Louisville, N. A. & C. R. Co. v. Snyder*, 37 Am. & Eng. R. Cas. 137, 117 Ind. 435, 20 N. E. Rep. 284, 3 L. R. A. 434. *Carrico v. West Virginia C. & P. R. Co.*, 52 Am. & Eng. R. Cas. 393, 35 W. Va. 389, 14 S. E. Rep. 12. *Crine v. East Tenn., V. & G. R. Co.*, 84 Ga. 651, 11 S. E. Rep. 555.

The mere fact that a person is injured while riding in a railroad car does not impose upon the company the burden of disproving negligence. But the presumption of a want of proper care on the part of the company may arise from circumstances attending the injury, and in such cases the onus is upon the company to show that the injury is not attributable to any fault on its part. *Holbrook v. Utica & S. R. Co.*, 12 N. Y. 236; *affirming* 16 Barb. 113.—DISTINGUISHED IN *Pennsylvania R. Co. v. MacKinney*, 37 Atl. & Eng. R. Cas. 153, 124 Pa. St. 462. EXPLAINED IN *Curtis v. Rochester & S. R. Co.*, 18 N. Y. 534. FOLLOWED IN *Sheldon v. Hudson River R. Co.*, 14 N. Y. 218; *Breen v. New York C. & H. R. R. Co.*, 34 Am. & Eng. R. Cas. 523, 109 N. Y. 297, 16 N. E. Rep. 60, 14 N. Y. S. R. 835. QUOTED IN *Yerkes v. Keokuk N. L. Packet Co.*, 7 Mo. App. 265; *Brehm v. Great Western R. Co.*, 34 Barb. (N. Y.) 256. REVIEWED IN *Pittsburg & C. R. Co. v. Andrews*, 39 Md. 329.

Where a passenger is injured, either by anything done or omitted by the carrier, its employes, or anything connected with the appliances of transportation, the burden of proof is upon the carrier to show that such injury was in no way the result of its negligence; but to throw this burden upon the carrier it must first be shown that the injury complained of resulted from the breaking

* See also *ante*, 581-590.

of machinery, collision, derailment of cars, or something improper or unsafe in the conduct of the business or in the appliances of transportation. *Thomas v. Philadelphia & R. R. Co.*, 148 Pa. St. 180, 23 Atl. Rep. 989.—APPLIED IN *Fredericks v. Northern C. R. Co.*, 157 Pa. St. 103.

Where a passenger is injured through imperfect construction of a coach, the burden is upon the company to show that it exercised the proper care and skill in its manufacture. *Holton v. London & S. W. R. Co.*, 1 C. & E. 542.

The burden of proof is on carrier to show that one riding in a railroad car, who paid his fare or was liable to pay it when demanded, was not a passenger but a trespasser. *Pennsylvania R. Co. v. Boons*, 57 Pa. St. 339.

4. Instructions; * Questions of Law and Fact.

505. What instructions are proper, generally.—(1) *General rules.*—It is not error to charge that the law requires a company to take great care in the management of its trains. A carrier of passengers by rail is required to use the highest degree of care for their safety. *Texas C. R. Co. v. Stuart*, 1 Tex. Civ. App. 642, 20 S. W. Rep. 962.—FOLLOWED IN *Texas & P. R. Co. v. Davidson*, 3 Tex. Civ. App. 542.

Where the evidence leaves it uncertain as to the cause of a wreck, and whether one defect or the combined effect of several defects caused a wreck, it is proper to give to the jury the rules by which appellants' whole duty to the passengers was measured, in order that they might determine whether or not there had been neglect to perform it in any particular. *Fordyce v. Chancey*, 2 Tex. Civ. App. 24, 21 S. W. Rep. 181.

A charge instructing the jury that the duty is devolved on them to determine whether the defendant "has used that strict diligence which the law requires in providing for the safety of its passengers," is not objectionable as requiring too high a degree of care and diligence. *Alabama G. S. R. Co. v. Hill*, 93 Ala. 514, 9 So. Rep. 722.

On the trial of an action for personal injuries to the plaintiff, a passenger, caused by one of defendant's engines, it was not

error for the court to give in charge to the jury section 3033 of the Ga. Code. *Western & A. R. Co. v. Abbott*, 74 Ga. 851.

Although it may not be directly stated in an instruction that it is necessary for the jury to find that the persons in charge of the train at the time the injuries were received were in the immediate employ of, or acting at the time as servants of, the defendant, there will be no ground for objection where it can fairly be inferred from the instruction that the finding of that fact is essential to the plaintiff's case. *Caples v. Central Pac. R. Co.*, 6 Nev. 265.

It is correct to charge that the mere fact that plaintiff sustained an injury while a passenger does not entitle him to recover, and that he must show that the accident was caused by a lack of due care on the part of the defendant, as such instruction only states the rule that the burden of proof to show negligence is on the plaintiff. *Buck v. Manhattan R. Co.*, 32 N. Y. S. R. 51, 10 N. Y. Supp. 107.

It was not error to instruct the jury, in a suit for injury received while attempting to get upon a train, that if plaintiff was injured in an effort to cross in front of the engine he could not recover, but if he was thrown down by the sudden starting of the train while he was in the act of getting on, then it was for the jury to determine whether the company was negligent or not. *Jones v. Brooklyn B. & W. E. R. Co.*, 21 N. Y. S. R. 169, 3 N. Y. Supp. 253.

(2) *Illustrations.*—In an action against a person who, it is claimed, was operating a railroad as a common carrier of passengers, an instruction that "if the jury believe from the evidence that defendant was engaged in the business of transporting passengers for hire upon a railroad operated by him, then the law denominates him a common carrier"—held, correct. *Davis v. Button*, 78 Cal. 247, 20 Pac. Rep. 545, 18 Pac. Rep. 133.

In an action for injuries received while alighting from a train, there was a conflict of evidence as to whether the injury resulted from suddenly starting the cars before plaintiff had time to get off, or from the passenger's negligence in jumping while the train was in motion. The court instructed the jury generally as to the duty of the company to stop its trains a reasonable time to allow passengers to get off, and then added that if the negligence of plaintiff "caused or contributed to the injury complained of"

* Instructions as to the duty of the carrier, see **APPEAL AND ERROR, 46.**

she cannot recover. *Held*, not error in failing to state that to defeat a recovery plaintiff must have contributed "proximately" to the injury. *Craven v. Central Pac. R. Co.*, 72 Cal. 345, 13 Pac. Rep. 878.

Where a conductor has agreed to slacken a train so that a passenger can get off, it was not error for the court to charge that the speed of the train should be so checked that the passenger could get off safely, rather than that if the train slackened so that the plaintiff might have gotten off safely he cannot recover. *Western R. Co. v. Young*, 51 Ga. 489, 7 Am. Ry. Rep. 352.

In an action by a passenger for a personal injury, two counts of the declaration charged liability for a failure to make up the train and sufficiently to couple its cars, while the other two charged the negligence to be the moving the engine and cars attached thereto without sufficiently and securely coupling the cars. *Held*, that proof of either ground was sufficient to authorize a recovery, and that an instruction embracing this principle was not erroneous. *Hannibal & St. J. R. Co. v. Martin*, 111 Ill. 219; affirming 11 Ill. App. 386.

A female passenger sued for an injury received as she was about to enter defendant's cars, and it appeared that she was so injured as to cause a miscarriage the same night, which resulted in a permanent ailment. The company gave evidence in defense that plaintiff went out too soon, on a cold stormy day, which tended to aggravate her trouble. The court charged that the question of her negligence in going out so soon depended upon whether she felt that she was fairly urged to go out in pursuit of business, and felt that in so doing she was not guilty of any want of care and caution. *Held*, that the instruction was correct, in submitting the true test as to the amount of care plaintiff must exercise. *Hope v. Troy & L. R. Co.*, 40 Hun (N. Y.) 438; affirmed in 110 N. Y. 643, mem., 17 N. E. Rep. 873.—FOLLOWING *Sauter v. New York C. & H. R. R. Co.*, 66 N. Y. 52.

In an action for personal injuries to a passenger, the court charged the jury that the burden was upon the plaintiff to show the extent of his injuries; that he was entitled to recover only for such injuries as he sustained from the accident, and that he was not entitled to recover for any disease that proceeded from any other cause. *Held*, that the jury must have inferred from the charge

that they were to consider the whole evidence, and that it was not open to the objection that it led the jury to believe that they were to find for plaintiff if he showed by the evidence of his own witnesses that his condition was the result of injuries received in the accident. *Gulf, C. & S. F. R. Co. v. McManneville*, 34 Am. & Eng. R. Cas. 428, 70 Tex. 73, 8 S. W. Rep. 66.

Where the question was, whether the defendant was negligent in stopping the cab of its freight train near to a dangerous retaining-wall and leaving the plaintiff, who had been allowed to take passage on the train, without a light and without notice of the dangerous character of the place it was proper to charge the jury "that when the defendant brought the passenger to the place where the train was going, all it was bound to do then was to see that he was afforded reasonable immunity from danger and reasonable protection in getting away from the point where he had been landed." *Central R. & B. Co. v. Smith*, 34 Am. & Eng. R. Cas. 456, 80 Ga. 526, 5 S. E. Rep. 772.

590. Taken in connection with other instructions.—(1) *Generally*.—An instruction that the law imposes on a common carrier of passengers the utmost care in carrying them safely is not erroneous, where an instruction is also given that the carrier is not an insurer of the safety of passengers, and that negligence on the part of its servants must be shown. *Smith v. Chicago & A. R. Co.*, 52 Am. & Eng. R. Cas. 483, 108 Mo. 243, 18 S. W. Rep. 971.—EXPLAINING *Dougherty v. Missouri R. Co.*, 97 Mo. 647.

An instruction that it is the duty of companies to exercise the greatest caution and skill in the management of their business is only applicable where the relation of passenger and carrier exists; yet a verdict for the plaintiff will not be set aside where such an instruction was given, though inapplicable to the case, where in other instructions the jury were distinctly told that defendant was only liable for want of ordinary care. *Frick v. St. Louis, K. C. & N. R. Co.*, 8 Am. & Eng. R. Cas. 280, 75 Mo. 595.

An instruction which tells the jury that if a brakeman told the plaintiff a falsehood as to where the train was at the time, and this deceived the plaintiff as to the speed of the train, it might excuse the rashness of plaintiff in jumping off, is proper where the ques-

tion of the brakeman's authority has been fully submitted to the jury. *Galloway v. Chicago, R. I. & P. R. Co.*, 58 Am. & Eng. R. Cas. 245, 87 Iowa 458, 54 N. W. Rep. 447.

A judgment for an injury to a passenger will not be reversed because of an instruction asked for by plaintiff, to the effect that carriers must furnish "safe and sufficient means of transportation," where the general charge informed the jury that carriers are only required to furnish transportation reasonably safe and sufficient. *Millwood C. & C. Co. v. Madison, (Pa.)* 2 Atl. Rep. 39.

(2) *Illustrations.*—In an action by a passenger for a personal injury received while standing on the steps of a platform, the car being overcrowded, an instruction for the plaintiff stated, in general terms, the duty of ordinary care and prudence on the part of the passenger, and that he was not required by law to exercise extraordinary or the highest degree of care, and that instruction was followed immediately by another, in which the jury were told that by ordinary care, the law means such a degree of care under the circumstances and in the situation in which the plaintiff was placed, as an ordinarily prudent man would exercise under like circumstances and in the same situation. *Held*, that the first instruction was not obnoxious to the criticism that it relieved the plaintiff of the additional care placed upon all who take extra-hazardous positions, and relieved him of the duty of exercising care proportioned to the apparent danger of the situation. *Chicago & A. R. Co. v. Fisher*, 141 Ill. 614, 31 N. E. Rep. 406; affirming 38 Ill. App. 33.

An instruction to the effect that if the want of proper care or skill on the part of the conductor caused the injury the defendant would be liable—*held*, not to be erroneous, taken in connection with another instruction to the effect that if the plaintiff was guilty of negligence in jumping from the car she could not recover. *Evansville & C. R. Co. v. Duncan*, 28 Ind. 441.

The trial court instructed the jury that although plaintiff may not have employed a skillful surgeon to attend him, still, "if he did exercise such care and attention in regard to his case as a prudent man would under his particular circumstances and situation have done," they should find for him. In other instructions the jury were told in detail what facts within the range of the evidence, if found, would constitute con-

tributory negligence and prevent plaintiff's recovery. *Held*, that the instruction quoted, though general, was not misleading, and, taking all the instructions together, the question of negligence was fairly presented to the jury. *Kluttz v. St. Louis, I. M. & S. R. Co.*, 11 Am. & Eng. R. Cas. 639, 75 Mo. 642.

The plaintiff received injuries in alighting from the defendant company's train. The court instructed the jury that, if the train did not stop long enough for the plaintiff to get off, and while she was standing on the platform defendant's brakeman pulled her off, whereby she was injured, she can recover. *Held*, not erroneous, as in another paragraph the court told the jury that under such a state of facts the plaintiff could not recover if guilty of contributory negligence. *Owens v. Kansas City, St. J. & C. B. R. Co.*, 33 Am. & Eng. R. Cas. 524, 95 Mo. 169, 15 West. Rep. 88, 8 S. W. Rep. 350.—NOT FOLLOWING *Sullivan v. Hannibal & St. J. R. Co.*, 88 Mo. 182.—FOLLOWED IN *Dougherty v. Missouri R. Co.*, 34 Am. & Eng. R. Cas. 488, 97 Mo. 647, 15 West. Rep. 235, 8 S. W. Rep. 900; see on rehearing, 37 Am. & Eng. R. Cas. 206, 11 S. W. Rep. 251.

An instruction that a company owes a much higher degree of care to passengers than it does to the public, generally, going upon its tracks at public crossings, taken in connection with the other instructions given to the jury—*held*, to be correct. *Union Pac. R. Co. v. Sue*, 25 Neb. 772, 41 N. W. Rep. 801.

In an action by a passenger to recover damages for injuries resulting from the alleged negligent manner of coupling cars, the court charged: "It is necessary that cars be coupled together by the backing of the engine, but in doing that the employes of the company must do it in such a manner as not to strike the car with such force as to injure passengers sitting therein. If they did, it would be such an act of negligence as would entitle the plaintiff, or any person, to recover who suffered injury therefrom." In other parts of the charge the court repeatedly stated that plaintiff could not recover unless the injury was the result of the negligent conduct of the defendant. *Held*, that the jury could not have understood that the fact of injury was the test of plaintiff's right to recover. *McCloskey v. Bells Gap R. Co.*, 156 Pa. St. 254, 27 Atl. Rep. 246.

Plaintiff received injuries in the hip and knee. The court charged the jury that if the plaintiff had been previously injured, and at the time his knee was so far recovered that with ordinary care it would have gotten well, or that it was well, and that without plaintiff's fault it was hurt by the negligence of the defendant, so as to render it stiff, the defendant would be liable. *Held*, that this instruction, if taken in connection with an instruction already given, that if plaintiff's injuries were received prior to his becoming a passenger they must find for defendant, was not erroneous as assuming as a fact that the plaintiff had previously been injured only at the knee. *East Line & R. R. Co. v. Rushing*, 34 *Am. & Eng. R. Cas.* 367, 69 *Tex.* 306, 6 *S. W. Rep.* 834.

In an action for an injury alleged to have been caused by a rough place in the roadbed, the court instructed the jury that it was the duty of the company to keep its roadbed in such repair, and its cars in such condition, as to transport its passengers safely; and if it failed to do so it was liable. *Held*, erroneous, as making the company an insurer of the safety of its passengers; yet the error was cured by the further instruction that plaintiff could not recover unless he showed by a preponderance of evidence that the company had negligently suffered its roadbed to be so out of repair as to cause the injury. *Gulf, C. & S. F. R. Co. v. Killebrew*, (*Tex. Civ. App.*) 20 *S. W. Rep.* 1005; *reversing* 20 *S. W. Rep.* 182.—*APPROVING* *Galveston, H. & S. A. R. Co. v. Delahunty*, 53 *Tex.* 212.

507. What instructions are improper, generally.—It is error to submit a case to a jury upon the theory that the virtue or efficiency of a rule prohibiting passengers from riding in express cars is entirely dependent upon the fidelity of the conductor or other agent charged with its enforcement. *Florida Southern R. Co. v. Hirst*, 52 *Am. & Eng. R. Cas.* 409, 30 *Fla.* 11, 11 *So. Rep.* 506.

In an action for personal injuries received while alighting from a moving train, the court should explain to the jury what constitutes contributory negligence, and then instruct them that if they find such facts plaintiff could not recover. It is not enough to say generally that a plaintiff cannot recover if he is guilty of contributory negligence. *New York, L. E. & W. R. Co.*

v. Enches, 39 *Am. & Eng. R. Cas.* 444, 127 *Pa. St.* 316, 17 *Atl. Rep.* 991.

In a suit for damages sustained in stepping off a car, the plaintiff then suffering from a prior injury, an instruction to find for the plaintiff if the jury find that the conductor refused to stop the car where asked and that the plaintiff carefully and without negligence stepped off, is erroneous, because the plaintiff's condition at the time is ignored, and the contributory negligence is left to the jury to find as a matter of fact, without any explanation of what would, on the evidence, constitute such contributory negligence. And an instruction to the jury that if satisfied the car was moving faster than usual when the plaintiff got off, and that plaintiff knew the risk and danger, and was not influenced by the remark of the conductor to jump, this was evidence of a want of care, was objectionable, in not referring to plaintiff's wound, and in not directing the attention of the jury to facts which, if satisfactorily proved, would, in the estimation of the court, constitute negligence; but it simply declares certain facts evidence of negligence, when the facts did not of themselves constitute negligence. *Wyatt v. Citizens' R. Co.*, 62 *Mo.* 408.

A charge that as soon as "the deceased alighted in safety from the car in which he and his wife (the plaintiff) were carried, then the relation ceased, and from that time the defendants owed them no duty as passengers," is too strong and unqualified in its character. *Ormond v. Hayes*, 60 *Tex.* 180.

An instruction declaring an attempt to get on a slowly moving train negligence *per se*, is not cured by one that the jury should find for the plaintiff unless the accident was caused by his fault or negligence. *Fulks v. St. Louis & S. F. R. Co.*, 52 *Am. & Eng. R. Cas.* 280, 111 *Mo.* 335, 19 *S. W. Rep.* 818.

In an action for injuries received in a collision, the court gave the jury certain rules as to the measure of damages, and then added: "These, we think, would be fair rules to ascertain the measure of damages; but if you can find any better ways than those suggested you are at liberty to adopt them, as the measure and amount of damages are entirely for you to ascertain, under all the evidence and circumstances of the case." *Held*, error. *Pennsylvania R. Co. v. Books*, 57 *Pa. St.* 339.

598. Misleading instructions.—In an action for carrying a passenger beyond her station, in submitting the case to the jury they should be instructed as to the proper rule by which to estimate damages, and it is error to tell them that they can find for the plaintiff actual damages in any amount they may think proper, such instruction being liable to lead the jury to infer that they are authorized in finding the whole amount sued for. *Gulf, C. & S. F. R. Co. v. Head*, 4 *Tex. App. (Civ. Cas.)* 313, 15 *S. W. Rep.* 504.

In a suit for personal injury to a passenger, the court charged the jury: "It is the duty of the defendant to exercise proper care to transport its passengers safely, and the want of such care is deemed in law negligence, for which the defendant is liable." *Held*, error, because susceptible of the construction that the failure to exercise a degree of care which will actually result in the safe carriage of passengers is negligence for which the carrier would be liable. *International & G. N. R. Co. v. Underwood*, 27 *Am. & Eng. R. Cas.* 240, 64 *Tex.* 463.

The proof showed that the plaintiff, having a ticket, delayed getting upon the train until it had started and got under considerable speed, when he caught hold of the railing at the end of the rear car and stepped upon the bottom step, when he was swung round to the rear of the car, with his back toward it, and in an effort to recover himself swung back, and with his right hand took hold of the other guard-rail; and while in that position it was claimed he was wantonly and maliciously assaulted by the conductor. The court instructed the jury that if they believed, from the evidence, that plaintiff, under all the circumstances, in attempting to board the train acted as a reasonably prudent man would have done under like circumstances, without negligence, and used ordinary care to prevent accident, and that injuries were sustained by him resulting from the wilful or wantonly malicious conduct of the servant of defendant acting in the line of his duty, the defendant was liable for such injuries. *Held*, that while under some circumstances the principles of the instruction might be applicable, it was calculated to mislead the jury under the facts of the case tried. *Wabash, St. L. & P. R. Co. v. Rec-tor*, 9 *Am. & Eng. R. Cas.* 264, 104 *Ill.* 296.

In an action by a United States mail agent

to recover for a personal injury, the jury were instructed that if they found damages for the plaintiff, to take into consideration "loss of time and wages," etc. *Held*, that the instruction was not reversible error; for it seems that no jury of ordinary intelligence would understand the charge as directing damages for both loss of time and wages for the time lost. *Gulf, C. & S. F. R. Co. v. Wilson*, 79 *Tex.* 371, 15 *S. W. Rep.* 280.

599. Instructions assuming facts.—A charge that the company will be liable for an injury to a passenger who attempts to step off while the cars are in motion, in consequence of a sudden jerk, if the cars had got so slow as to make it apparently safe, should not be given, when the evidence shows that the cars were going rapidly. *Blodgett v. Bartlett*, 50 *Ga.* 353.

In an action by a passenger for a personal injury, it is error to instruct the jury that if they found that plaintiff was by his injuries prevented from pursuing his usual business and vocation, he would be entitled to recover reasonable compensation for such loss, when there was no evidence as to the value of his time or services. *Winter v. Central Iowa R. Co.*, 74 *Iowa* 448, 38 *N. W. Rep.* 154.

Where plaintiff testified that as she was about to ascend the steps of the car the brakeman sprang upon the steps in front of her, and the start he gave her caused her to fall, it was error to submit to the jury, as a fact in evidence, that plaintiff testified that she was pushed or jostled by the brakeman. *Philadelphia, W. & B. R. Co. v. Alvord*, 128 *Pa. St.* 42, 18 *Atl. Rep.* 391.

In a suit for injuries inflicted by the alleged negligence of the company's servant in closing a car door on plaintiff's finger and crushing it, one of the controverted facts in the case was whether the plaintiff, when the injury was received, was attempting to enter one of the carriages of the train or whether he was standing on the car platform with his hand negligently so placed as to be rendered liable to injury. *Held*, that a charge which in its language seemed to assume as a fact that the plaintiff's finger was crushed when attempting to enter the car, was error. *Gulf, H. & S. A. R. Co. v. Davidson*, 21 *Am. & Eng. R. Cas.* 431, 61 *Tex.* 204.

And this error was not remedied by another charge to the effect that unless the jury believed that the porter (the servant)

knew that plaintiff's finger was in such a position that it would get crushed when he shut the door, and when the injury was inflicted, they could not find for the plaintiff. *Gulf, H. & S. A. R. Co. v. Davidson*, 21 *Am. & Eng. R. Cas.* 431, 61 *Tex.* 204.

600. Instructions invading province of jury.—It is the province of the jury to determine whether the facts of the case justify or require the giving of punitive damages or not. So, in an action by a passenger for being wrongfully carried beyond her station, it is error to charge the jury that it is their duty to make just compensation for the injury, and also to inflict proper punishment upon the company for its disregard of public duty. *Southern R. Co. v. Kendrick*, 40 *Miss.* 374.—**RECONCILED IN** *Memphis & C. R. Co. v. Whitfield*, 44 *Miss.* 466. **REVIEWED IN** *Thompson v. New Orleans, J. & G. N. R. Co.*, 50 *Miss.* 315.

It is error to charge, where the evidence shows the contrary, that one when injured was in the relation of a passenger and not of an employé to the defendant. *Texas & P. R. Co. v. Scott*, 64 *Tex.* 549.

In an action to recover for personal injuries received by a passenger while alighting from a train, it was not error to refuse to charge the jury that the testimony of plaintiff as to the distance she was thrown, the direction, swiftness, and whirling motion of her fall, and the character of the injuries she received, was sufficient evidence that she had left the car after it had started, and if believed by the jury she was not entitled to recover. *Enches v. New York, L. E. & W. R. Co.*, 135 *Pa. St.* 194, 19 *Atl. Rep.* 939.

Where the evidence is conflicting as to whether the plaintiff, who was traveling upon the front platform of a baggage-car, was a passenger or a trespasser, an instruction that the plaintiff is entitled to recover if he, while in the exercise of ordinary care, was injured by the negligence of the defendant, withdraws from the jury the question whether the plaintiff was a passenger, and is erroneous. *Chicago, B. & Q. R. Co. v. Mehlsack*, 41 *Am. & Eng. R. Cas.* 60, 131 *Ill.* 61, 22 *N. E. Rep.* 812; *reversing* 33 *Ill. App.* 221.

A charge that a passenger suing for injuries sustained while descending from a car, because of the company's alleged failure to provide a safe means of descent, was not guilty of any want of ordinary care if she left the car with reasonable diligence, is er-

roneous, as withdrawing from the jury the question of her contributory negligence, where her own testimony tends to support the allegations in the answer that her injuries were caused by her own want of care while attempting to alight. *McDermott v. Chicago & N. W. R. Co.*, 82 *Wis.* 246, 52 *N. W. Rep.* 85.—**QUOTING** *Robson v. North Eastern R. Co.*, L. R. 2 Q. B. D. 85.

In an action to recover for injuries sustained by alighting from a train in motion under the conductor's direction, the defendant requested the following instruction: "If the jury believe from the evidence that the train was stopped at the station a sufficient length of time to enable the plaintiff, by the exercise of reasonable diligence, to have alighted; that, failing to do so, he leaped from the train after it had started, and while it was in motion, and was thereby injured, they will find for the defendant." *Held*, that this was properly refused, as it seeks to make it negligence *per se* and inexcusable for the plaintiff to alight from the train while it is in motion. Whether or not he is guilty of negligence is a question to be determined from all the circumstances in proof. *St. Louis, I. M. & S. R. Co. v. Person*, 30 *Am. & Eng. R. Cas.* 567, 49 *Ark.* 182, 4 *S. W. Rep.* 755.

601. Instructions not correctly stating the law.—(1) *General rules.*—In an action for injuries received while riding in a car, an instruction that the company must show that it used all reasonable practical care and precautions to prevent the injury, is erroneous. A carrier is bound to exercise the highest degree of care and skill to preserve the safety of its passengers. *Moore v. Des Moines & Ft. D. R. Co.*, 27 *Am. & Eng. R. Cas.* 315, 69 *Iowa* 491, 30 *N. W. Rep.* 51.

The following instructions have been held erroneous as not correctly stating the law:

An instruction stating in substance that, notwithstanding the warning given to the passenger, and his disobedience of the same, he would be entitled to recover if the conductor of the train, at the moment of giving the signal to start, saw the passenger in a position which the conductor knew to be dangerous, and without giving him a reasonable time to enter the car and by a sudden jerk in starting the cars the passenger was injured. *Louisville & N. R. Co. v. Bisch*, 41 *Am. & Eng. R. Cas.* 89, 120 *Ind.* 549, 22 *N. E. Rep.* 662.

In an action for injuries caused by the colliding of two trains of the same company, where there was evidence that the plaintiff received injuries which would entitle him to a recovery, and which, he claimed, caused subsequent sickness, an instruction in such terms that they must infer that plaintiff could not recover unless the sickness which came on two or three days after it, was caused by it. *Graham v. Burlington, C. R. & N. R. Co.*, 34 *Am. & Eng. R. Cas.* 397, 39 *Minn.* 81, 38 *N. W. Rep.* 812.

In an action for an injury received in falling from a car platform, where the evidence failed to show any fault on the part of the company, but showed that it was due to the passenger's haste and excitement, incident to her first experience in entering a railroad car, thereby causing a misstep, an instruction that she may recover for the injury "if the fall could have been averted by the skill or care of the defendant or its servants." *Chicago, St. L. & N. O. R. Co. v. Trotter*, 18 *Am. & Eng. R. Cas.* 159, 61 *Miss.* 417.

An instruction that a carrier was liable for an injury to a passenger from a defect in his vehicle unless he had used the "greatest possible care and diligence that was necessary." *Gilson v. Jackson County Horse R. Co.*, 12 *Am. & Eng. R. Cas.* 132, 76 *Mo.* 282.

An instruction that the defendants "owe the duty to their passengers to use the highest degree of care to safely land them at their point of destination," as this charge instructed the jury, in effect, that railways are insurers against injuries to their passengers. *Texas & P. R. Co. v. Bucklew*, 3 *Tex. Civ. App.* 272, 22 *S. W. Rep.* 994.

An instruction that carriers of passengers, "operating a railroad, are held under the law to the greatest possible care and diligence for the safety of the passengers they undertake to transport; they are not insurers of the absolute safety of their passengers, but are required to provide for their safety as far as human care and foresight will go"—as imposing too great care upon the carrier. *Fordyce v. Withers*, 1 *Tex. Civ. App.* 540, 20 *S. W. Rep.* 766.—QUOTING *International & G. N. R. Co. v. Halloren*, 53 *Tex.* 53.

An instruction that "where a passenger, being carried on a train, is injured without fault of his own, there is legal presumption of negligence, casting upon the carrier the burden of disproving it." *Hawkins v.*

Front St. Cable R. Co., 3 *Wash.* 592, 28 *Pac. Rep.* 1021.—DISTINGUISHING *Meier v. Pennsylvania R. Co.*, 64 *Pa. St.* 225. FOLLOWING *Federal St. & P. V. Pass. R. Co. v. Gibson*, 96 *Pa. St.* 83.

(2) *Illustrations.*—In an action for injuries to a passenger caused by the derailment of a car, the court instructed the jury that if they found "there was a spread or bent rail at the time and place of derailment," they might "infer negligence from the fact," and that the burden of disproving it was on the defendant. *Held*, that the instruction was erroneous, as it assumed that any spread or bend in a rail is negligence, without regard to its sufficiency to cause the derailment of a car or otherwise impair the safety of a train. *Arkansas Midland R. Co. v. Canman*, 52 *Ark.* 517, 13 *S. W. Rep.* 280.

Plaintiff's wife was a passenger on defendant's train from B. to W. When near its depot in the latter city, "W." was called by some one. She inquired of another passenger if they were in W. and was answered in the affirmative. She then prepared to leave the train. The night was dark. The announcement of "W." was not countermanded. No warning was given to passengers not to leave, and several passengers in fact left the train. Plaintiff's wife lived near the depot and had frequently been on the defendant's road. She was seen to go out of the car door when the train started and moved into the depot. She was afterward found lying on the track about two squares outside of the depot, so much injured that her death ensued in about ten days. This action is by the husband for the loss of service. The judge instructed the jury that the passenger had a right to presume that the train had stopped and that the cry of "W." was made by the agent of the company; that it was the duty of the company to counteract a false proclamation of their arrival, and to keep an agent in their reach to advise passengers of the truth or falsehood of a proclamation so made, or else the company would be derelict in its duty and chargeable with the consequences. This rule was held to be erroneous. *Pabst v. Baltimore & O. R. Co.*, 2 *MacArth. (D. C.)* 42.—REVIEWING *Bridges v. North London R. Co.*, L. R. 6 Q. B. 377.

602. What prayers for instructions should be granted.—Where suit is brought for the killing of a person on a

train, and there is conflicting evidence as to whether or not he was a passenger at the time, where there is evidence to show negligence it is the duty of the court to give the jury the law by which it can determine, from the facts of the case, whether he was a passenger or not. *Texas & P. R. Co. v. Scott*, 64 Tex. 549.

While it may be true that a passenger receiving a personal injury may not enhance his claim for damages or recover for any aggravation of his injuries produced by his own want of care or neglect, it is not necessary that the plaintiff's instructions should exclude the idea that he may. The defendant may have an instruction based on that hypothesis. *Hannibal & St. J. R. Co. v. Martin*, 111 Ill. 219; affirming 11 Ill. App. 386.

In an action to recover for personal injuries caused by another car violently colliding with that in which plaintiff was riding, a charge instructing the jury that, "in the absence of all explanation, the law presumes that the injury was caused by the negligence of the defendant, and casts upon the defendant the burden of overcoming that presumption, or of showing by the evidence that diligence and careful observance of duty could not have prevented the injury," asserts a correct general proposition; and if it had a tendency to mislead, an explanatory charge should have been asked. *Georgia Pac. R. Co. v. Love*, 91 Ala. 432, 8 So. Rep. 714.—APPLYING *New Jersey R. & T. Co. v. Pollard*, 22 Wall. (U. S.) 341. *LIMITING Louisville & N. R. Co. v. Jones*, 83 Ala. 376.

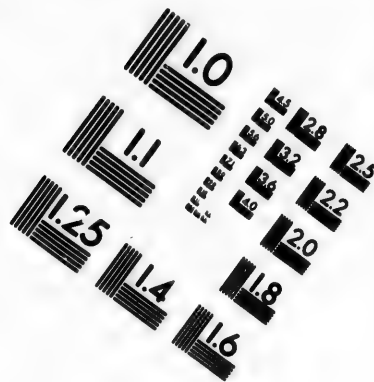
On the trial of an action for a personal injury, the court, at plaintiff's request, instructed the jury that carriers of passengers are required to use all means that vigilance and foresight can reasonably exercise, in view of the character and mode of conveyance adopted, to prevent accidents to passengers. The court, at defendant's request, instructed the jury that "while carriers of passengers are held to the highest degree of care and prudence which is consistent with the practical operation of their road and the transaction of their business, they are not absolute insurers of the personal safety of the passengers." *Held*, that taken together these instructions stated the law correctly. *Chicago, P. & St. L. R. Co. v. Lewis*, 58 Am. & Eng. R. Cas. 126, 145 Ill. 67, 33 N. E. Rep. 960.—FOLLOWING

Chicago & A. R. Co. v. Arnol, 144 Ill. 261.

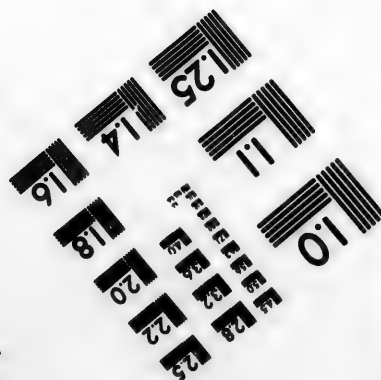
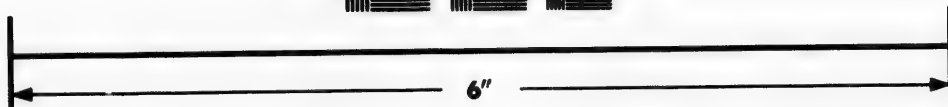
In an action for injuries suffered by the plaintiff in leaving a train on which he had been a passenger, and alleged to have occurred from the negligence of the company's servants in not stopping the train at the station long enough to enable the plaintiff to leave it in safety—*held*, that it was error for the court to refuse to instruct the jury that if the train had stopped "a sufficient time for the plaintiff to have left it upon the platform where passengers leaving the defendant's cars usually land, and had again started on its course and had passed said platform, and the plaintiff then left the platform of the car rather than be carried by, he was guilty of carelessness and could not recover in the action;" and that "if the train stopped a sufficient time to allow the plaintiff to get off, then the defendant was not guilty of negligence in its management;" there being evidence in the case which made those instructions pertinent. *Davis v. Chicago & N. W. R. Co.*, 18 Wis. 175.—REVIEWED IN *Hartwig v. Chicago & N. W. R. Co.*, 1 Am. & Eng. R. Cas. 65, 49 Wis. 358.

603. What prayers for instructions should be refused, generally.—Whether a traveler is carried on a freight train or on a regular passenger train, the duty of the carrier to set him down at the proper station is the same; and when the action is brought to recover damages for personal injuries sustained by plaintiff while traveling on a freight train, from being carried beyond the station and there set down in a heavy rain, charges based on the difference between the two kinds of trains in the "comforts and conveniences usually furnished passengers" are abstract, and therefore properly refused. *Alabama G. S. R. Co. v. Sellers*, 93 Ala. 9, 9 So. Rep. 375.

Where plaintiff in an action for personal injuries while a passenger testified that his wages as a brick-wheeler were \$40 a month and his family's board and house-rent, it was proper for the court to refuse to instruct that "the jury cannot take into consideration the value of the house-rent and the board which he was getting from his employer at the time of the injury in determining the damages, if any, for his loss of time, but only the cash wages which he was then earning." *Ledyard v. West St. & N.*



Resolution test chart showing patterns of vertical and horizontal lines with numerical values ranging from 1.0 to 2.5.



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E. Elec. R. Co., 5 Wash. 64, 31 Pac. Rep. 417.

The following requests for instructions were properly refused:

A charge that the defendant was not guilty of negligence "if the train stopped a sufficient time to allow plaintiff to get off;" or "if the train stopped a sufficient time for her to alight and the conductor started the train without knowing of her intention to alight there and without knowing or seeing that she was in the car to alighting;" or "if the train stopped long enough for two other ladies in the car to alight safely." *Highland Ave. & B. R. Co. v. Burt*, 48 Am. & Eng. R. Cas. 56, 92 Ala. 410, 50 So. Rep. 410.

A charge that the orders and regulations of the company were sufficient to protect the trains in question against collision, the court having instructed that the rules were "reasonable and proper"—whether such rules are adequate for safety in the management of trains being a question of fact. *Chicago, B. & Q. R. Co. v. McLallen*, 84 Ill. 109, 16 Am. Ry. Rep. 425.

In an action for injuries sustained by being thrown to the ground by the starting of a train while attempting to board it, a charge that "if, when the signal to start the train was given, the plaintiff was neither getting upon the train nor appeared to be approaching it for that purpose, there was no negligence on the part of the defendant or its servants," as the jury were justified in finding that the plaintiff's theory of the case would be sustained. *Dawson v. Boston & M. R. Co.*, 156 Mass. 127, 30 N. E. Rep. 466.

604. Ignoring material issues.—In an action for personal injuries sustained by a passenger, contributory negligence being pleaded as a defense, and some evidence being adduced to support it, a charge asked which ignores that evidence, making the defendant's liability depend only on the care and diligence exercised by its servants, is properly refused. *Thompson v. Duncan*, 76 Ala. 334.

In a suit for an injury to a passenger caused by leaping from a box-car while the train was stopped at the station to which the plaintiff had taken passage, no means of descent being provided—*held*, that an instruction to the effect that if the plaintiff leaped from the car without being in peril, or having reason to believe that she was in peril, and the injury thereby resulted, she

could not recover, was correctly refused, because it did not contain the further element that the circumstances were such that the plaintiff might reasonably have apprehended injury from the leap. *Evansville & C. R. Co. v. Duncan*, 28 Ind. 441.—*DISTINGUISHED IN* *Memphis & C. R. Co. v. Whitfield*, 44 Miss. 466.

Where there is evidence that the place where plaintiff's wife was injured was not the regular platform provided by the company for the reception and discharge of passengers, but that the company had acquiesced in its use and allowed passengers to get on trains there without objection; that plaintiff's wife had been directed by a uniformed employé of the company to board the train at that point—an instruction ignoring these facts, and instructing the jury that if plaintiff's wife knew, or with reasonable care could have known, of the regular place for the reception of passengers, he could not recover, is erroneous, and should have been refused. *Baltimore & O. R. Co. v. Kane*, (Md.) 17 Atl. Rep. 1032.

605. Prayers incorrectly stating the law.—An instruction that "the rule that passenger carriers are to be held to the exercise of the strictest diligence is not to be understood by the jury as requiring of such carriers those particular precautions as it is apparent after the accident might have prevented the injury," is properly refused. *Wheaton v. North Beach & M. R. Co.*, 36 Cal. 590.

In an action for a personal injury to a passenger defendant asked the court to instruct the jury "that gross negligence is defined by the law to be wilful or intentional negligence." *Held*, properly refused. Negligence, even when gross, is but an omission of duty. It is not necessarily designed and intentional mischief, though proof of that may be cogent evidence of such fact. *Jacksonville S. E. R. Co. v. Southworth*, 135 Ill. 250, 25 N. E. Rep. 1093; *affirming* 32 Ill. App. 307.

An instruction, in an action for personal injuries to a passenger caused by his car running off the track and upsetting, that the company has performed its whole duty as a common carrier of passengers when it has furnished for their carriage a car or caboose which will run with safety while upon its road but will be unable to resist the clash when thrown from its track—

held, properly refused. *Pittsburgh, C. & St. L. R. Co. v. Williams*, 3 Am. & Eng. R. Cas. 457, 74 Ind. 462.

It was not error to instruct the jury in such case that proof of defects at other points in the road would not make a case of negligence at the place of the accident, nor render the defendant liable for the injury to the plaintiff, unless it was further shown that such defective condition caused or materially contributed to the accident. *Pittsburgh, C. & St. L. R. Co. v. Williams*, 3 Am. & Eng. R. Cas. 457, 74 Ind. 462.

606. Prayers for further instructions.—In an action for personal injuries to a passenger received at night, after the jury has been instructed that railroad companies are held to a high degree of care to prevent injuries to passengers, it is not error to further instruct that it is the duty of such companies to have the passageway to and from its stations lighted at night, so as to enable passengers to get on and off its trains with safety. Such instruction is but an application of the rule of law laid down in the first instruction to the facts of the case. *Galveston, H. & S. A. R. Co. v. Thornsberry*, (Tex.) 17 S. W. Rep. 521.

Where a passenger sues for an injury received in stepping from the car to the station platform, after the court has fairly instructed the jury as to whether the platform was a suitable one, and as to whether the car was properly brought up to it, it is not error to refuse to further charge, "whether defendant had any reasonable or probable ground to expect an accident to a passenger properly descending," or whether the platform had been used for a long time in the same condition. *Velamatyr v. Milwaukee & P. du C. R. Co.*, 24 Wis. 578.—DISTINGUISHED IN *Pittsburgh, C. & St. L. R. Co. v. Krouse*, 30 Ohio St. 222. QUOTED IN *Hartwig v. Chicago & N. W. R. Co.*, 1 Am. & Eng. R. Cas. 65, 49 Wis. 358.

Plaintiff was injured in a wreck of a mixed construction train before the road was open to general travel, and the court instructed the jury "that the defendant would not be expected to apply all the checks and guards that are in use upon established passenger lines, and the passenger would be presumed to take such risks as were necessarily incident to the new condition of the track and the train upon which he traveled." This was favorable to the defendant, and it was not error to refuse

further instruction upon that issue. *San Antonio & A. P. R. Co. v. Robinson*, 79 Tex. 608, 15 S. W. Rep. 584.

607. Modification of requests for instructions.—(1) *In general.*—In charging a jury there is no error in adding that the fact that a casualty occurs authorizes an inference that it was occasioned by the company's negligence, and that the jury might presume negligence. *Central R. Co. v. Freeman*, 75 Ga. 331.

An instruction asked, to the effect that the operators of an elevator are not liable for an accident caused by a defect or flaw in one of the piston-rods of the elevator apparatus, which was not discoverable on a reasonable and careful examination, is properly modified by inserting the words "according to the best-known tests reasonably practicable." *Treadwell v. Whittier*, 80 Cal. 574, 22 Pac. Rep. 266.

The complaint being, not that the plaintiff did not have proper facilities for getting on and off the car, but that the car was stopped near a precipice without a light, and without notice to the plaintiff of its dangerous proximity, it was not error to modify a request to charge, in substance, that the company is not bound to make landings or any provision for the reception and discharge of passengers where none are expected to be. *Central R. & B. Co. v. Smith*, 34 Am. & Eng. R. Cas. 456, 80 Ga. 526, 5 S. E. Rep. 772.

(2) *Illustrations.*—A request for an instruction "that the running of a train beyond the usual stopping place at the station, before coming to a standstill, is not in itself negligence, nor is the pause after it is brought to a stop, for a period necessary to reverse the motion so as to back to the usual stopping place, negligence," is properly modified by adding, "unless the stop is so made and for such a length of time as to indicate that it is an invitation to passengers to alight, and the movement backward is made without warning while they are alighting in response to such invitation." *Sherwood v. Chicago & W. M. R. Co.*, 44 Am. & Eng. R. Cas. 337, 82 Mich. 374, 46 N. W. Rep. 773.

The court charged the jury in substance that it was the plaintiff's duty to present himself at the station in time, and in some way, before it became the duty of the conductor to give the signal to start, signify his purpose to take the train; that if he did

not indicate to defendant's agents that he was a passenger before the train was signaled to move, defendant was not guilty of negligence; but if he did, and was not given a reasonable time to get aboard, defendant was chargeable with negligence; that to render defendant liable its negligence must be found to have been the sole cause of the injury; that the burden was with plaintiff to prove that he was free from negligence, as well as that defendant was guilty of it; that if plaintiff attempted to get on the train while it was in motion he was guilty of negligence and could not recover. The court was then requested by plaintiff to charge that "defendant was bound, under the circumstances of the case as presented by plaintiff, to allow him a reasonable time in which to get on the train, and is responsible for any injury resulting to him from the slightest motion of the car during the entrance of plaintiff as such passenger in such reasonable time." The court responded: "I so charge, subject to the qualification that I charged before. That is the law, of course, if a passenger presents himself as a passenger to get aboard the train before the conductor has actually signaled the engineer to start." The court was also requested to charge "that the defendant is liable whether the signal by the conductor or brakeman to start has been given or not, provided a reasonable opportunity was not offered to the passenger to get on board the train." The court responded: "As to passengers presenting themselves as passengers before the signal was given, I so charge." *Held*, no error; that while the court might well have been justified in declining either request, it could not be assumed that by the disposition made of them it intended to modify the charge as already made. *Hickenbottom v. Delaware, L. & W. R. Co.*, 122 N. Y. 91, 25 N. E. Rep. 279, 33 N. Y. S. R. 312; *affirming* 15 N. Y. S. R. 11.

There was no error in refusing to charge that plaintiff, if informed that the train would not be hauled up to the platform to allow him to get on, "had no right to take another way of getting on, and put himself in peril," and that if he did so and was hurt, he could not recover. The court gave the above instruction, modified by adding, "if you find that he put himself in such peril." *Held*, that this must be understood as meaning, "if you find that he knowingly put himself in such peril;" and in this there

was no error against defendant. *Hartwig v. Chicago & N. W. R. Co.*, 1 Am. & Eng. R. Cas. 65, 49 Wis. 358, 5 N. W. Rep. 865.

608. Directing verdict.—Where evidence is presented on both sides tending in any degree to establish the respective theories of plaintiff and defendant, it is error to take the case from the jury by instruction. So *held*, in an action by a passenger for personal injuries. *Clotworthy v. Hannibal & St. J. R. Co.*, 21 Am. & Eng. R. Cas. 371, 80 Mo. 220.

When on the undisputed evidence, and the legitimate inferences drawn from it, the injury to a passenger is caused by his own negligence, the court is not required to submit the question of negligence to the jury, but may on request give the general affirmative charge in favor of the defendant. *East Tenn., V. & G. R. Co. v. Holmes*, 58 Am. & Eng. R. Cas. 252, 97 Ala. 332, 12 So. Rep. 286.

Where there is no necessary implication, from the evidence, that the plaintiff voluntarily and with culpable negligence abandoned a safe place on a railway train and placed himself in an unsafe one, there will be no error in refusing an instruction to find for the defendant, in an action against it to recover damages caused by its negligence. *Chicago & A. R. Co. v. Fisher*, 141 Ill. 614, 31 N. E. Rep. 406; *affirming* 38 Ill. App. 33.

In a suit for failure to stop for plaintiff to get off at a station where fast trains did not ordinarily stop, he having purchased a ticket in another state, in which was contained a special agreement to let him off there, it is error to instruct for defendant. There being evidence tending to support his contention, it should be left to the jury to say whether plaintiff had a special contract to be carried to said station on that train, and whether there was such a custom, a fixed habit, known to the traveling public, to stop there for debarkation of foreign travelers. *Humphries v. Illinois C. R. Co.*, 70 Miss. 453, 12 So. Rep. 155.

609. Questions of fact for the jury.*—(1) *General rules.*—Where a passenger sues for an injury and there is uncertainty as to the existence of negligence on the part of the company, or of contributory

* Injuries to passengers in alighting from moving trains. When negligence and contributory negligence are for the jury, see 37 AM. & ENG. R. CAS. 93, *abstr.*; see also note, 51 AM. REP. 602.

negligence on the part of the plaintiff, the question should be submitted to a jury; and this is so whether the uncertainty results from a conflict of evidence or from undisputed facts from which fair-minded men might draw different conclusions. *Richmond & D. R. Co. v. Powers*, 149 U. S. 43, 13 Sup. Ct. Rep. 748.

Where there is evidence tending to show that an employé was riding on a train as a passenger when he received an injury, the question of the existence of the relation of carrier and passenger should be submitted to the jury. *Bryant v. Chicago, St. P., M. & O. R. Co.*, 58 Am. & Eng. R. Cas. 15, 53 Fed. Rep. 997, 4 C. C. A. 146.

And in such a case it would be error to direct a verdict for the company on the assumption that the servant was not in the relation of a passenger to the company. *Bryant v. Chicago, St. P., M. & O. R. Co.*, 58 Am. & Eng. R. Cas. 15, 53 Fed. Rep. 997, 4 C. C. A. 146.

Where the court cannot say, as a matter of law, that the facts alleged do not constitute negligence on the part of a company, the case is for submission to the jury. It is for them to determine whether it was negligence to keep locked the closet in the passenger coach, leaving no place for passengers to attend to calls of nature, and for all of the company's servants to remain away from the coach so that the closet could not be unlocked, and to stop the coach over a cut twenty feet deep, without notice to passengers of the danger to which they would be exposed if they attempted to go out. *Wood v. Georgia R. & B. Co.*, 84 Ga. 363, 10 S. E. Rep. 967.

After instructing the jury that the plaintiff was bound to use ordinary diligence to avoid being injured, it is not error to refer it to the jury whether or not, under the circumstances, he ought to have left the car or have taken the seat nearest to where he stood when he discovered the danger. *Chatanooga, R. & C. R. Co. v. Huggins*, 52 Am. & Eng. R. Cas. 473, 89 Ga. 494, 15 S. E. Rep. 848.

In an action for a personal injury to a passenger caused by the train running over a cow, the question of the company's negligence in not guarding the track better is for the jury, though it appear that the company was not bound to fence. *Lackawanna & B. R. Co. v. Chenewith*, 52 Pa. St. 382.

When a passenger is injured through

being struck by a hard substance whilst a train is passing upon the opposite line, the case ought to be sent to the jury, although there is evidence to the effect that none of the employés of the company was guilty of negligence contributing to the accident. *Pennsylvania R. Co. v. MacKinney*, 37 Am. & Eng. R. Cas. 153, 124 Pa. St. 462, 17 Atl. Rep. 14.

Where, in an action against a railroad for personal injuries, plaintiff's testimony, though uncorroborated and flatly contradicted, described as the cause of her injuries the conduct of a brakeman, which was in violation of his duty and negligent, the case presented was to be submitted to the jury. *Philadelphia, W. & B. R. Co. v. Alvord*, 128 Pa. St. 42, 18 Atl. Rep. 391.

The following questions were held to be for the decision of the jury, in cases where passengers were injured:

Whether or not the railway company has taken proper measures to prevent injury to its passengers by an insane passenger. *Meyer v. St. Louis, I. M. & S. R. Co.*, 58 Am. & Eng. R. Cas. 111, 54 Fed. Rep. 116.

Whether the giving way of a bridge on the line of the road was due to faults in the construction of the bridge or to other causes. *Kansas Pac. R. Co. v. Miller*, 2 Colo. 442, 20 Am. Ry. Rep. 245.

Whether the company was negligent in ordering one on the wrong train to get off after the train is in motion. *Southwestern R. Co. v. Singleton*, 67 Ga. 306.

Whether an engineer in charge of an engine was acting in the line of his duty at a given time of the accident. *Grand Rapids & I. R. Co. v. Ellison*, 39 Am. & Eng. R. Cas. 480, 117 Ind. 234, 20 N. E. Rep. 135.

Whether unnecessary force was used in ejecting the passenger or used in an unreasonable manner. *Marquette v. Chicago & N. W. R. Co.*, 33 Iowa 562.

Whether or not a brakeman possessed the authority to allow a passenger to leave a moving train, there being a conflict of evidence on this point. *Galloway v. Chicago, R. I. & P. R. Co.*, 58 Am. & Eng. R. Cas. 245, 87 Iowa 458, 54 N. W. Rep. 447.

Whether the negligence proved was willful or not. *Claxton v. Lexington & B. S. R. Co.*, 13 Bush (Ky.) 636, 17 Am. Ry. Rep. 12.—QUOTED IN *Needham v. Louisville & N. R. Co.*, 85 Ky. 423, 3 S. W. Rep. 797.

The amount of actual damages a passenger may recover, under the evidence, for

being carried beyond his station and compelled to walk back, whereby he claims he was exposed to the weather and was made sick. *Louisville, N. O. & T. R. Co. v. Mask*, 64 Miss. 738, 2 So. Rep. 360.

Whether the employé was guilty of a want of reasonable care or not, under all the circumstances of the case, in giving directions to a passenger to get off a moving car. *Wilburn v. St. Louis, I. M. & S. R. Co.*, 36 Mo. App. 203.

Whether a company is negligent or not in failing to ascertain the necessity and utility of an invention for the better protection of passengers, and to avail itself of it, where its prior use by other companies has been shown. *Hegeman v. Western R. Corp.*, 13 N. Y. 9, affirming 16 Barb. 353.

Whether a porter who assaults a passenger upon a sleeping-car in which he has hired a section, during an altercation which occurred after the passenger has been transferred to another train, owing to a washout, was in the performance of his duties as the agent of the railroad company when the assault was inflicted. *Dwinelle v. New York C. & H. R. R. Co.*, 44 Am. & Eng. R. Cas. 384, 120 N. Y. 117, 24 N. E. Rep. 319, 30 N. Y. S. R. 578, 8 L. R. A. 224; reversing 45 Hun 139, 9 N. Y. S. R. 838.

Whether a company has performed its duty in regard to the frequency of examinations of the various portions of its machinery and appliances, and whether the system and manner of running the road are all that may be required of the carrier. *Palmer v. Delaware & H. Canal Co.*, 44 Am. & Eng. R. Cas. 298, 120 N. Y. 170, 24 N. E. Rep. 302, 30 N. Y. S. R. 817; affirming 46 Hun 486, 11 N. Y. S. R. 872.

Whether such circumstances exist as will repel the legal presumption of negligence. *Sullivan v. Philadelphia & R. R. Co.*, 30 Pa. St. 234.—APPLIED IN *Wright v. Pennsylvania R. Co.*, 3 Pittsb. (Pa.) 116.

Whether a passenger is guilty of contributory negligence in jumping from a moving train, where there is evidence that he was put in peril by default or negligence of the company's employés, or left the train while in motion by their direction. *Pennsylvania R. Co. v. Lyons*, 41 Am. & Eng. R. Cas. 154, 129 Pa. St. 113, 18 Atl. Rep. 759.

The effect to be given to the calling of the name of a station where the train is halting. *International & G. N. R. Co. v. Eckford*, 71 Tex. 274, 8 S. W. Rep. 679.

Whether the care due from the company for the safety of its passengers in alighting from its cars includes the duty of assisting a woman laden with bundles in alighting therefrom. *Texas & P. R. Co. v. Miller*, 79 Tex. 78, 15 S. W. Rep. 264. See also *Missouri Pac. R. Co. v. Wortham*, 37 Am. & Eng. R. Cas. 82, 73 Tex. 25, 3 L. R. A. 368, 10 S. W. Rep. 741.

Whether a company has fulfilled its duty to furnish safest appliances for alighting from its cars by furnishing a box about eleven inches square on top and a little larger at the bottom, it appearing that a passenger might in stepping upon it overturn it. *Missouri Pac. R. Co. v. Wortham*, 37 Am. & Eng. R. Cas. 2, 73 Tex. 25, 3 L. R. A. 368, 10 S. W. Rep. 741.

Where the evidence showed that plaintiff was injured by being thrown down while getting on a train by a sudden starting of the same, and that the train had stopped and passengers had been directed to get on, even though some evidence tended to show that plaintiff had been told to get on the rear car and was injured in attempting to board another car. *Detroit & M. R. Co. v. Curtis*, 23 Wis. 152.

(2) *Illustrations*.—Where plaintiff, who was injured while a passenger on a freight train, testifies that as the train neared the station he arose to look out, when a sudden jerk threw him down, and that he lay in the caboose in pain whilst switching was going on at the station, and the defendant's witnesses testify that the injury occurred as the train was preparing to leave the station and not whilst it was approaching it, a verdict for the plaintiff will not be set aside, the weight of the evidence and credibility of the witnesses being for the jury. *Lusby v. Atchison, T. & S. F. R. Co.*, 41 Am. & Eng. R. Cas. 93, 41 Fed. Rep. 181.—QUOTING *Chicago, B. & Q. R. Co. v. Hazzard*, 26 Ill. 373.

A station-master wearing a uniform similar to that of the conductor of a train, and having a like lantern, signaled an engineer to move his train out of the way of an incoming train, the signal being similar to that given by the conductor in notifying the engineer to leave the station. The latter thereupon pulled out, leaving the conductor behind, and failing to take a sleeping-car which should have been attached to his train. He did not discover his mistake until the next station was reached, and being

unable to telegraph for instructions because there was no operator at the station, without placing a light on the rear car he backed down for the purpose of taking up the conductor and the missing car, but on the way collided with another train, whereby the plaintiff's intestate, a passenger, was injured. *Held*, that though the original neglect in prematurely starting the train did not directly cause the injury, yet it was productive of the immediate cause thereof, and the jury had the right to take into consideration the successive careless acts or omissions in reaching their conclusion as to the extent of the culpability in respect to the acts which should not have been omitted, and the wrongful omissions or acts which led to the wrong actually done. *Kansas City, M. & B. R. Co. v. Sanders*, 58 *Am. & Eng. R. Cas.* 140, 98 *Ala.* 293, 13 *So. Rep.* 57.

Plaintiff sued for being carried three quarters of a mile past his station, whereby he missed the conveyance home and was compelled to walk back over the wet and muddy road at night, which brought on a sickness from which he never recovered, as he claimed. *Held*, that his evidence was sufficient to support a verdict finding that the injury complained of resulted from a failure to stop the train. *Louisville, N. O. & T. R. Co. v. Mask*, 64 *Miss.* 738, 2 *So. Rep.* 360.

A brakeman called a station where plaintiff was to leave, and soon after the train stopped. The night was dark, and plaintiff and others arose to leave the car, and when on the car steps she was thrown down by a violent motion of the train backward. It appeared that the train had pressed the platform, and, after stopping, started up for the purpose of backing to it. *Held*, that both the question of the company's negligence, in failing to give notice that the train was not yet at the platform, and the contributory negligence of plaintiff, in attempting to leave the train as she did, were for the jury. *Taber v. Delaware, L. & W. R. Co.*, 71 *N. Y.* 489; *affirming* 4 *Hun* 765.—*QUOTED IN* *Smith v. Georgia Pac. R. Co.*, 41 *Am. & Eng. R. Cas.* 143, 88 *Ala.* 538. *REVIEWED IN* *Memphis & L. R. R. Co. v. Stringfellow*, 21 *Am. & Eng. R. Cas.* 374, 44 *Ark.* 322, 51 *Am. Rep.* 598.

Plaintiff, a member of a military company, was a passenger on a special train, which stopped at an intermediate station to per-

mit another train to pass. No announcement was made of the purpose of the stop. The time of stop was about fifteen minutes. The plaintiff, finding no water on the train, left it and crossed a track to a passenger platform and entered the switch-house in search of water. The question of whether he had abandoned his relation as a passenger was one for the jury. *Wandell v. Corbin*, 17 *N. Y. S. R.* 718, 1 *N. Y. Supp.* 795.

By reason of a wreck on a road it became necessary for defendant to transfer its passengers by foot to another train at night. Plaintiff was a female passenger, somewhat aged and infirm, and was traveling alone, and encumbered with some baggage. A single brakeman was sent out with a lantern to conduct some 24 to 30 passengers to the other train. Plaintiff was unable to keep up with the party and fell behind, where she was unable to distinguish the lantern from other lights, and she stumbled and fell, receiving serious injuries. *Held*, that both questions, as to whether the company exercised reasonable care, under the circumstances, and as to whether plaintiff was guilty of any lack of reasonable care, were proper to be left to the jury. *Weld v. New York, L. E. & W. R. Co.*, 52 *N. Y. S. R.* 184, 22 *N. Y. Supp.* 974.

A conductor announced that the next station was where plaintiff, a passenger, wished to get off. Shortly thereafter the train stopped and some one called out the station. As a matter of fact the train had been signaled and had stopped before it reached the station. No notice was given to the passengers, and plaintiff, thinking he was at the station, stepped out. It was a dark, rainy, cold night, and he fell in a creek and was injured. *Held*, that the questions of the company's negligence and of the passenger's contributory negligence were for the jury, and a verdict in favor of the passenger would not be disturbed. *Philadelphia & R. R. Co. v. Edelstein*, (Pa.) 16 *Atl. Rep.* 847.

5. Amount of Recovery; Damages.

a. In General.

610. Right to damages.—In assessing damages against a railroad for wrongfully failing to carry plaintiff as a passenger, whereby he is compelled to walk a considerable distance, the inconvenience or physical hardship of walking cannot be considered as an element of damages, where he volun-

tarily assumes it instead of hiring a team and driving. *Morse v. Duncan*, 8 Am. & Eng. R. Cas. 374, 14 Fed. Rep. 396.—*FOLLOWING Francis v. St. Louis Transfer Co.*, 5 Mo. App. 7; *Trigg v. St. Louis, K. C. & N. R. Co.*, 6 Am. & Eng. R. Cas. 349, 74 Mo. 147.

A plaintiff cannot hold the defendant responsible for an injury to himself caused even in part by his own fault in failing to use ordinary care or ordinary judgment, or for any injury not resulting from the fault of the defendant, but caused by some new intervening cause not incident to the injury caused by the defendant's wrongful act or omission of duty. *Pullman Palace Car Co. v. Bluhm*, 18 Am. & Eng. R. Cas. 87, 109 Ill. 20, 50 Am. Rep. 601.

In a case where the plaintiff's arm has been broken from the negligent conduct of the defendant, and the plaintiff exercises ordinary care to keep the parts together, and uses ordinary care in the selection of surgeons and doctors, and nurses, if needed, and employs those of ordinary skill and care in their profession, and still, by some unskillful or negligent act of such surgeon, doctor, or nurses, the bones fail to unite, thereby making a false joint, the defendant, if responsible for the breaking of the arm, will be liable in damages for the unfavorable result of the injury. *Pullman Palace Car Co. v. Bluhm*, 18 Am. & Eng. R. Cas. 87, 109 Ill. 20, 50 Am. Rep. 601.

611. General and special damages.

—Where the train on which a passenger is being carried runs off the track, and under the excitement of the moment the passenger jumps off, any damages resulting directly and proximately to the passenger may be recovered, including injuries sustained by fright in jumping from the train; but such damages will be general and not special. *Smith v. St. Paul, M. & M. R. Co.*, 9 Am. & Eng. R. Cas. 262, 30 Minn. 169, 14 N. W. Rep. 797.

The agent of a railroad company in Atlanta, Ga., sold to a passenger a ticket to Galveston, Tex. (to which point it was guaranteed he could go), by way of his own road and connecting roads to New Orleans, and thence by the Morgan line of steamers to Galveston, and upon the arrival of the passenger in New Orleans he found that the steamers on the Morgan line had been taken off. If there were other routes to his destination open to him, the measure of

damages which he could recover against the road issuing the ticket would be what it would have cost him to have reached his destination by other means and routes than the Morgan line, including reasonable pay for delays; and it might include, also, such special damages as the party may have sustained by reason of such delay. *Central R. Co. v. Combs*, 18 Am. & Eng. R. Cas. 298, 70 Ga. 533.

If it should appear that no quarantine existed when the ticket was sold, and that, subsequently to the purchase, the Morgan line of steamers was withdrawn, in consequence of the prevalence of yellow fever in New Orleans, then the purchaser would not be entitled to recover anything. *Central R. Co. v. Combs*, 18 Am. & Eng. R. Cas. 298, 70 Ga. 533.

If the steamers had been withdrawn when the ticket was purchased, and the purchaser proceeded to New Orleans, and there was no other convenient and expeditious way, then the measure of damages would be the expenses of the purchaser from Atlanta to New Orleans and back, expenses while there, necessary expenses on the road, and the loss of time in making the passage there and back. *Central R. Co. v. Combs*, 18 Am. & Eng. R. Cas. 298, 70 Ga. 533.

612. Proximate damages.—In an action by a passenger to recover compensation for an injury, the jury are authorized to give such damages as are warranted by the immediate consequences of the wrong, and such as necessarily result from the act complained of. *Baltimore & O. R. Co. v. Blocher*, 27 Md. 277. *Baltimore & O. R. Co. v. Carr*, 71 Md. 135, 17 Atl. Rep. 1052. *McClary v. Sioux City & P. R. Co.*, 3 Neb. 44.

If a passenger is negligently injured, which results in a cancer, if the jury believe that the cancer is the natural proximate consequences of the injury, the cancer should be considered as an element in awarding damages. *Baltimore City Pass. R. Co. v. Kemp*, 18 Am. & Eng. R. Cas. 220, 61 Md. 74, 47 Am. Rep. 381, n.—*DISTINGUISHING Hobbs v. London & S. W. R. Co.*, L. R. 10 Q. B. 111.

In an action by a passenger for the refusal to accept his ticket, the plaintiff will be entitled to recover, in the absence of

* Disease as proximate or remote result of company's negligence, see note, 18 Am. & Eng. R. Cas. 233.

maice or wantonness or circumstances of aggravation, such damages only as were the immediate and necessary consequences resulting from the wrongful act of the defendant; that is to say, the expenses incurred by him by reason of the defendant's refusal to allow him to enter its car, the amount paid for another ticket, compensation for loss of time, hotel expenses, if any, incurred, and, in addition to these, for the inconvenience suffered by him, if it be such as is capable of being ascertained and assessed at a money value. *Northern C. R. Co. v. O'Conner*, 52 *Am. & Eng. R. Cas.* 176, 76 *Md.* 207, 16 *L. R. A.* 449, 24 *Atl. Rep.* 449.

The plaintiff, who was a young girl about eight years of age, being carried about one mile beyond her destination, and put off at a place with which she was not familiar, would naturally be frightened by her conditions and surroundings, and attempt to walk rapidly along the track back to the station; and for damages resulting from these natural consequences of the defendant's wrongful act a recovery may be had. *East Tenn., V. & G. R. Co. v. Lockhart*, 79 *Ala.* 315.

613. Remote damages.—(1) *Generally*.—If a train wrongfully fails to stop to take on a passenger, he is entitled to recover nominal damages, and such actual damages as he may sustain by reason of the delay; but if the passenger, instead of procuring a comfortable and safe conveyance, or waiting a few hours for another train, proceeds on foot and thereby brings on sickness, he is not entitled to recover for the sickness. *Indianapolis, B. & W. R. Co. v. Birney*, 71 *Ill.* 391.—DISTINGUISHED IN *Evans v. St. Louis, I. M. & S. R. Co.*, 11 *Mo. App.* 463. FOLLOWED IN *Morse v. Duncan*, 8 *Am. & Eng. R. Cas.* 374, 14 *Fed. Rep.* 396. REVIEWED IN *Louisville, N. & G. S. R. Co. v. Fleming*, 14 *Lea (Tenn.)* 128; *Brown v. Chicago, M. & St. P. R. Co.*, 3 *Am. & Eng. R. Cas.* 444, 54 *Wis.* 342, 41 *Am. Rep.* 41.

The fact that the passenger was compelled to borrow money to pay fare illegally exacted is too remote to afford a basis for the assessment of damages. The same is true as to the remarks or comments of other passengers subsequent to the transaction complained of. *Hoffman v. Northern Pac. R. Co.*, 45 *Minn.* 53, 47 *N. W. Rep.* 312.

(2) *Illustrations*.—In an action against a carrier for non-performance of his contract

to carry a passenger, remote and contingent damages cannot be recovered. So held, in a case where the plaintiff, through the violation of the agreement of the defendants, was detained at New Orleans and at Panama, on his way to California, an unreasonable length of time, and the court charged the jury that the measure of damages would be the wages at the then rates in San Francisco during the period of such detention. *Yonge v. Pacific Mail Steamship Co.*, 1 *Cal.* 353.

A theatrical manager purchased tickets for himself and troupe over a railroad, at the terminus of which they were to take a train on a connecting road to their destination, where a performance was to be given. A collision occurred on the first road, and the train was delayed so as to miss connection with the train on the second road, and plaintiff and his troupe failed to reach their destination in time for the performance, and were compelled to refund \$288 for tickets that had already been sold. Plaintiff did not notify the company of his engagement until at the point of delay, late at night, and then by telegraph, but it did not appear that the telegram was received in time to avoid the delay. Held, that the damages resulting from a failure to keep the engagement were too remote to be recovered. *Georgia R. Co. v. Hayden*, 71 *Ga.* 518, 51 *Am. Rep.* 274.

In an action for damages for injuries to a female passenger, in which the only evidence introduced referred to the injuries she sustained and to a miscarriage or abortion caused by, and great pain suffered in consequence of, the injury, an instruction that "if the damages are only the imaginary result of the tortious act, or other and continuous circumstances preponderate largely in causing the injurious effect, such damages are too remote to be a basis of recovery against the wrong-doer, and damages traceable to the act, but not its legal or material consequences, are too remote or contingent," is properly refused. *Augusta & S. R. Co. v. Randall*, 34 *Am. & Eng. R. Cas.* 439, 79 *Ga.* 304, 4 *S. E. Rep.* 674.

A transfer company undertook to convey plaintiff from a station through a city to her home, but set her down a mile from her residence, on the sidewalk of a street much frequented, and on which street-cars ran to within one square of her home. It was daylight, but the weather was cold, and plaintiff was a lady of delicate constitution,

She walked, and in doing so contracted a cold which resulted in sickness permanently impairing her health. *Held*, that she could only recover reasonable cost of a conveyance home and any necessary expense in endeavoring to avoid exposure to the cold; that both her own contributory negligence and the remoteness of the damages would prevent a recovery of damages resulting from the sickness. *Francis v. St. Louis Transfer Co.*, 5 Mo. App. 7.—FOLLOWED IN *Morse v. Duncan*, 8 Am. & Eng. R. Cas. 374, 14 Fed. Rep. 396.

Where a train of cars was running three quarters of an hour behind the usual, ordinary, and advertised time for the running of trains upon the road of a carrier, and was upset by a sudden gust of wind which crossed the track, but not that portion of the track where the train would have been if running on time, whereby a passenger was injured—*held*, that the injury complained of was not the natural result of the train being behind time, and that the damages sustained were too remote to entitle a recovery against the carrier. *McClary v. Sioux City & P. R. Co.*, 3 Neb. 44.

(3) — *English cases.*—Where a company's trains fail to connect as advertised, and a passenger is compelled to stay over at the connecting point until the next day, he is entitled to recover his hotel expenses and the railway fare the next day to his destination, but cannot recover for any damage occasioned by his not reaching other places by the time he might have reached them if the company had performed its contract. *Hamlin v. Great Northern R. Co.*, 1 H. & N. 408, 2 Jur. N. S. 1122, 26 L. J. Ex. 20.—FOLLOWED IN *Le Blanche v. London & N. W. R. Co.*, L. R. 1 C. P. D. 286, 45 L. J. C. P. 521, 34 L. T. 667, 24 W. R. 808.

Where a husband and wife are carried aside from their destination by a train on which they are passengers, and are obliged to get off in the night-time and walk home through the rain, damages may be recovered for the inconvenience suffered, but not on account of the illness of the wife, who was laid up and made sick. *Hobbs v. London & S. W. R. Co.*, L. R. 10 Q. B. 111, 44 L. J. Q. B. 49, 32 L. T. 352, 23 W. R. 520.—COMMENTED ON IN *McMahon v. Field*, L. R. 7 Q. B. D. 591, 50 L. J. Q. B. D. 552, 45 L. T. 381.

A husband took tickets at W. for himself, wife, and two children of five and seven years of age, respectively, to go to H. station by the last train at night. By the negligence of the porters they were put into the wrong train and carried to E.; being unable to obtain accommodation for the night at E., or a conveyance, they walked home, a distance of between four and five miles, and the night being wet the wife caught cold, and medical expenses were incurred. *Held*, that the husband was entitled to recover damages in respect of the inconvenience suffered by being compelled to walk home, but that the illness of the wife was a consequence too remote from the breach of contract for damages to be recoverable for it. *Hobbs v. London & S. W. R. Co.*, L. R. 10 Q. B. 111, 44 L. J. Q. B. 49, 3 Ry. & C. T. Cas. xxiii.

A passenger claimed to recover as damages from a company a sum of money, of which he had been robbed, in consequence, as he alleged, of the company's negligence in allowing their carriage to be overcrowded. *Held*, that the damage claimed for was too remote. *Cobb v. Great Western R. Co.*, 58 Am. & Eng. R. Cas. 169, [1893] 1 Q. B. 459.

614. Future or prospective damages.—Where a passenger sues for personal injuries the jury may include in the damages any that the evidence shows will result in the future. *Washington & G. R. Co. v. Harmon*, 147 U. S. 571, 13 Sup. Ct. Rep. 557.

Where, in an action for personal injuries to a passenger, the injured party has not fully recovered at the date of the trial, the jury are not limited to the damages suffered up to that time, but may also allow compensation for future disability and suffering resulting from the same cause. *Johnson v. Northern Pac. R. Co.*, 47 Minn. 430, 50 N. W. Rep. 473.

615. Nominal damages.—In the absence of malice, insult, or wilful wrong when a passenger train has failed to stop at a flag-station, where passengers get on and off, and a passenger for such jumps off and walks back about two hundred yards, and there is no proof of actual damages, only nominal damages can be recovered from the railroad company; exemplary damages are not recoverable. *Kansas City, M. & B. R. Co. v. Fite*, 67 Miss. 373, 7 So. Rep. 223.

δ. Elements and Measure of Damages.

616. Generally.*—The measure of damages in favor of a passenger injured by the negligence of a railroad company is the injuries received, the sufferings experienced, and the consequent loss sustained by the passenger. *Rutherford v. Shreveport & H. R. Co.*, 41 *Am. & Eng. R. Cas.* 129, 41 *La. Ann.* 793, 6 *So. Rep.* 644.

A passenger who is injured by the negligent running of the train, or on account of an insufficient platform at which he is landed, is entitled, as damages, to compensation for the bodily injuries sustained, the pain suffered, the effect of the injury on his health, according to its degree and probable duration, the expenses of his sickness resulting from the injury, and of attempting to effect a cure, and the pecuniary loss sustained by reason of inability to attend to his business or profession. *St. Louis, I. M. & S. R. Co. v. Cantrell*, 8 *Am. & Eng. R. Cas.* 198, 37 *Ark.* 519, 40 *Am. Rep.* 105.

In assessing damages to a passenger for loss of limb the jury should consider the age, situation, bodily suffering, and mental anguish of the person injured, and the loss sustained by him in consequence, and the extent to which he was thereby disabled from self-support. *Whalen v. St. Louis, K. C. & N. R. Co.*, 60 *Mo.* 323, 9 *Am. Ry. Rep.* 224.

Where a female passenger sues for being carried past her station and being put off at a lonely place in the night-time, being compelled to walk back and carry a child and a satchel, which it was alleged caused sickness and other suffering, it is proper for the court to charge the jury that "the carrier must make compensation according to the nature of the injury, and such injury may consist of personal inconvenience, sickness, loss of time, bodily and mental suffering, loss of capacity to earn money, personal injury, pecuniary expenses, disfigurement, or permanent physical or mental impairment." *Texas & P. R. Co. v. Pollard*, 2 *Tex. App. (Civ. Cas.)* 424.

Passengers by vessel, who are entitled to meals, may recover damages for the bad quality of the food furnished, where the evidence shows that it was not such as they were entitled to expect from the fare paid.

* Measure of damages in actions for injuries to passengers, see note, 9 *AM. & ENG. R. CAS.* 371. And see also **DAMAGES, 67-74.**

The Bark D. C. Murray, 11 *Sawy. (U. S.)* 416.

617. Compensatory damages.—In actions against passenger carriers for personal injuries occasioned by their negligence, the rule of damages is based upon the idea of compensation and not of punishment. *Johnson v. Wells*, 6 *Nev.* 224.—**QUOTING** *Morse v. Auburn & S. R. Co.*, 10 *Barb. (N. Y.)* 625.

And the passenger is entitled to full compensation for his injury. *Memphis & C. R. Co. v. Whitfield*, 44 *Miss.* 466.

A passenger is entitled to such damages as will compensate for the injuries sustained and for expenditures made and liabilities incurred in consequence of the injury, and also for pain and suffering, keeping in mind whether the injuries were liable to be permanent or temporary. *Mackoy v. Missouri Pac. R. Co.*, 5 *McCrary (U. S.)* 538.

In estimating his compensatory damages the jury may consider loss of time, pecuniary expense, and bodily pain, and incurable hurt, expense of cure, and mental suffering caused by the injury; and also such future damages as may result from loss of health, time, use of limbs, bodily and mental pain and suffering. *Memphis & C. R. Co. v. Whitfield*, 44 *Miss.* 466.—**QUOTING** *Curtiss v. Rochester & S. R. Co.*, 20 *Barb. (N. Y.)* 282; *Pennsylvania R. Co. v. Vandever*, 36 *Pa. St.* 298; *Pennsylvania R. Co. v. Kelly*, 31 *Pa. St.* 372. **REVIEWING** *Morse v. Auburn & S. R. Co.*, 10 *Barb. (N. Y.)* 621.

The damages should be limited to such as are strictly compensatory, including bodily pain and so much only of mental suffering as may be indivisibly connected therewith. *Johnson v. Wells*, 6 *Nev.* 224.—**QUOTING** *Illinois C. R. Co. v. Barron*, 5 *Wall. (U. S.)* 90.—**DISTINGUISHED IN** *Quigley v. Central Pac. R. Co.*, 11 *Nev.* 350; *Willson v. Northern Pac. R. Co.*, 5 *Wash.* 621.

The damages may include compensation for suffering, expense of medical attendance, and loss of time, but the damages must be strictly compensatory, unless the injury was wantonly afflicted. *Pennsylvania R. Co. v. Books*, 57 *Pa. St.* 339.—**DISTINGUISHED IN** *Ohio & M. R. Co. v. Dickerson*, 59 *Ind.* 317.

Where a declaration is framed in two counts, one on a contract for common carriage and the other for personal assault, a

recovery on the first count entitles the plaintiff to actual damages only. *Springer Transp. Co. v. Smith*, 15 *Tenn.* 498, 1 *S. W. Rep.* 280.

At the trial in an action by a passenger for personal injuries evidence was admitted showing that plaintiff was dependent for a support upon his own labor. In instructing the jury the court gave rules for the estimation of damages, entirely omitting the question of plaintiff's support. *Held*, that even if there was error in admitting the evidence it was cured by the instruction. *Mackoy v. Missouri Pac. R. Co.*, 5 *McCrary (U. S.)* 538.

618. Physical pain and suffering.—

(1) *Rule stated.*—Though it is difficult to conceive how bodily pain and suffering can be estimated in dollars and cents, yet it is well settled that a recovery can be had for them as damages in actions against carriers for personal injuries to passengers occasioned by negligence. *Johnson v. Wells*, 6 *Nev.* 224.—QUOTING *Laing v. Colder*, 8 *Pa. St.* 479.—*Pennsylvania R. Co. v. Allen*, 53 *Pa. St.* 276.

A passenger injured by the negligence of the carrier may recover for loss of time and any necessary pecuniary expenses incurred and for bodily pain and suffering endured. *Morse v. Auburn & S. R. Co.*, 10 *Barb. (N. Y.)* 621.—DISTINGUISHED IN *Munro v. Pacific Coast D. & R. Co.*, 84 *Cal.* 515, 24 *Pac. Rep.* 303. QUOTED IN *Johnson v. Wells*, 6 *Nev.* 224. REVIEWED AND QUOTED IN *Memphis & C. R. Co. v. Whitfield*, 44 *Miss.* 466.

He may recover damages for personal suffering, medical expenses, and any other direct pecuniary loss, including loss of probable future earnings during the time of the disability. *Brignoli v. Chicago & G. E. R. Co.*, 4 *Daly (N. Y.)* 182.

(2) *Illustrations.*—In attempting to board one of defendant's cars plaintiff was thrown from and under it by the sudden and alleged negligent starting of the train, receiving injuries which resulted in the amputation of his right arm. In an action to recover damages—*held*, it was competent for plaintiff to show that after the amputation he experienced pain, seemingly in the amputated hand and arm; that his bodily pain resulting from the injury was properly the subject of proof and consideration, although its location was deceptive. *Hickenbottom v. Delaware, L. & W. R. Co.*, 122

N. Y. 91, 25 *N. E. Rep.* 279, 33 *N. Y. S. R.* 312; *affirming* 15 *N. Y. S. R.* 11.

The train on which plaintiff was riding as a passenger was wrecked and plaintiff was fastened by broken pieces of the train where he could not extricate himself, and the same parts of the train which held plaintiff supported the locomotive and tender some two feet above him. He remained in this condition some 30 or 40 minutes, momentarily expecting to be crushed, under such agony that he begged bystanders to kill him. *Held*, that it was proper to charge the jury in estimating damages that they might consider the "situation at the time, how painful, how trying it was." *Quinn v. Long Island R. Co.*, 34 *Hun (N. Y.)* 331.—REVIEWING *Ransom v. New York & E. R. Co.*, 15 *N. Y.* 415.—REVIEWED IN *Harding v. New York, L. E. & W. R. Co.*, 36 *Hun (N. Y.)* 72.

619. Mental anguish.—The court instructed the jury that in determining the amount of damage the plaintiff was entitled to recover, if any, they had the right to and should take into consideration all the facts and circumstances in evidence—the nature and extent of the plaintiff's physical injuries, if any, testified about by the witnesses, his suffering in body and mind, if any, resulting from such injuries, and also such prospective suffering and loss of health, if any, as they might believe, from all the evidence before them, he has sustained or will sustain. It was objected that it made mental suffering an element of damage, and practically assumed that the plaintiff was entitled to damages, etc. *Held*, that the objections were not well founded. *Hannibal & St. J. R. Co. v. Martin*, 111 *Ill.* 219; *affirming* 11 *Ill. App.* 386.

Where a passenger is rightfully upon a train with a ticket that entitles him to be carried to the point he claims, and for some reason the conductor disputes and refuses to accept such ticket and requires him to pay extra fare, to avoid being ejected from the car in the presence of other persons in such a way as to call their attention to the dispute or controversy, he is entitled to recover damages as compensation for the feelings of humiliation and shame suffered by him. *Chicago & E. I. R. Co. v. Conley*, 6 *Ind. App.* 9, 32 *N. E. Rep.* 96.

Where in an action by a passenger for personal injuries plaintiff's evidence tended to show that threats of personal violence

made by the conductor and others on the train caused him to jump therefrom while it was in motion, whereby his foot was run over, necessitating amputation, an instruction that plaintiff could recover damages for the threats, whether or not any injury resulted therefrom to his person or property, and which permitted plaintiff to recover for mental anguish alone, regardless of the physical injuries he may have suffered, was erroneous. *Spohn v. Missouri Pac. R. Co.*, 116 Mo. 617, 22 S. W. Rep. 690.

When, in an action by a passenger against a company, the only allegation in the petition with respect to pain and suffering occasioned by injuries for which suit is brought is, "that in consequence of said injuries the plaintiff was confined to his bed under treatment of physicians for five or six weeks, and that he suffered painfully from said wounds," plaintiff cannot recover for mental suffering. *International & G. N. R. Co. v. Irvine*, (Tex.) 18 Am. & Eng. R. Cas. 294.—QUOTING *Texas & P. R. Co. v. Durrett*, 57 Tex. 53.

Where a passenger, through the negligence of the company, is injured while alighting from the train, proofs showing that his nervous system, his spine, and general health were affected thereby, are sufficient to justify the inference that he suffered mental anguish, and to allow the jury to consider such as an element of damages. *Galveston, H. & S. A. R. Co. v. Thornsberry*, (Tex.) 17 S. W. Rep. 521.

Where a passenger sues for being kept out of a car to which her sex and ticket entitled her, and for being pushed against the railing and compelled to enter another car, an instruction which tells the jury that in estimating her damages they may take into consideration her feelings, pain, and humiliation of mind, as well as the actual inconvenience and bodily injury, including both mental and physical pain which she suffered thereby, correctly states the law. *Texas & P. R. Co. v. Johnson*, 2 Tex. App. (Civ. Cas.) 154.

Plaintiff and others were carried on an excursion in going out, but the company failed to send a train for their return in the evening, and they were compelled to stay out all night. Held, that if the action therefor be based on the special contract to carry, no recovery can be had for disappointment of mind, sense of wrong, or injured feelings; but such damages may be recovered if the action be for a breach of the general duty

of the company as carriers. *Walsh v. Chicago, M. & St. P. R. Co.*, 42 Wis. 23, 15 Am. Ry. Rep. 71.

In an action for personal injuries, occasioned by the breaking down of a stage-coach, it is error to instruct the jury in estimating damages to take into consideration plaintiff's "pain of mind," as distinct from his bodily suffering. *Johnson v. Wells*, 6 Nev. 224.—CRITICISING *Blake v. Midland R. Co.*, 18 Q. B. 111; *Ransom v. New York & E. R. Co.*, 15 N. Y. 415. DISAPPROVING *Fairchild v. California Stage Co.*, 13 Cal. 590.

620. **Peril and fright.**—A female passenger was compelled to leave a car at night several hundred feet from the platform, and in walking along a side-track she fell in an open cattle-guard and was injured. While she was trying to extricate herself those in charge of the train switched cars onto the side-track toward her, greatly frightening her. Held, that her fright might be considered in estimating the damages. *Stutz v. Chicago & N. W. R. Co.*, 37 Am. & Eng. R. Cas. 187, 73 Wis. 147, 40 N. W. Rep. 653.—FOLLOWED IN *Kreuziger v. Chicago & N. W. R. Co.*, 73 Wis. 158, 40 N. W. Rep. 657.

621. **Disfigurement.**—Where a female passenger is injured by the negligence of the carrier, she may recover damages for the disfigurement of her person; but in estimating the damages her condition and circumstances should be considered. *The Oriflamme*, 3 Sawy. (U. S.) 397.

622. **Impairment of faculties.**—In an action for injuries to a passenger the jury may consider, in estimating the damages, whether the mental faculties of plaintiff were impaired by the accident, whether the act was wilfully done or not. *Toledo, W. & W. R. Co. v. Baddeley*, 54 Ill. 19.—DISTINGUISHING *Flemington v. Smithers*, 2 C. & P. 292.

And in such case it is competent for the physician who attended plaintiff to give his opinion in respect to the effect of the injuries received by plaintiff upon his future condition. *Toledo, W. & W. R. Co. v. Baddeley*, 54 Ill. 19.

623. **Aggravation of disease.**—If the injury of which a passenger complains did not of itself cause a permanent stiff-

* Peril and fright as elements of damage, see note, 37 AM. & ENG. R. CAS. 193.

ness of his arm, but aggravated a former injury which he had received, increasing his pain and suffering, and necessitating surgical attention, these are elements of damages for which he is entitled to recover. *Montgomery & E. R. Co. v. Mallette*, 92 Ala. 209, 9 So. Rep. 363.

The fact that a plaintiff was sick when she left the train, though the conductor was ignorant of it, is competent and admissible evidence for her, not as an element of damages, but as tending, in connection with other circumstances, to show the relation between the subsequent aggravation of her sickness and the defendant's original wrongful act; and the rough condition of the track back to the station, over which she walked, is admissible as evidence for the same purpose. *East Tenn., V. & G. R. Co. v. Lockhart*, 79 Ala. 315.

624. Carrying beyond station or destination.—Where the company has violated its contract with a passenger by carrying him beyond his destination, it is responsible in damages for the discomfort, inconvenience, sickness, expenses, and charges shown to have been the direct, natural, and proximate result of the breach of the contract. *International & G. N. R. Co. v. Terry*, 21 Am. & Eng. R. Cas. 323, 62 Tex. 380.—APPROVING *Williams v. Vanderbilt*, 28 N. Y. 217.

In an action against a carrier by a passenger who was carried beyond his destination, the plaintiff is entitled to recover damages for his trouble and inconvenience in getting back to his destination. *East Tenn., V. & G. R. Co. v. Lockhart*, 79 Ala. 315. *Pennsylvania R. Co. v. Aspell*, 23 Pa. St. 147.

Where the complaint not only avers the failure to stop at the station in the first instance, but also the refusal of the conductor to back the train to the station, and the consequent necessity, enforced by his orders, for plaintiff to alight and walk back, charges asked, limiting her right of recovery to damages sustained in consequence of the failure to stop in the first instance, are properly refused. *Alabama G. S. R. Co. v. Sellers*, 93 Ala. 9, 9 So. Rep. 375.

In such case the fact that plaintiff had a baby in her arms is relevant and admissible as evidence in aggravation of damages, whether regard be had to the baby itself, her natural solicitude for it, or only as one of the impediments which prevented or hindered her use of an umbrella as a pro-

tection against rain. *Alabama G. S. R. Co. v. Sellers*, 93 Ala. 9, 9 So. Rep. 375.

A passenger who is carried beyond her station by the negligence of the company, but without any circumstances of aggravation, and without receiving any personal injury, may recover compensation for the inconvenience, loss of time, labor, and expense of traveling back, but not for anxiety and suspense of mind suffered in consequence of the delay, nor the effects upon her health, nor the danger to which she was exposed in consequence of the train being stopped at her station an insufficient length of time to enable her to get off. *Trigg v. St. Louis, K. C. & N. R. Co.*, 6 Am. & Eng. R. Cas. 345, 74 Mo. 147, 41 Am. Rep. 305.—DISTINGUISHED IN *Winkler v. St. Louis, I. M. & S. R. Co.*, 21 Mo. App. 99. FOLLOWED IN *Morse v. Duncan*, 8 Am. & Eng. R. Cas. 374, 14 Fed. Rep. 396. QUOTED IN *McGinnis v. Missouri Pac. R. Co.*, 21 Mo. App. 399.

625. Delay.*—The expenses incurred by the plaintiff, occasioned by the refusal of the defendant to admit him to the train, such as the expense of a ticket to travel upon another train and hotel expenses incurred by reason of the delay, may be allowed for, and mere inconvenience may be ground for damage if it is such as is capable of being stated in a tangible form and assessed at a money value, and so far as any actual loss sustained in matters of business that can be shown to have been occasioned as the direct and necessary consequence of the wrongful act of the defendant. *Baltimore & O. R. Co. v. Carr*, 71 Md. 135, 17 Atl. Rep. 1052.

Defendant undertook to carry plaintiff by vessel from New York to San Francisco, via Nicaragua, but only transported him to the latter place, where the vessel was wrecked. *Held*, that plaintiff might recover damages for loss of time and expense, and the cost of returning, and for loss of time by reason of sickness after his return, which was brought on by the negligence of the carrier in leaving him in an unhealthy place, and the expenses of such sickness. *Williams v. Vanderbilt*, 28 N. Y. 217; *affirming 29 Barb.* 491.—APPLYING *Quimby v. Vanderbilt*, 17 N. Y. 306. DISAPPROVING *Briggs v. Van-*

* See also *ante*, 125; *post*, 642.

Measure of damages for a delay in carrying a theatrical troupe, see 26 AM. & ENG. R. CAS. 262, *abstr.*

derbilt, 19 Barb. 222; Bonsteel v. Vanderbilt, 21 Barb. 26.—APPLIED IN Branch v. Wilmington & W. R. Co., 77 N. Car. 347. APPROVED IN International & G. N. R. Co. v. Terry, 21 Am. & Eng. R. Cas. 323, 62 Tex. 380.

626. Expenses resulting from injury.—Where a passenger is injured through the negligence of the carrier he may recover damages for loss of time, for suffering in the past and that which the injury will probably cause in the future, and also for loss of health and bodily strength, having in view the effect of the injury upon his ability to labor. *Secord v. St. Paul, M. & M. R. Co.*, 5 *McCrary (U. S.)* 515, 18 *Fed. Rep.* 221.—FOLLOWED IN *Owens v. Baltimore & O. R. Co.*, 39 Am. & Eng. R. Cas. 276, 35 *Fed. Rep.* 715.

The expense incurred from being detained until it was too late to take a particular train is a proper item of damages in an action for the injury caused by such obstruction of a highway as resulted in such detention. *Patterson v. Detroit, L. & N. R. Co.*, 19 Am. & Eng. R. Cas. 415, 56 *Mich.* 172, 22 *N. W. Rep.* 260.

But the passenger cannot recover expenses incurred in undergoing a protracted medical treatment and for loss of time, without proof showing the amount expended for the medical treatment and the value of his lost time. *Galveston, H. & S. A. R. Co. v. Thornsberry, (Tex.)* 17 *S. W. Rep.* 521.

627. Inability to attend to business or profession.—In assessing damages for injuries to a passenger, the jury, among other things, may consider the loss the plaintiff has sustained through his inability to continue his professional practice. *Phillips v. London & S. W. R. Co.*, *L. R.* 5 *C. P. D.* 280, 49 *L. J. Q. B.* 233, 42 *L. T.* 6. And see *Phillips v. London & S. W. R. Co.*, *L. R.* 5 *Q. B. D.* 78, 41 *L. T.* 21, 28 *W. R.* 10; *affirming L. R.* 4 *Q. B. D.* 406, 48 *L. J. Q. B.* 693, 40 *L. T.* 813, 27 *W. R.* 797.

In estimating compensatory damages in cases of assaults upon passengers the jury may take into consideration, as elements of damage, loss of time, inability to attend to business, pecuniary expenses, bodily pain, any incurable hurt, personal inconvenience, and mental anguish caused by bodily pain. *International & G. N. R. Co. v. Kentle*, 16 Am. & Eng. R. Cas. 337, 2 *Tex. App. (Civ. Cas.)* 262.

In an action to recover damages for personal injuries, the plaintiff may show, by her evidence, that the injury sustained was of such a character as to render her unable to perform her work after the injury as she had been able to do before. *Stutz v. Chicago & N. W. R. Co.*, 37 Am. & Eng. R. Cas. 187, 73 *Wis.* 147, 40 *N. W. Rep.* 653.

The jury, in estimating the damages, are to consider the health and condition of the plaintiff before the injuries complained of, as compared with his then condition in consequence of such injuries, and whether they are in their nature permanent, and how far they are calculated to disable him from engaging in those business pursuits for which, in the absence of such injuries, he would have been qualified; and also the physical and mental suffering to which he has been subjected by reason of his injuries, and to allow such damages as in their opinion will be a fair and just compensation for such injuries. *Pittsburg & C. R. Co. v. Andrews*, 39 *Md.* 329, 10 *Am. Ry. Rep.* 485.

There was no error in refusing to instruct the jury: "You cannot find any damages by way of compensation for the lessened capacity to labor for the period of plaintiff's life, there being no evidence to show what would purchase an annuity equal to the value of his labor for the duration of his life, and no basis has been furnished for making the calculation; and you will allow nothing, on this account, for permanent injuries, if any." There is no rule of law requiring the production of such testimony. *Houston & T. C. R. Co. v. Boehm*, 9 Am. & Eng. R. Cas. 366, 57 *Tex.* 152.—REVIEWED IN *Gulf, C. & S. F. R. Co. v. Gordon*, 70 *Tex.* 80.

Where a suit for damages was brought by a married woman with her husband as nominal plaintiff, for personal injuries received while a passenger upon one of defendant's freight trains, and it was averred that she was so disabled by the injury as to be wholly unable to attend to her ordinary household duties, the court instructed the jury, in substance, that the age and situation of the plaintiff and the extent to which she is disabled, if it all, should be taken into consideration by the jury. *Held*, that the instruction, in view of the evidence, was not such as to work any substantial injustice to defendant; that it was proper to consider the age, as it might have much to do with the extent of the injury, and that the use of

the word "situation," under the evidence in this case, worked no injury to defendant. *Thomas v. Wabash, St. L. & P. R. Co.*, 20 Mo. App. 485.

628. Loss of time.—When the evidence shows that the plaintiff was employed at a stated compensation at the time he was injured, and was disabled to discharge the duties of his employment, at least temporarily, he cannot recover for loss of time, unless it is also shown that his compensation was in fact stopped or diminished during his disability. *Montgomery & E. R. Co. v. Mallette*, 92 Ala. 209, 9 So. Rep. 363.

629. Salary, wages earned, etc.—Where a professional man is injured through the negligence of the carrier, he may testify as to his past earnings, for the purpose of enabling the jury to fix his damages. *Nash v. Sharpe*, 19 Hun (N. Y.) 365.—APPLYING *Masterton v. Mt. Vernon*, 58 N. Y. 391; *McIntyre v. New York C. R. Co.*, 37 N. Y. 287; *Walker v. Erie R. Co.*, 63 Barb. (N. Y.) 260.—QUOTED IN *Wallace v. Western N. C. R. Co.*, 41 Am. & Eng. R. Cas. 212, 104 N. Car. 442, 10 S. E. Rep. 552.

Where a teacher of the French language is injured through the negligence of the carrier, he may show as affecting the damages, the number of his pupils and the amount of his earnings during the last preceding year. *Simonin v. New York, L. E. & W. R. Co.*, 36 Hun (N. Y.) 214.—FOLLOWING *Ehrgott v. Mayor of N. Y.*, 96 N. Y. 264.

There being no allegation of any special engagement of the plaintiff with any person, by which he might earn money, the court allowed the plaintiff to introduce evidence tending to prove that he, at the time of the injury, was receiving for his services as a traveling salesman \$3000 per year. *Held*, that the admission of such evidence was error, and that such error was not cured by an instruction that the evidence was admitted for no other purpose than to show plaintiff's capacity to earn money, and must not be considered in any respect as a measure of damage. *Wabash Western R. Co. v. Friedman*, 146 Ill. 583, 30 N. E. Rep. 353, 34 N. E. Rep. 1111.

630. Character of plaintiff.—Where a passenger sues for personal injuries, evidence of the number of his family, his habits, industry, and economy, is admissible on the question of damages. *Pennsylvania R. Co. v. Books*, 57 Pa. St. 339.

When a carrier becomes liable in damage for a wrong or injury done to a passenger the same rules as to the measure of damages apply to corporations as to individuals; but the character of the passenger cannot be considered in estimating the amount of damages. *International & G. N. R. Co. v. Kentle*, 16 Am. & Eng. R. Cas. 337, 2 Tex. App. (Civ. Cas.) 262. *Johnson v. Wells*, 6 Nev. 224.

The character of the passenger cannot be considered in estimating the amount of his damages for an assault committed upon him. *International & G. N. R. Co. v. Kentle*, 16 Am. & Eng. R. Cas. 337, 2 Tex. App. (Civ. Cas.) 262.

The fact that a female passenger who is injured is of unchaste character may be considered by the jury in assessing compensatory damages, so far as it tends to show her ability to earn money or take care of a family. *Abbot v. Tolliver*, 71 Wis. 64, 36 N.W. Rep. 622.

Where a passenger sues for an injury, and testifies that prior to the injury he was employed in the pottery business, and that he was an industrious, capable man in that business, and able to earn full wages, but that he had been crippled by the injury, whereby he could not work so as to earn full wages, it is competent for the company, in defense, to show that he was and had continued to be an habitual drunkard. *Cleveland & P. R. Co. v. Sutherland*, 19 Ohio St. 151.

631. Conflict of laws.—Defendant road was chartered under the laws of New York, and constructed its road from a point in the state through New Jersey and Pennsylvania and again into the state. Plaintiff purchased a ticket to ride between two points in New York, but which would require him to pass through the other two states named. He was injured in Pennsylvania, where a statute existed limiting the amount of damages recoverable. *Held*, that the damages must be ascertained according to the New York laws. *Dyke v. Erie R. Co.*, 45 N. Y. 113.—APPLYING *Peninsular & O. S. Nav. Co. v. Shand*, 3 Moore P. C. C. N. S. 272.—APPLIED IN *Murray v. Brooklyn City R. Co.*, 27 N. Y. S. R. 280, 7 N. Y. Supp. 900.

632. Deduction of insurance money.—The liability of a railway to respond in damages for an injury occasioned by accident to a passenger on their road is

not discharged *pro tanto* by the payment of any sum, on account of such injury, by an accident insurance company, the primary liability being on the railway company. *Pittsburg, C. & St. L. R. Co. v. Thompson*, 56 Ill. 138, 3 Am. Ry. Rep. 454.

633. Matters in aggravation or mitigation.*—A conductor's statement that a train would stop at a certain station "five minutes," in reply to a question by a passenger, cannot be considered as affecting the latter's damages for injuries sustained in attempting to re-enter cars, when he had gotten off to attend to some business matters and had only gone a few steps when the train started in much less time than five minutes. *Missouri Pac. R. Co. v. Foreman*, 73 Tex. 311, 11 S. W. Rep. 326.

Where the plaintiff is aware of certain rules of a company, and takes passage over the road for the purpose of violating these rules and bringing suit, his declarations to this effect are admissible in mitigation of damages. *Holmes v. Carolina C. R. Co.*, 26 Am. & Eng. R. Cas. 190, 94 N. Car. 318.

c. Exemplary, Punitive, or Vindictive Damages.†

634. When will be awarded, generally.‡—It is the duty of a carrier to have the stations announced as the trains approach them and to stop the cars at the platform long enough to enable passengers to alight in safety, and any violation of this duty is, generally, culpable negligence and actionable, and plaintiff may recover compensatory and, in some cases, exemplary damages. *Dawson v. Louisville & N. R. Co.*, (Ky.) 11 Am. & Eng. R. Cas. 134.—DISTINGUISHING *Chicago, St. L. & N. O. R. Co. v. Scurr*, 6 Am. & Eng. R. Cas. 341, 59 Miss. 456. QUOTING *Toledo, W. & W. R. Co. v. Baddeley*, 54 Ill. 19. REVIEWING *New Orleans, J. & G. N. R. Co. v. Hurst*, 36 Miss. 661; *Southern R. Co. v. Kendrick*, 40 Miss. 374; *Memphis & C. R. Co. v. Whitfield*, 44 Miss. 466.

If a company employs a drunken engineer, and passengers are injured through his negligence, inattention, or misconduct,

the company is liable, not only in compensatory damages, but punitive damages for the want of the exercise of proper care in the selection of its employés. *Beale v. Railway Co.*, 1 Dill. (U. S.) 568.

Plaintiff got on an early morning train before the ticket office was open, and offered to pay regular fare, but an additional amount was demanded by the conductor, which he refused to pay; and upon being told that he must get off, asked that the train be stopped at a place near his home, and at a place where it was usual for the train to stop, but which the conductor refused, and carried him to the next station, five miles beyond, and put him off where the conductor had reason to know that he could not procure shelter at that hour in the morning. Held, that it is not a rule of law that passengers cannot be ejected between stations, and the carrying of the passenger to the next station, under such circumstances, may be considered by the jury in determining whether exemplary damages ought to be allowed or not. *Hall v. South Carolina R. Co.*, 34 Am. & Eng. R. Cas. 311, 28 So. Car. 261, 5 S. E. Rep. 623.

635. — and when not.—(1) Generally.—Exemplary or punitive damages are not recoverable by passengers unless there is an element of fraud, malice, gross negligence, insult, or other cause of aggravation. *Holmes v. Carolina C. R. Co.*, 26 Am. & Eng. R. Cas. 190, 94 N. Car. 318.

A passenger cannot recover vindictive damages for being negligently thrown from a car, where there is no proof of wilfulness or of malice. *Hill v. New Orleans, O. & G. W. R. Co.*, 11 La. Ann. 292.—REVIEWED IN *Palmer v. Charlotte, C. & A. R. Co.*, 3 So. Car. 580.

Where a company adopts all rules and regulations needful for the safety of the passengers, and employs competent agents, whose duty it is to see that these rules and regulations are observed, the company, in case of injury to the passengers, happening by reason of the carelessness of a subordinate agent, is not liable for punitive damages. *Ackerson v. Erie R. Co.*, 32 N. J. L. 254.—FOLLOWED IN *Porter v. Erie R. Co.*, 32 N. J. L. 261.

(2) Illustrations.—In an action by a female passenger to recover for an injury resulting from being taken past a station to which she had purchased a ticket, it was not improper to instruct the jury that if

* Passenger's own negligence as mitigating the amount of damages recoverable, see *ante*, 364.

† See also *post*, 651.

‡ Exemplary damages for injuries to passengers, see notes, 30 AM. & ENG. R. CAS. 579; 41 *Id.* 132.

any of the employés of the company were "insulting in words, tone, or manner," they should find for the plaintiff "damages, in their discretion," not exceeding the amount claimed in the petition. *Louisville & N. R. Co. v. Ballard*, 88 Ky. 159, 10 S. W. Rep. 429.

But in the same case on a former appeal it was error to instruct the jury that if any of the employés of the company were "indecorous" or insulting they should award the plaintiff "damages, in their discretion," not exceeding the amount claimed in the petition. *Louisville & N. R. Co. v. Ballard*, 28 Am. & Eng. R. Cas. 135, 85 Ky. 307, 7 Am. St. Rep. 600, 3 S. W. Rep. 530.

A passenger cannot recover punitive damages for being told, in conformity to a rule of the company, to leave the ladies' car and take a seat in another car, where the conductor uses no force or insult in removing him. *Holmes v. Carolina C. R. Co.*, 26 Am. & Eng. R. Cas. 190, 94 N. Car. 318.—QUOTED IN *Knowles v. Norfolk Southern R. Co.*, 102 N. Car. 59, 9 S. E. Rep. 7.

Plaintiff purchased a round-trip ticket and rode out, but upon attempting to return was told by the conductor that she could not ride on that ticket, whereupon she left the car and remained until the next train, when she rode home without extra fare. *Held*, that a suit for a failure to carry on the first train must be considered as based upon a breach of contract, and only nominal damages can be recovered, in the absence of evidence of actual damages. Exemplary damages are not allowable for a breach of contract. *Goins v. Western R. Co.*, 68 Ga. 190.—FOLLOWING *Hughes v. Western R. Co.*, 61 Ga. 131. QUOTING *Hamlin v. Great Northern R. Co.*, 1 H. & N. 408.

Upon the arrival of the train at their station, plaintiff and wife were prevented from alighting before the train moved off, owing to the crowding into the car of a large number of excursionists. In his efforts to signal the engineer to stop, the plaintiff broke the bell-cord. The train had moved two or three hundred feet, when plaintiff demanded that the conductor stop the train. This the conductor refused to do, because "the train carried the U. S. mail." At the same time he chided plaintiff for having broken the bell-cord, but he offered to take plaintiff and wife to the next station, six miles, whence they could return on an excursion train in an hour. This was done,

plaintiff paying return fare. *Held*, not a case for punitive damages. *Mississippi & T. R. Co. v. Gill*, 66 Miss. 39, 5 So. Rep. 393.

A wreck necessitated passengers to walk about one hundred yards. Plaintiff, a passenger, with her infant, was twice notified by the conductor to alight, but, being reluctant to wait in the open air, remained with an acquaintance who had volunteered to assist her off and across to the other train on its arrival. He was a claim agent of the road, but had nothing to do with operating the train. Her train had occasion to back some distance, and on its return the other train had come. She hurried to reach it, but failed, and had to return home on the same train, about twenty miles. The conductor knew she was being left, but, being behind time, did not wait for her. There was no rudeness on his part, and only slight personal discomfort and disappointment on her part were shown. *Held*, the company was not liable for punitive damages, and a verdict for \$500 is greatly excessive. *Alabama & V. R. Co. v. Purnell*, 69 Miss. 652, 13 So. Rep. 472.

Under such facts it was for the jury to say whether the conductor did all he might have done to insure the continuance of plaintiff's journey. The court, therefore, rightly refused to instruct the jury to find for the defendant, but she could recover, if at all, only compensatory damages. *Alabama & V. R. Co. v. Purnell*, 69 Miss. 652, 13 So. Rep. 472.—FOLLOWING *Chicago, St. L. & N. O. R. Co. v. Scurr*, 59 Miss. 456.

The court instructed the jury for the plaintiff that "if there was some element of fraud, malice, reckless negligence, or oppression, insult, rudeness, or wilful wrong, or other cause of aggravation, in the running of defendant's train by L. without stopping," they might give the plaintiff exemplary damages. *Held*, that this instruction is bad, because it authorizes punitive damages if there was some element, however infinitesimally small, of any of the multitudinous things named, in running the train by L., and because it furnishes no guide for an intelligent consideration of the only question of controversy, to wit, whether the running by was wilful or inadvertent. *Vicksburg & M. R. Co. v. Scanlan*, 63 Miss. 413.—EXPLAINING *Chicago, St. L. & N. O. R. Co. v. Scurr*, 59 Miss. 456.

636. Gross negligence, generally.—If a passenger be injured through the

gross negligence of the carrier he may recover exemplary damages, if the negligence be so gross as to show an entire want of care, or justify the presumption that the carrier is indifferent as to the passenger's safety. *Alabama G. S. R. Co. v. Arnold*, 30 *Am. & Eng. R. Cas.* 546, 80 *Ala.* 600, 2 *So. Rep.* 337. *Taylor v. Grand Trunk R. Co.*, 48 *N. H.* 304.—REVIEWED IN *Fay v. Parker*, 53 *N. H.* 342.—*Frink v. Coe*, 4 *Greene (Iowa)* 555.—QUOTED IN *Bonice v. Dubuque St. R. Co.*, 53 *Iowa* 278.

Evidence showing that the plaintiff was carried several hundred yards beyond the station at which she was to alight, and, on the conductor's refusal to move the train back, was compelled to alight and walk back through a drenching rain, having a baby in her arms and encumbered with a valise, authorizes the jury to award exemplary damages.* *Alabama G. S. R. Co. v. Sellers*, 93 *Ala.* 9, 9 *So. Rep.* 375.

637. Failure to keep track in repair.†—When the plaintiff sues for damages on account of personal injuries received while traveling as a passenger on defendant's road, the car being thrown from the track by a broken rail, and there is evidence tending to show such a condition of the track at that place, and so long continued that the defendant's failure to discover and remedy it was gross negligence—the equivalent of recklessness, wantonness, or intentional wrong—a general charge against the right to recover exemplary damages is properly refused. *Alabama G. S. R. Co. v. Hill*, 47 *Am. & Eng. R. Cas.* 500, 90 *Ala.* 71, 8 *So. Rep.* 90.—QUALIFIED IN *Richmond & D. R. Co. v. Vance*, 93 *Ala.* 144.

The imposition of vindictive, exemplary, or punitive damages on account of injuries to a passenger, in an accident caused by the condition of the track, is not limited to cases in which there is "an entire want of care" on the part of the company in the maintenance of its track; since, although some degree of care may have been exercised in that respect, the track may have been consciously left in such condition that running trains over it would probably re-

sult in accidents involving injuries to passengers. *Alabama G. S. R. Co. v. Hill*, 93 *Ala.* 514, 9 *So. Rep.* 722. *Maysville & L. R. Co. v. Herrick*, 13 *Bush (Ky.)* 122, 17 *Am. Ry. Rep.* 53.—DISAPPROVED IN *Louisville & N. R. Co. v. McCoy*, 81 *Ky.* 403.

If the court charge the jury that they are authorized to consider the question of exemplary damages if the track was out of repair and had been for a long time previous to the accident, and defendant knew of its condition and failed to remedy it, the charge is erroneous, as authorizing the jury to award exemplary damages to the plaintiff, whether his injuries were caused by reason of the defective condition of the road or not. *Missouri Pac. R. Co. v. Shuford*, 37 *Am. & Eng. R. Cas.* 194, 72 *Tex.* 165, 10 *S. W. Rep.* 408.

638. Recklessness, wilfulness, malice, oppression, or insult.—(1) *When recoverable.*—Exemplary damages may be recovered for an injury to a passenger resulting from a violation of duty by one of its employes in the conduct of the train, if the violation of duty be accompanied with oppression, fraud, malice, insult, or other wilful misconduct, evincing a reckless disregard of consequences. As to female passengers the rule goes further, and there is as to them an implied undertaking upon the part of the company that it will protect them against obscenity, immodest conduct, or wanton approach. Mere "indecorous" conduct, however, even toward a female passenger, is not sufficient to authorize exemplary damages. *Louisville & N. R. Co. v. Ballard*, 28 *Am. & Eng. R. Cas.* 135, 85 *Ky.* 307, 7 *Am. St. Rep.* 600, 3 *S. W. Rep.* 530.—FOLLOWED IN *Rose v. Wilmington & W. R. Co.*, 106 *N. Car.* 168, 11 *S. E. Rep.* 526.

Exemplary damages are recoverable against a carrier for his violation of his duty in wilfully and capriciously refusing to land his vessel and receive the plaintiff on board as a passenger, according to his advertisement. *Heirn v. McCaughan*, 32 *Miss.* 17.—APPLIED IN *Purcell v. Richmond & D. R. Co.*, 108 *N. Car.* 414.

Where a company declines to sell a ticket to a regular stopping place and to deliver the passenger's baggage there, the jury may award exemplary damages if the company acts wilfully, maliciously, or so negligently as to indicate a wanton disregard of the rights of others. *Pittsburgh,*

* Exemplary damages for carrying passengers beyond station and compelling them to walk back, see 48 *AM. & ENG. R. CAS.* 98, *abstr.*

† Exemplary damages for injuries to passengers caused by defective track, see note, 47 *AM. & ENG. R. CAS.* 512.

2 *D. R. D.*—37.

C. & St. L. R. Co. v. Lyon, 37 *Am. & Eng. R. Cas.* 231, 123 *Pa. St.* 140, 16 *Atl. Rep.* 607.

Evidence showing that an accident was caused by a broken rail, that the rails and cross-ties at that place were worn, rotten, and unsound, and that old rails were being constantly used to repair the track there, is sufficient to authorize the jury to infer that the railroad company had knowledge of this condition of things and to impute to it such recklessness or wantonness as is the equivalent of conscious wrong-doing in continuing to run trains over a track in such condition; and so finding, the jury may award punitive damages. *Alabama G. S. R. Co. v. Hill*, 93 *Ala.* 514, 9 *So. Rep.* 722.

Where a passenger is carried past her destination without being afforded an opportunity to alight, and the company refuses to return her to such station when the omission is discovered within a reasonable distance, and there is no controlling exigency aside from the inconvenience to prevent such return, the wrong done to the passenger is wilful and malicious and entitles her to exemplary damages. *Samuels v. Richmond & D. R. Co.*, 52 *Am. & Eng. R. Cas.* 315, 35 *So. Car.* 493, 14 *S. E. Rep.* 943.

(2) *When not recoverable.*—If a passenger be injured through ordinary negligence, the carrier is liable only for compensatory damages. Punitive damages, or smart-money, are only allowable where there is wanton recklessness or gross negligence. *Kentucky C. R. Co. v. Dills*, 4 *Bush (Ky.)* 593.—DISTINGUISHED IN *Ohio & M. R. Co. v. Dickerson*, 59 *Ind.* 317.

Exemplary damages should not be awarded for an injury to a passenger, caused by a negligent collision, unless the collision resulted from wilful misconduct, or the company's employés evince a reckless indifference as to the rights of the passengers, such as would be equivalent to intentional wrong. *Milwaukee & St. P. R. Co. v. Arms*, 91 *U. S.* 489, 6 *Am. Ry. Rep.* 512.—EXPLAINED IN *Fisher v. Metropolitan El. R. Co.*, 34 *Hun (N. Y.)* 433. FOLLOWED IN *Missouri Pac. R. Co. v. Humes*, 22 *Am. & Eng. R. Cas.* 557, 115 *U. S.* 512. QUOTED IN *Philadelphia, W. & B. R. Co. v. Hoeftlich*, 18 *Am. & Eng. R. Cas.* 373, 62 *Md.* 300, 50 *Am. Rep.* 223; *Chattanooga, R. & C. R. Co. v. Liddell*, 85 *Ga.* 482; *Kansas Pac. R. Co. v. Kessler*, 18 *Kan.* 523; *Purdy*

v. Manhattan El. R. Co., 36 *N. Y. S. R.* 43, 13 *N. Y. Supp.* 295.

Where a conductor, in the confusion of business, carries a passenger beyond his station and then gives him a free return ticket, the company is only liable for compensatory damages. Exemplary damages are recoverable only where there is insult, wilfulness, or recklessness. *Chicago, St. L. & N. O. R. Co. v. Scurr*, 6 *Am. & Eng. R. Cas.* 341, 59 *Miss.* 456, 42 *Am. Rep.* 373.—CRITICISING *New Orleans, J. & G. N. R. Co. v. Bailey*, 40 *Miss.* 395; *Philadelphia & R. R. Co. v. Derby*, 14 *How. (U. S.)* 468; *Memphis & C. R. Co. v. Green*, 52 *Miss.* 783.

In the absence of any circumstances of malice, oppression, insult, personal injury, damages to business, mental or physical suffering, punitive damages are not allowable for a mere failure to stop a train to take on a passenger, although something more than actual damages may be awarded against the carrier as a punishment for neglect of duty, and for the protection of the public. *Memphis & C. R. Co. v. Green*, 52 *Miss.* 779.—CRITICISED IN *Chicago, St. L. & N. O. R. Co. v. Scurr*, 59 *Miss.* 456.

A passenger, by reason of a failure to stop the train, was carried beyond the station for which he had purchased a ticket. *Held*, exemplary damages could not be recovered on proof of mental anxiety occasioned by the separation from his family, it not appearing that the failure to stop was wilful or attended with circumstances of malice, insult, or oppression. *Dorwick v. Illinois C. R. Co.*, 30 *Am. & Eng. R. Cas.* 576, 65 *Miss.* 14, 7 *Am. St. Rep.* 61, 1 *So. Rep.* 36.

Although there is a breach of duty by the conductor of a railroad train toward a passenger, yet, in the absence of wilful wrong, oppression, or reckless disregard of his rights, mere brusqueness in the words or manner of the conductor toward the passenger is not an insult which justifies the infliction of punitive damages against the company. *Mississippi & T. R. Co. v. Gill*, 66 *Miss.* 39, 5 *So. Rep.* 393.

Punitive damages should not be allowed for the conductor's failure to protect a passenger from assault or insult by other passengers, unless there has been a wilful refusal or absolute failure to interpose when called on for assistance, or when the injury occurs in the conductor's presence. Weak and inefficient action, not resulting from

want of sympathy on his part for the person aggrieved, or from indisposition to aid him, may render the company liable to compensatory, but not to punitive, damages. *New Orleans, St. L. & C. R. Co. v. Burke*, 53 Miss. 200, 9 Am. Ry. Rep. 308.

639. Unauthorized acts of servants.*—(1) *Company liable*.—If a passenger is injured by the malicious, oppressive, or reckless negligence of the company's servants, the company is liable in exemplary damages, and it is not error to refuse to charge that the company is not so liable unless the injury was caused by the wilful negligence of its servants, authorized or approved by the company, and showing a criminal and reckless misconduct on the part of the company. *Quinn v. South Carolina R. Co.*, 37 Am. & Eng. R. Cas. 166, 29 So. Car. 381, 7 S. E. Rep. 614, 1 L. R. A. 682.—QUOTING *State v. Morris & E. R. Co.*, 23 N. J. L. 369.—APPLIED IN *Spellman v. Richmond & D. R. Co.*, 35 So. Car. 475. LIMITED IN *Samuels v. Richmond & D. R. Co.*, 52 Am. & Eng. R. Cas. 315, 35 So. Car. 493.

Where a male passenger peaceably enters a ladies' car, it being the only one where he can get a seat except in a smoking-car, and he is seized by a brakeman, without previous request to leave the car or offering him a seat elsewhere, and is forcibly ejected from the car and thrown upon the platform while the train is in motion, he may recover punitive damages. *Bass v. Chicago & N. W. R. Co.*, 42 Wis. 654, 15 Am. Ry. Rep. 45.

(2) *Exemplary damages not recoverable*.—Exemplary damages cannot be recovered of a corporation or other person for the wrongful acts of its servants, even when wilful and malicious, unless the employer directed the doing of the act or ratified it when done, or unless it is chargeable with gross negligence in the employment or retention of such servant. *Sullivan v. Oregon R. & N. Co.*, 21 Am. & Eng. R. Cas. 391, 12 Ore. 392, 7 Pac. Rep. 508.—APPROVING *Cleghorn v. New York C. & H. R. R. Co.*, 56 N. Y. 44.

If a conductor, without authority of any kind from his company, wrongfully procures the arrest of a passenger, the company is not liable in punitive or exemplary

damages, though the conductor may have acted in an illegal, wanton, and oppressive manner. *Lake Shore & M. S. R. Co. v. Prentice*, 147 U. S. 101, 13 Sup. Ct. Rep. 261.—FOLLOWED IN *Pittsburgh, C. C. & St. L. R. Co. v. Russ*, 57 Fed. Rep. 822.

Where the evidence does not tend to prove that the injury complained of was caused by the wilful, wanton, or oppressive conduct of the agents of a railway company, and that such conduct was expressly or impliedly authorized or ratified by the company, it is error to refuse to instruct the jury that in such case they cannot give punitive or exemplary damages. *Downey v. Chesapeake & O. R. Co.*, 28 W. Va. 732.—CRITICISING *Hopkins v. Atlantic & St. L. R. Co.*, 36 N. H. 9; *Louisville & N. R. Co. v. McCoy*, 81 Ky. 403.

An instruction, in an action to recover for personal injuries to a passenger, that the facts in evidence to authorize punitive damages must be such as would subject the defendant's servant to liability to conviction for criminal negligence if prosecuted therefor is properly refused. *Augusta & S. R. Co. v. Randall*, 34 Am. & Eng. R. Cas. 439, 79 Ga. 304, 4 S. E. Rep. 674.

Plaintiff held a commutation ticket on defendant's road, and claimed the right to ride to a certain stopping place in the suburbs of a city, which was denied by the conductor, whereupon the company instructed the conductor to require extra compensation or eject plaintiff at a point short of the place where he claimed the right to ride to. Held, in an action against the company for being ejected, where there was no evidence of unnecessary violence, that it was error to instruct the jury that punitive damages could not be allowed against the conductor, but that the company should be punished to such an extent as the jury might deem the facts authorized. *Parker v. Long Island R. Co.*, 13 Hun (N. Y.) 319.—REVIEWING *Hamilton v. Third Ave. R. Co.*, 53 N. Y. 30.

d. Excessive Damages.

640. Generally.*—(1) *Rule stated*.—In actions against carriers of passengers for injuries there seem to be no well-defined rules for estimating damages; it is matter

* Excessive damages for injuries to passengers, see note, 30 AM. & ENG. R. CAS. 543; and also NEW TRIAL, 28-86.

Inadequate damages in actions for personal injuries, see NEW TRIAL, 87-89.

* Liability in punitive damages for unauthorized and unratified wanton or grossly negligent acts of servants, see note, 21 AM. & ENG. R. CAS. 402.

to be submitted to the sound discretion and judgment of the jury, the actual loss to the plaintiff, present or prospective, being the lowest amount which they are justified in giving; and the court will not set aside an assessment of damages by a jury where there is no evidence to show misconduct of the jury, or that they acted upon a wrong principle or from a corrupt motive. *Blanchard v. Windsor & A. R. Co.*, 10 Nov. Sc. 8.

The court will not disturb damages on the ground that they are excessive, when from gross negligence the lives and safety of passengers are exposed to danger, and injury results therefrom, unless the verdict was so unreasonable as to induce the belief that it was the result of passion or prejudice. *Montgomery & W. P. R. Co. v. Borling*, 51 Ga. 582.

While courts may allow even liberal compensatory damages against railroad companies, in cases of gross fault and negligence on their part, resulting in severe injuries to the passengers whom they have, for due consideration, undertaken to carry safely, those corporations surely are entitled to protection against exaggerated and apparently stale claims, where the injury received or damage suffered is slight or nominal. *Maher v. Louisville, N. O. & T. R. Co.*, 40 La. Ann. 64.

The judgment of the jury as to the amount of the damages must govern, unless the damages allowed are so excessive as to warrant the belief that the jury must have been influenced by partiality or prejudice, or misled by some mistaken view of the merits of the case. *Farish v. Reigle*, 11 Gratt. (Va.) 697.

(2) *Illustrations.*—Where a passenger sues for an injury and it appears that he is only entitled to compensatory damages, a verdict of \$2500 will not be set aside as excessive, where the suit is by a male passenger for being ejected from the ladies' car, where he entered peaceably, and was thrown onto the car platform by a brakeman while the train was in motion, without first asking him to leave the car, and without offering him a seat elsewhere, and where there had been three former verdicts in the same case for an equal or larger amount. *Bass v. Chicago & N. W. R. Co.*, 42 Wis. 654, 15 Am. Ry. Rep. 45.

A passenger sued for an assault committed on him by the conductor and received a verdict for \$800. The blow was a

severe one and resulted in serious injury. Plaintiff claimed that the attack on him was without provocation, while, on the other hand, the company claimed that plaintiff unlawfully attacked the conductor under a threat to "slug" him. *Held*, that if plaintiff's claim as to the assault was the true one, the damages were not excessive, but were excessive if the position of the company was correct, which must be determined by a jury on another trial. *Chicago, R. I. & P. R. Co. v. Barrett*, 16 Ill. App. 17. —QUOTED IN *East St. Louis & C. R. Co. v. Frazier*, 26 Ill. App. 437.

A passenger sued for an assault committed on him by a brakeman, and there was a sharp conflict of evidence as to whether he did not first strike the brakeman. The jury returned a verdict in favor of the plaintiff for \$2000 and the trial court required him to remit \$1400 thereof as a condition for entering judgment upon the remainder. *Held*, that the verdict was so excessive as to be proof of passion and prejudice on the part of the jury, and it was not cured by the remittitur. To sustain the remainder of the verdict would be equivalent to denying the right of trial by jury. *Chicago & N. W. R. Co. v. Cummings*, 20 Ill. App. 333.

641. Refusal to carry—Inconvenience.—Where a passenger is wantonly carried three quarters of a mile beyond his station, and is compelled to walk back at night in the rain, a verdict in his behalf for \$500 will not be set aside as excessive. *Higgins v. Louisville, N. O. & T. R. Co.*, 64 Miss. 80, 8 So. Rep. 176.

But a verdict for \$1500 in favor of a passenger, because a train did not stop at the station to take him on, is excessive, where he only had to wait a short time for a freight train, where no damages were proven, except disappointment, delay, and the inconvenience of riding on a freight train. *Memphis & C. R. Co. v. Green*, 52 Miss. 779.

Defendant company sold excursion tickets with the agreement that the holders might return, if they chose, on the regular train next day. Plaintiff, a young lady, offered to return the next morning, but through some oversight in failing to give the conductor full notice of the terms on which the tickets were issued, she was refused. She went to the house of a friend and remained some 12 or 13 hours, and re-

turned home on another train, using her ticket. Her time was worth \$1.30 a day. *Held*, that a verdict in her favor of \$1000 was grossly excessive. *Goins v. Western R. Co.*, 59 Ga. 426.

642. Delay.—(1) *Not excessive.*—A young lady bought a round-trip excursion ticket, with the agreement that if she did not choose to return on the excursion train she could use the ticket on the regular train the next day, but the conductor declined to accept it. After waiting some 12 or 13 hours she was allowed to return on another train, using the ticket. *Held*, that \$50 in her favor, above actual expenses, was adequate compensation. *Hughes v. Western R. Co.*, 61 Ga. 131.—FOLLOWED IN *Goins v. Western R. Co.*, 68 Ga. 190.

Plaintiff purchased a regular full-rate ticket at a time when the company was selling excursion tickets at half rate. He was 57 years old and preferred not to take the excursion train, but was unlawfully refused admittance to the regular train, and was compelled to go on the excursion train, which left about two hours later, and arrived at his destination about midnight, and was filled with disorderly persons. *Held*, that a verdict against the company for \$100 was not excessive. *Brassfield v. Hannibal & St. J. R. Co.*, 19 Mo. App. 651.

A verdict for \$500 damages, in an action against a railroad for failing to carry passengers, will not be set aside as excessive where the proof shows that plaintiff was traveling with his wife and two children, and having baggage checked, and after traveling part of the way over the defendant road was compelled to buy tickets and complete the journey over another road; that they were delayed several days, having to stay at hotels, waiting for baggage, etc., and incurring an extra expense of \$90. They were entitled to something for the annoyance, vexation, and trouble. *St. Louis, A. & T. R. Co. v. Berry*, 4 Tex. App. (Civ. Cas.) 235, 15 S. W. Rep. 48.

(2) *Excessive.*—A female passenger was carried beyond her station and was put off where she had to pay \$1.50 for a conveyance in which to return, and lost three hours' time. *Held*, that a verdict in her favor for \$750 was excessive. *Marshall v. St. Louis, K. C. & N. R. Co.*, 18 Am. & Eng. R. Cas. 248, 78 Mo. 610.

The failure of the defendant to carry plaintiff as agreed caused him to lose one day's time, the opportunity of seeing a celebration, and a free dinner. *Held*, that a verdict of \$50 was excessive. *Eddy v. Harris*, 47 Am. & Eng. R. Cas. 473, 78 Tex. 661, 15 S. W. Rep. 107.

Plaintiff, a young man, who was set down on a summer night in the woods, about three fourths of a mile past his destination, in company with other passengers, his only inconvenience being some delay in finding the station, getting his feet muddy and wet, and having to carry his grip through a drizzling rain, is entitled to some damages, but not to \$200. *Howe v. Gibson*, 3 Tex. Civ. App. 263, 22 S. W. Rep. 826.

643. For personal injuries, generally.—In a suit for damages resulting from the negligent conduct of the agents of a railroad in failing to stop its cars at the depot of a place where, by a passenger's ticket, she had a right to depart from the train, but stopping at another point and causing the passenger to alight in the rain, whereby she was injured, a verdict for \$100 being reasonable, and the court below having refused a new trial, this court will not interfere. *Alabama G. S. R. Co. v. Wilkinson*, 77 Ga. 75.

Where a passenger sues for injuries he should be allowed to testify to the facts, and it is the province of the jury to estimate the damages therefrom; and where an injured passenger was permitted to state that he was damaged to the amount of \$5000—*held*, reversible error, though the jury only returned a verdict for \$2000. *Ohio & M. R. Co. v. Nickless*, 71 Ind. 271.

Where a passenger was injured by her train colliding with a construction train, and there was no bad motive or purpose to injure, and the neglect was not so wanton as to demand the severest punishment, a verdict for \$10,000 should be set aside as excessive. *Louisville Southern R. Co. v. Minogue*, 90 Ky. 369, 14 S. W. Rep. 357.

A passenger was so injured that one leg was about two inches shorter than the other, but it appeared that the limb would so far recover as to be more of a deformity than a disability. *Held*, that \$5000 damages were excessive, in view of the fact that only compensatory damages were recoverable. *International & G. N. R. Co. v. Underwood*, 27 Am. & Eng. R. Cas. 240, 64 Tex. 463.

* See also *ante*, 125, 625.

644. Great bodily injury.—(1) *Not excessive.*—Forty-four hundred dollars compensatory damages for the loss of an eye, etc.—*held*, not to be excessive. It was the province of the jury, by their verdict, to compensate the outraged passenger, not only for the loss of his eye, but for the mental sufferings caused by the indignities to which he was subjected. *Sherley v. Billings*, 8 *Bush* (Ky.) 147.

A verdict in favor of a passenger for \$3500 will not be set aside as excessive where it appears that one arm and one leg were fractured, his spine injured, and his collar-bone broken. *Klutts v. St. Louis, I. M. & S. R. Co.*, 11 *Am. & Eng. R. Cas.* 639, 75 *Mo.* 642.

Plaintiff, a passenger, received a deep cut in the face, by reason of the negligence of the carrier, which very nearly caused a loss of life from bleeding, and causing much pain and a temporary, if not a permanent, impairment of his eyesight and hearing, with considerable loss of time and attention to business. *Held*, that \$5000 should be awarded him for the above injuries and for cost of medical aid and expenses of prosecuting the suit. *Newman v. Alabama G. S. R. Co.*, 38 *Fed. Rep.* 819.

(2) *Excessive.*—Where a passenger is injured through a defect in the track, under such circumstances that only compensatory damages are recoverable, a verdict for \$10,000 will be set aside as excessive, where the principal injury is a compound fracture of the leg. *Union Pac. R. Co. v. Hause*, 1 *Wyom.* 27.

Action for negligently carrying the plaintiff on defendants' road, whereby he sustained great bodily injury. Plea, not guilty, which was withdrawn at the trial and damages assessed by the jury at £6178 11s. 7d. The court granted a new trial on terms, saying that after the best consideration they could not but regard the damages as very large and exceeding what they considered reasonable. *Batchelor v. Buffalo & B. R. Co.*, 5 *U. C. C. P.* 127.

645. Slight bodily injury.—(1) *Not excessive.*—Where a passenger is shoved off a train by the conductor when moving 10 miles an hour, a verdict of \$500 in his favor is not excessive, though the passenger admits that he received no serious injuries, but was only bruised so that he lost a week's labor. *East Line & R. R. Co. v. Lee*, 71 *Tex.* 538, 9 *S. W. Rep.* 604.

A verdict in favor of an injured passenger for \$5000—*held*, not so excessive as to require a reversal, where it appeared that his injuries consisted in a contusion of the scalp and chest, causing considerable loss of time, with pain and suffering, and with a diminished capacity for mental or physical labor in the future. *Houston & T. C. R. Co. v. Boehm*, 9 *Am. & Eng. R. Cas.* 366, 57 *Tex.* 152.

(2) *Excessive.*—Where the only permanent injury to a passenger is to the ligaments of the third finger of the right hand, causing a slight deformity and some loss of power, besides some bruises elsewhere and an injury to his lungs, which caused him some uneasiness and rendered him more liable to pulmonary trouble, a verdict in his favor for \$5000 is excessive. *Union Pac. R. Co. v. Hand*, 7 *Kan.* 380, 1 *Am. Ry. Rep.* 548.—*QUOTED IN* *Kennon v. Gilmer*, 5 *Mont.* 257.

In an action by a passenger for a personal injury, caused by a train in which he was a passenger being thrown from the track, it appeared he had no bones broken; that he received a bruise on the side which his doctor testified was only muscular; that he kept his bed most of the time for a month, but could at any time walk around. *Held*, that \$500 damages were excessive. *Chicago, R. I. & P. R. Co. v. McCara*, 52 *Ill.* 296.

Where a young woman, in attempting to go upon a car, stepped into an opening in the platform, whereby she received an injury to her knee and leg, and it appeared that, at the trial, about three years after the accident, she had not fully recovered, but walked naturally and gracefully, and it was not probable that the injury would be permanent, and she was not deprived of any business or calling by which to earn money, and it also appearing that her poor health at the time of the injury prevented as quick a recovery as otherwise might have been expected, and it not appearing that she had suffered any extreme pain—*held*, that \$2500 damages was excessive, no vindictive damages being claimed. *Chicago, R. I. & P. R. Co. v. Payzant*, 87 *Ill.* 125, 18 *Am. Ry. Rep.* 200.

646. Permanent injury.—(1) *Generally.*—In an action for an injury to a passenger, resulting in permanent or incurable hernia, \$5000 damages against the company is not excessive. *Illinois C. R. Co. v. Simmons*, 38 *Ill.* 242.

Where there is evidence tending to show that a passenger has received serious injuries, and the attending physician and another testify that he will never regain his health, a verdict of \$10,000 in his favor will not be disturbed, though there be other medical evidence on the part of the defense tending to show that plaintiff would soon regain his health. *Southern Pac. Co. v. Rauh*, 49 Fed. Rep. 696, 7 U. S. App. 84, 1 C. C. A. 416.

In a suit by a lady passenger for a personal injury caused by gross negligence, and where it appeared the injury was severe, her spine being injured permanently, she being a person of education and a teacher by profession, \$8958 damages, while considered large, is not so excessive as to warrant a reversal. *Illinois C. R. Co. v. Parks*, 88 Ill. 373, 21 Am. Ry. Rep. 313.

A verdict of \$5000 is not excessive where the evidence shows that the passenger was injured in a collision, having one leg crushed and one hand disabled, besides having his head cut and a permanent injury to one hip. *Chicago, B. & Q. R. Co. v. Sullivan*, 21 Ill. App. 580; affirmed in 15 West. Rep. 45, 17 N. E. Rep. 460.

The testimony showing that the injury has already caused great pain and suffering, is of a permanent character, that it greatly impairs plaintiff's ability for labor, will subject him to discomfort and pain during the future, and render him less able to resist or recover from other diseases hereafter, the award of \$5246 damages is not excessive. *Southern Kan. R. Co. v. Walsh*, 47 Am. & Eng. R. Cas. 493, 45 Kan. 653, 26 Pac. Rep. 45.

A verdict in favor of a female passenger for \$5000 damages for an injury which manifestly resulted in great physical and mental suffering, and which most probably involves the permanent reduction of the strength of the broken leg, is not so excessive as to make it appear that the jury were influenced in their action by passion or prejudice. *Maysville & L. R. Co. v. Herrick*, 13 Bush (Ky.) 122, 17 Am. Ry. Rep. 53.

When the evidence shows that a passenger, in addition to receiving painful injuries which were only temporary in character, received a spinal injury which is likely to prove permanent, a verdict of \$4000 will not be deemed so excessive as to require a reversal on appeal. *Missouri Pac. R. Co. v. Shuford*, 37 Am. & Eng. R. Cas. 194, 72 Tex. 165, 10 S. W. Rep. 408.

An able-bodied and industrious mechanic who was rendered a wreck in mind and body, unfit for labor, and subject to epileptic fits, recovered \$20,000 actual damages for an injury received while a passenger. Such a verdict will not be disturbed. *International & G. N. R. Co. v. Brazzil*, 44 Am. & Eng. R. Cas. 437, 78 Tex. 314, 14 S. W. Rep. 609.

A verdict in favor of a passenger for \$15,000 for a left foot and ankle broken and crushed, and amputated below the knee, of a man forty-six years old and in good health, and earning \$1500 per year, is not excessive. *Galveston, H. & S. A. R. Co. v. Cooper*, 2 Tex. Civ. App. 42, 20 S. W. Rep. 990.

A verdict for \$15,000 is not excessive in an action for injuries to a passenger, due to defendant's negligence, when the evidence shows that plaintiff, at the time of the accident, was a strong, healthy woman, of the age of thirty years; that she was industrious, and had been making fifty dollars per month, in addition to looking after household duties; that she has lost the use of her lower limbs by reason of paralysis as a result of her injuries, and that she will be a helpless invalid during the remainder of her life. *Sears v. Seattle Con. St. R. Co.*, 6 Wash. 227, 33 Pac. Rep. 389, 1081.

In an action to recover damages to a passenger caused by a defective platform, the jury having apparently found that the injuries complained of were serious and permanent, and having awarded plaintiff a verdict for \$1800, this court, not being able to say that the finding was unsupported by evidence, cannot hold the damages excessive. *Quaife v. Chicago & N. W. R. Co.*, 48 Wis. 513, 4 N. W. Rep. 658, 33 Am. Rep. 821.

(2) *Illustrations — Not excessive.* — A strong and healthy passenger was so injured in a railroad collision that he had apparently become a confirmed invalid and must lead a life of more or less infirmity and suffering. Held, that \$5000 was a reasonable compensation for the injury. *The Raleigh*, 41 Fed. Rep. 527.

A passenger received a severe cut on the head, leaving a permanent scar, and had ends of his fingers on one hand mashed off. He was in bed four weeks, and disabled from working four months. He suffered much pain and incurred an expense, in medical attendance and medicine, of between \$25

and \$35. He could ordinarily earn \$25 a month. *Held*, that the court would not set aside a verdict of \$1250 as excessive. *Memphis & L. R. R. Co. v. Stringfellow*, 21 *Am. & Eng. R. Cas.* 374, 44 *Ark.* 322, 51 *Am. R. p.* 598.

A verdict for \$15,000 for personal injuries to a passenger received through the negligence of a railroad company—*held*, not excessive under the circumstances of this case, there being evidence tending to show a permanent injury, accompanied with continual suffering and disability, which the jury would be warranted in believing, notwithstanding conflicting evidence as to the extent of the injury. *Morgan v. Southern Pac. Co.*, 95 *Cal.* 501, 30 *Pac. Rep.* 601.

A young lady passenger was injured by reason of a defective track, having some ribs broken and her spine injured, which rendered her unconscious for a time, and left her with impaired health, still suffering excruciating pains internally at stated intervals. *Held*, that a verdict of \$6933 would not be disturbed as excessive. *Houston & T. C. R. Co. v. Lee*, 34 *Am. & Eng. R. Cas.* 452, 69 *Tex.* 556, 7 *S. W. Rep.* 324.

A passenger 62 years old was injured, having three of his ribs broken, whereby he was rendered unconscious for a time, and suffered very greatly for a considerable time, with some evidence tending to show that his injuries would be permanent, and probably result in paralysis. *Held*, that a verdict in his favor of \$3750 was not excessive. *Missouri Pac. R. Co. v. Aiken*, 71 *Tex.* 373, 9 *S. W. Rep.* 437.

A female passenger was so seriously injured that a year afterward she was unable to appear as a witness at the trial, and the evidence showed that she was still suffering from nervous prostration which was likely to be permanent, and had suffered more or less all that time. *Held*, that a verdict of \$5000 damages would not be disturbed on appeal. *Missouri Pac. R. Co. v. Mitchell*, 72 *Tex.* 171, 10 *S. W. Rep.* 411.

Where, in an action for personal injuries to a passenger caused by defendant's negligence, the evidence showed that the plaintiff had suffered severe pain for months, and had not, at the time of the trial, more than three years after the accident, entirely recovered, and physicians who had examined her differed in opinion as to whether she would ever entirely recover—*held*, that a verdict of \$4000 should not be set aside

as being excessive. *Heucke v. Milwaukee C. R. Co.*, 69 *Wis.* 401, 34 *N. W. Rep.* 243.

(3) — *excessive*.—A passenger had his leg broken in a railroad accident, and received some flesh wounds about the head, but at the time of the trial, ten months afterward, he seemed restored to health, except that the injured leg was left slightly shortened. *Held*, that a verdict for \$6000 damages is excessive, and should be set aside, unless the party would agree to reduce it to \$4000. *Clapp v. Hudson River R. Co.*, 19 *Barb. (N. Y.)* 461.—REVIEWING *Holbrook v. Utica & S. R. Co.*, 16 *Barb. (N. Y.)* 113; *Hegeman v. Western R. Corp.*, 16 *Barb. (N. Y.)* 353.—DISAPPROVED IN *Nudd v. Wells*, 11 *Wis.* 407. QUOTED IN *Little Rock & Ft. S. R. Co. v. Barker*, 39 *Ark.* 491.

A passenger 54 years old was caught in a railroad wreck and had three ribs broken, with a crushing wound on one leg, both above and below the knee, and was so disabled as to be confined to his house for six or seven weeks, and suffered great pain; he was still lame nine months after the accident, and the evidence tended to show that it might continue for years. *Held*, that a verdict for \$5000 should not be set aside as excessive. *Quinn v. Long Island R. Co.*, 34 *Hun (N. Y.)* 331.

647. Internal injury.—Where a female passenger sues for injuries for being thrown from her seat, causing her to faint and afterward to keep her bed for five days, under medical treatment, claiming to have received severe internal injuries, a verdict in her favor for \$1625 will be sustained, though it appear that the company had already paid her \$275, and her doctor's bill, amounting to \$250. *Stevens v. European & N. A. R. Co.*, 66 *Me.* 74, 19 *Am. Ry. Rep.* 48.

648. Incapacitated for work.—(1) *Not excessive*.—A passenger 58 years old was so injured in a railroad accident as to produce a rupture. He had been engaged in a business requiring a great deal of lifting, for which the rupture disqualified him. He had been earning \$300 a month before the accident, and little or nothing since. *Held*, that a verdict for \$7000 should not be disturbed, though it appeared that the rupture might not shorten his life. *Wedekind v. Southern Pac. Co.*, 20 *Nev.* 292, 21 *Pac. Rep.* 682.

The evidence showed that plaintiff was a man engaged in an extensive and lucrative

business; that his injuries were exceedingly painful, serious, and permanent, which would continue through life and probably shorten it; that he was so afflicted as to measurably unfit him for the duties of his profession. *Held*, that a verdict in his favor for \$20,000 would not be disturbed. *Walker v. Erie R. Co.*, 63 Barb. (N. Y.) 260.—QUOTED IN *Koetter v. Manhattan R. Co.*, 13 N. Y. Supp. 458.

A poor laboring woman was so injured by a train as to be unable for a long time to go out. She was at the time of the trial not able to do any work, still suffered great pain, and would probably be rendered unable to obtain a subsistence by her labor during life. *Held*, that a verdict for \$1600 was not excessive. *Mooney v. Hudson River R. Co.*, 1 Sweeney (N. Y.) 325.

Plaintiff, a U. S. mail agent, was injured in a railway wreck, complained of external bruises and alleged internal injury from inhaling steam. He laid off from work ten days, and then thirty days. Verdict for \$500 not excessive, although physicians testified that the injuries, if any, were slight. *Gulf, C. & S. F. R. Co. v. Wilson*, 79 Tex. 371, 15 S. W. Rep. 280.

(2) *Excessive*.—A passenger, a young man 21 years old, who had been earning about \$50 a month, had his leg broken through the negligence of the railroad company, whereby he lost his employment. *Held*, that a verdict for \$14,833 in his favor was excessive. *Southwestern R. Co. v. Singleton*, 66 Ga. 252.

A United States mail agent, who was receiving an annual salary of \$1080, jumped from a train to avoid a collision and sprained his ankle, whereby he lost two weeks. There was nothing in the case to justify awarding punitive damages. *Held*, that a verdict for \$2500 was excessive. *Spicer v. Chicago & N. W. R. Co.*, 29 Wis. 580, 12 Am. Ry. Rep. 204.—REVIEWED IN *Duffy v. Chicago & N. W. R. Co.*, 34 Wis. 188.

640. Physical pain and mental anguish.—Where a female passenger is so injured as to be confined to her room for months, during which time she suffered great pain, and is still suffering at the time of trial, a verdict in her favor for \$500 will not be disturbed as excessive. *Atlanta & W. P. R. Co. v. Smith*, 81 Ga. 620, 8 S. E. Rep. 446.

A verdict for \$2000 for the mental suffering of plaintiff's wife, resulting from rude

and violent treatment of her by defendant's agents and train conductor, is not excessive. *Missouri Pac. R. Co. v. Martino*, 2 Tex. Civ. App. 634, 18 S. W. Rep. 1066, 21 S. W. Rep. 781.—QUOTING *International & G. N. R. Co. v. Gilbert*, 64 Tex. 541.

650. Insult and indignity.—Where a passenger has been subjected to indignity, his feelings outraged, and has been degraded in the eyes of his fellow-passengers by being assailed with gross and vituperative language, and even blows, by a railroad conductor, whose duty it is to protect the passenger, exemplary damages are allowable, and a verdict for \$1000 is not excessive. *Atlanta & W. P. R. Co. v. Condor*, 75 Ga. 51.

When a conductor applied profane epithets to a passenger, threatened to kill him, spat tobacco-juice in his face, and in abusive terms ordered him to get up from his seat and retire to the rear of the car, at the same time seizing him by the arm, a verdict for \$4375 damages will not be set aside. *East Tenn., V. & G. R. Co. v. Fleetwood*, 90 Ga. 23, 15 S. E. Rep. 778.

651. Punitive damages.*—Where a conductor exhibits a revolver unnecessarily and forces a passenger to jump from a moving train between stations, simply because he refuses to pay fare and insists upon being carried on an excursion ticket, the company is liable in exemplary damages. Plaintiff sued for being ejected under the above circumstances and recovered a verdict for \$4900, but agreed to take \$4000 in consideration that the carrier withdraw a motion for a new trial and pay the amount promptly. *Gallena v. Hot Springs R. Co.*, 4 McCrary (U. S.) 371, 13 Fed. Rep. 116.

Plaintiff was carried 400 yards past his station and was then compelled to leave the cars in spite of his remonstrance and request that the train should be backed to the station. In an action against the company the jury awarded him \$4500. *Held*, that the damages appeared large, but in view of the fact that it was a case where punitive damages might be awarded, the verdict would not be disturbed. *New Orleans, J. & G. N. R. Co. v. Hurst*, 36 Miss. 660.—REVIEWED IN *Quigley v. Central Pac. R. Co.*, 5 Sawy. (U. S.) 107; *Gulf, C. & S. F. R. Co. v. Levy*, 59 Tex. 542, 46 Am. Rep. 269.

* See also *ante*, 634-638.

Where it appeared, in a suit for injuries to a passenger, that the railroad was in a bad condition; that there were old and rotten ties in the track which the company were removing and putting in new ones and heavier rails; that the accident occurred in an unusual spell in winter weather; that the speed of trains had been reduced to ten miles an hour for greater safety, the facts did not justify recovery of \$5000 exemplary damages, in addition to \$20,000 actual damages. *International & G. N. R. Co. v. Brazil*, 44 Am. & Eng. R. Cas. 437, 78 Tex. 314, 14 S. W. Rep. 609.

CARRIAGE OF SLAVES.

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I. IN GENERAL.

1. Slaves regarded as passengers.

—Carriers of passengers are liable only for negligence; and slaves are passengers. *McClenaghan v. Brock*, 5 Rich. (So. Car.) 17.

The demanding of the fare of a slave traveling with his master, by the conductor, is not conclusive evidence that he was traveling as a passenger. *Muscogee R. Co. v. Redd*, 54 Ga. 33.

2. Degree of care required of carrier.

—The liability of a railroad for an injury to a slave traveling upon a train as a passenger is measured by the law applicable to passengers, and not that of the carriage of goods. *Mitchell v. Western & A. R. Co.*, 30 Ga. 22.

In dealing with slaves as passengers, a high degree of caution, diligent and circumspect demeanor are demanded of railroad companies; but to make such a company liable to the owner for the escape and loss of a slave, carried as a passenger on their cars, without the knowledge or consent of the owner, something more than a blameless and unwitting transportation must be shown; where no intentional wrong is charged, negligence must be shown. *Sill v. South Carolina R. Co.*, 4 Rich. (So. Car.) 154.

Slaves have volition, and possess reason and feeling. They cannot be stored away like a bale of goods or other merchandise. The great rigor of the law, therefore, as to the liability of common carriers of goods, or other property, does not apply to slaves.

Where a slave is placed with a common carrier to be transported from one point to another, for hire or reward, the carrier would be bound to use ordinary diligence only in taking care of him and securing him against injuries or escape. *Scruggs v. Davis*, 3 Head (Tenn.) 664.

Where the master goes on board a boat or other conveyance, and takes his slave with him, having charge and control of the slave, and without an express undertaking by the carrier to watch and guard his movements, whether any duty would devolve on the carrier in reference to the slave, *quære*. *Scruggs v. Davis*, 3 Head (Tenn.) 664.

3. Liability for killing slave.—Where a negro is employed by a railroad upon a different service from that for which he was hired, and is killed by riding upon cars of the company, an act not connected with the performance of the work to which he was put, and done without authority of the company, the road will be liable, especially where the negro had frequently ridden upon the cars and the company had not forbidden him so to do. *Lewis v. McAfee*, 32 Ga. 465.

In an action to recover for the killing of a negro hired by a railroad, it is not sufficient to fix the liability of the road that the negro was not compelled to remain at the place where he was required by the overseer to stay, in the absence of any such stipulation in the contract of hiring. *Mann v. Macon & W. R. Co.*, 32 Ga. 345.

The railroad company hired a slave from the plaintiff to work on their road, and it was agreed that the slave should not be employed on the cars or locomotives, but that he might be carried on the cars or locomotives "from any one place to another place on the railroad where his services may be required." This slave, with the knowledge of the conductor, went on the cars and was carried beyond the place at which his services that day were required, and in jumping from the cars while they were in motion was killed. Held, that the company were liable to the plaintiff for the loss. *Duncan v. South Carolina R. Co.*, 2 Rich. (So. Car.) 613.

4. — or causing personal injury to slave.—A master can recover for an injury to his slave if he was riding upon the train as a passenger, but not if he was traveling as the servant of his owner. *Muscogee R. Co. v. Redd*, 54 Ga. 33.

The mere fact that a slave being carried upon a train was run over at a wood station where the train temporarily stopped, is not sufficient to justify a recovery without some negligence on the part of the railroad. *Mitchell v. Western & A. R. Co.*, 30 Ga. 22.

A railroad has no control or supervision over the movements of slaves carried by it as passengers, and consequently is not bound to coerce their movements to avoid injury to them. *Mitchell v. Western & A. R. Co.*, 30 Ga. 22.

Where a railroad starts a train without first signaling, and at unusual speed, it will be liable for the running over of plaintiff's slave at that time, unless it affirmatively show that the injury resulted from some other cause, and for which the defendant was without fault. *Mitchell v. Western & A. R. Co.*, 30 Ga. 22.

When soldiers are traveling for an alleged purpose upon a train, and one of these has in his charge a negro slave whom the company refuse to carry as a soldier or an adjunct to such body of soldiers, but demand and receive fare for him as an ordinary passenger, the rule *in pari delicto*, etc., will not apply, and his master can recover for an injury to such slave. *Redd v. Muscogee R. Co.*, 48 Ga. 102, 11 Am. Ry. Rep. 390.

II. UNLAWFUL TRANSPORTATION.

5. Generally.—The acts to prevent slaves being carried away as passengers in steamboats prohibit the taking of them from the shores of the Ohio, opposite Kentucky; and liabilities are also incurred by landing or permitting them to go ashore, within or without this state; and these acts are not invalid. *Church v. Chambers*, 3 Dana (Ky.) 274.

For taking slaves as passengers in a boat, the owners, when liable, are jointly liable with the officers; and it is erroneous to decree against them *in personam*; in the first instance, they are personally liable when they had no agency in the act. *Church v. Chambers*, 3 Dana (Ky.) 274.

Pending an action under the provision of the act concerning the transportation of slaves, the act was repealed. *Held*, that under the general laws of the state, the action was not affected by the repeal. *Rogers v. Pacific R. Co.*, 35 Mo. 153.

6. Carrying without permit from owner.—A railroad company is liable to

the owner for permitting a slave to go off on its cars without a permit or ticket from the master, overseer, or person controlling such slave. The fact that a slave was white in color will not relieve the road from liability. *Southwestern R. Co. v. Pickett*, 36 Ga. 85.

Under the Georgia act of Feb. 21, 1850, a railroad is liable to the owner for carrying off a slave without a permit from the owner, overseer, or employer, though such slave be in charge of a white man professing to own him. *Brown v. Southwestern R. Co.*, 36 Ga. 377.

In admitting a slave on a railroad train, the agent of the road acts at his peril and that of the company. He is bound to inquire and know that the owner has given permission and authority to receive and carry the slave on the train; and if this is wanting, the very act of receiving and carrying the slave is a conversion, and this though the slave had a false pass which the agent believed genuine. *Western & A. R. Co. v. Fulton*, 4 Sneed (Tenn.) 589.

The Macon & W. R. R. Company took on board their cars the slave of H., having a general pass, and without the knowledge or consent of H., to transport him to a given point, for the usual fare for negroes. *Held*, that this was a conversion of the slave, and that the company are liable for all the injuries which he received, whether they occurred by the negligence of the company or otherwise. *Macon & W. R. Co. v. Holt*, 8 Ga. 157.

7. Carrying runaway slaves.—The Illinois courts have no jurisdiction of an action against a railroad for carrying a fugitive slave, held to service in another state, slavery not being recognized by the laws of the state. *Rodney v. Illinois C. R. Co.*, 19 Ill. 42.

Though slavery is not established by the laws of Pennsylvania, it is recognized and its protection guaranteed by the constitution of the United States; and a railway company in that state has no more right knowingly to assist in the escape of a runaway slave than a wagoner on the high road, and for such offense it is liable in Maryland to a citizen of that state owning such slave. *Northern C. R. Co. v. Scholl*, 16 Md. 331.—**DISTINGUISHED IN** *State v. Pittsburg & C. R. Co.*, 45 Md. 41.

8. Carrying slave out of state.—A permission from the master or owner of a slave is necessary to authorize the master or

the owner of a steamboat to convey a slave out of the state on a boat. It cannot be justified by proof that the master had himself taken or permitted another to take such slave out of the state on other occasions. *Graham v. Strader*, 5 B. Mon. (Ky.) 173.

That the owner of a slave in Kentucky permitted him to go to Lexington and to be employed there and at the surrounding towns and villages as a musician did not imply an authority or license to the owners and masters of steamboats to convey him out of the state. *Graham v. Strader*, 5 B. Mon. (Ky.) 173.

The act of the legislature of Kentucky giving the remedy by suit in chancery for the removal of slaves from the state by means of steamboat, did not create any new offense. *McFarland v. McKnight*, 6 B. Mon. (Ky.) 500.

The fact that the masters and owners of a steamboat carrying away a slave, which had escaped from his owner, are citizens of Virginia, carrying on commerce on the Ohio, does not exempt them or the boat from liability to the owner, under the statutes of Kentucky of 1824 and 1828, nor for other trespasses or misdemeanors committed within the jurisdiction of Kentucky. *McFarland v. McKnight*, 6 B. Mon. (Ky.) 500.

The owner of a slave domiciled in the state of Missouri, and having his slave there, cannot maintain a suit against a steamboat for the value of a slave escaping on such boat, on the ground that the boat passed through waters of Kentucky with the slave on board, under the statute of Kentucky. To render the boat liable under the statute the slave must be conveyed, or attempted to be conveyed, out of Kentucky, or from one part of the state to another, and this when the slave is taken on board of a vessel in Kentucky, or at any place out of the state. The statute was not intended to embrace slaves who were in no way subject to our laws at the time of their escape. *Bracken v. Steamboat Gulnare*, 16 B. Mon. (Ky.) 444.

9. Liability for allowing slave to escape.—A railroad is responsible for the wanton or negligent transportation of slaves, so that they thereby escape from, and are lost to, their owner, and is liable to the owner for the value of slaves so escaping. But if the slave returns again to his home the railroad is only liable to his owner for

the value of his services while gone. *Louisville & N. R. Co. v. Young*, 1 Bush (Ky.) 401.

Where a slave was transported on a railroad train under a false pass which the conductor believed to be genuine, whereby said slave was lost to his owner, it was a conversion for which the owner might recover of the railroad company the value of said slave. *Western & A. R. Co. v. Fulton*, 4 Sneed (Tenn.) 589.

Where a slave could not by an ordinary observer be distinguished from a white person, and the agents of a railroad, in the exercise of proper care and diligence, did not detect his status, the road will not be liable in an action for an escape. *Wallace v. Spullock*, 32 Ga. 488.

In an action on the case against a railroad company for negligence in transporting plaintiff's slave, whereby he escaped from his master's service, the jury are not bound, as in cases where property has been destroyed, to give damages to the full value of the slave. *O'Neill v. South Carolina R. Co.*, 9 Rich. (So. Car.) 465.

Where a slave of the plaintiff, in company with a white man who assumed to be in charge of him, was transported as a passenger on the defendants' cars, whereby he was enabled to effect his escape, and became lost to the plaintiff, and in the action against the railroad company, the jury, by their verdict for the defendants, negatived the charge of negligence, the court refused to disturb the verdict, all imputation of intentional wrong being disavowed. *Sill v. South Carolina R. Co.*, 4 Rich. (So. Car.) 154.

10. Procedure — Pleading — Petition.—In an action under a statute which provides that the owner of a slave may recover twice the value of the slave from a railroad company "in this state," which shall transport such slave over its road without the owner's permission, the petition was held fatally defective, for not averring that the defendant was a railroad corporation in Missouri. *Welton v. Pacific R. Co.*, 34 Mo. 358.—FOLLOWED IN *McClure v. Pacific R. Co.*, 35 Mo. 189.

11. — evidence—Burden of proof.—In a case against a railroad company for carrying off plaintiff's slave without his knowledge or consent, mere proof of transportation is itself sufficient evidence of negligence to throw the *onus* on the defendants. *Josey v. Wilmington & M. R. Co.*, 11 Rich. (So. Car.) 399.

12. — damages, generally. — The measure of damages against masters, etc., of boats, etc., for carrying away slaves, under the acts of 1824-8, is not the full value of the slaves, as in case of conversion, but the actual damages to slave-holder or party injured; which cannot, in general, be presumed equal to the entire loss of the property. *Church v. Chambers*, 3 *Dana* (Ky.) 274.

The measure of recovery by the owner of slaves against the master or owners of steamboats for conveying them out of the state is the value of the slaves, if hopelessly lost; if not hopelessly lost, the value, less by the chance of recovery. In estimating the value, their capacity for business, age, habits, character, habits of subordination, and whatever else affected their value, would be proper to be considered. *Graham v. Strader*, 5 *B. Mon.* (Ky.) 173.

In an action on the case against a railroad company, where a slave was transported without the owner's permission, and loss has resulted, negligence should be presumed, and the value of the slave is the extreme measure of damages. *Josey v. Wilmington & M. R. Co.*, 11 *Rich.* (So. Car.) 399.

In an action for the carrying off of a slave by a railroad, brought before the Georgia Code went into effect, the plaintiff is not entitled to double damages under § 2982 thereof. *Brown v. Southwestern R. Co.*, 36 *Ga.* 377.

13. — expenses incurred in recovering slave. — For the carrying off of a slave by a railroad, the owner is entitled to recover, in addition to the value of the hire of the slave while absent, with interest, his reasonable and necessary expense incurred in reclaiming him. *Brown v. Southwestern R. Co.*, 36 *Ga.* 377. *Graham v. Strader*, 5 *B. Mon.* (Ky.) 173.

CARRIERS.

See BAGGAGE; CABLE RAILWAYS; CANALS; CARRIAGE OF LIVE STOCK; CARRIAGE OF MAILS; CARRIAGE OF MERCHANDISE; CARRIAGE OF PASSENGERS; CARRIAGE OF SLAVES; CONNECTING LINES; ELECTRIC RAILWAYS; ELEVATED RAILWAYS; EXPRESS COMPANIES; FERRIES; PARALLEL AND COMPETING LINES; STREET RAILWAYS; TRAMWAYS; UNDERGROUND RAILWAYS.

CARRIERS' ACTS.

11 *Geo. IV.* & 1 *Wm. IV.* c. 68, decisions under, see CARRIAGE OF MERCHANDISE, 518-528; CARRIAGE OF PASSENGERS, 520.

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— — — power of station agent to bind company by, see STATION AGENTS, 5.

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— — — to carry, as freight, see CARRIAGE OF MERCHANDISE, 36.

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— — — **goods lost from, while unloading**, see **CARRIAGE OF MERCHANDISE**, 98.

— — — **loss caused by defects in**, see **CARRIAGE OF LIVE STOCK**, 6-10.

— — — **rent of hired cars**, see **LEASES, ETC.**, 113.

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— — — **liability for defects in**, see **CARRIAGE OF LIVE STOCK**, 7.

— — — **of company hauling**, see **CARRIAGE OF MERCHANDISE**, 9, 23.

— — — **connecting carrier, return of**, see **CARRIAGE OF MERCHANDISE**, 94.

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II. ACTIONS FOR FAILURE TO BUILD OR REPAIR..... 598

I. DUTY TO BUILD AND MAINTAIN.*

1. Statutes, constitutionality of.—A statute which imposes upon railroad companies an absolute liability, irrespective of negligence, for the full amount of damages proven to have been sustained by abut-

ting owners, upon whose land cattle have strayed through cattle-guards which the railroad companies are required to construct, is unconstitutional. *Birmingham Mineral R. Co. v. Paysons*, 56 Am. & Eng. R. Cas. 223, 100 Ala. 662, 13 So. Rep. 602.

A statute declaring that all railroads within the state "shall be required to put in cattle or stock guards upon their respective lines of roads, and keep the same in good order, whenever the demand is made upon them or their agents or employés by the owners of the land through which said road passes that said cattle or stock guard is necessary to prevent the depredation of stock upon their farms," is not unconstitutional for the reason that it makes the landowner the sole judge of the necessity of the fence, since, if the necessity for the fence was not left to the discretion of the abutting owner, the railroad company would be absolutely compelled to maintain the guards in question. *Birmingham Mineral R. Co. v. Parsons*, 56 Am. & Eng. R. Cas. 223, 100 Ala. 662, 13 So. Rep. 602.

Kan. Comp. Laws 1879, ch. 84, entitled "An act to require railroad companies to make cattle-guards and to pay damages that individuals may sustain," and providing in § 38 that where any railroad crosses any public highway the company shall construct crossings, is unconstitutional as containing a subject not expressed in its title. *Missouri, K. & T. R. Co. v. Long*, 6 Am. & Eng. R. Cas. 254, 27 Kan. 684.—DISTINGUISHED IN *Dyer County v. Chesapeake, O. & S. W. R. Co.*, 38 Am. & Eng. R. Cas. 676, 87 Tenn. 712, 11 S. W. Rep. 943.

The legislature has the power to require existing railroad corporations, and all hereafter incorporated, to maintain cattle-guards at all crossings, or to respond in damages for all cattle injured by their trains through such omission. This subject comes clearly within the police power of the state, which resides inalienably in the legislature. *Thorpe v. Rutland & B. R. Co.*, 27 Vt. 140.—QUOTING *Richmond, F. & P. R. Co. v. Louisa R. Co.*, 13 How. (U. S.) 71; *Charles River Bridge v. Warren Bridge*, 11 Pet. (U. S.) 548.—APPROVED IN *Gorman v. Pacific R. Co.*, 26 Mo. 441.—DISTINGUISHED IN *Bienberg v. Montana Union R. Co.*, 38 Am. & Eng. R. Cas. 275, 8 Mont. 271. QUOTED IN *Talcott v. Pine Grove Tp.*, 1 Flipp. (U. S.) 120; *Memphis & L. R. R. Co. v. Berry*, 41 Ark. 436; *Rodemacher v. Milwaukee & St.*

* Duty to construct and keep in good condition, see note, 35 Am. & Eng. R. Cas. 189.

P. R. Co., 41 Iowa 297; Kansas Pac. R. Co. v. Mower, 16 Kan. 573; Hallenbeck v. Hahn, 2 Neb. 377; Broadway & S. A. R. Co. v. Mayor, etc., of N. Y., 49 Hun (N. Y.) 126, 16 N. Y. S. R. 950, 1 N. Y. Supp. 646; People v. New York, N. H. & H. R. Co., 55 Hun (N. Y.) 409, 29 N. Y. S. R. 172, 8 N. Y. Supp. 672; Cincinnati, H. & D. R. Co. v. Sullivan, 32 Ohio St. 152; Pennsylvania R. Co. v. Brad-dock El. R. Co., 152 Pa. St. 116. REVIEWED IN Philadelphia, W. & B. R. Co. v. Bowers, 4 Houst. (Del.) 506; State v. Wabash, St. L. & P. R. Co., 25 Am. & Eng. R. Cas. 133, 83 Mo. 144.

The police power of the state extends to the regulation and control of the entire business of railroads, so as to prevent needless injury to persons or property. *Thorpe v. Rutland & B. R. Co.*, 27 Vt. 140.

2. Interpretation of statutes.—Cattle-pits are embraced in the term "fence," though not specially mentioned in a statute. *New Albany & S. R. Co. v. Pace*, 13 Ind. 411.—FOLLOWED IN Indianapolis & C. R. Co. v. Kibby, 28 Ind. 479.

The only purpose of the law as to the construction of cattle-guards (arts. 4240, 4241, Tex. Rev. St.) is to protect the inclosures through which the road passes, and the absence of cattle guards is not negligence or evidence of it. *Ward v. Bonner*, 80 Tex. 168, 15 S. W. Rep. 805.

Conn. act of 1850, § 3 (Comp. Laws 1854, p. 753), which provides that all railroad companies shall construct cattle-guards at highway crossings, unless in the opinion of the railroad commissioners it shall be unnecessary, applies to railroad companies incorporated before as well as those incorporated after the passage of the act. It works an alteration of the charter of a previously incorporated company which did not impose a duty, but contained a provision that it might be altered at the pleasure of the legislature. *Bulkley v. New York & N. H. R. Co.*, 27 Conn. 479.—APPLIED IN New York & N. E. R. Co.'s Appeal, 62 Conn. 527. QUOTED IN Kansas Pac. R. Co. v. Mower, 16 Kan. 573.

3. Duty to construct, generally.—The company is in duty bound to maintain cattle-guards necessary to prevent animals from entering upon the track from a highway, where fences cannot be maintained, provided the doing so does not interfere with the duty the company owes to the public and its employes. *Ft. Wayne, C. &*

L. R. Co. v. Herbold, 23 Am. & Eng. R. Cas. 221, 99 Ind. 91.

In the absence of a statute requiring it, a company is not liable for neglecting to make cattle-guards at private crossings. *Bartlett v. Dubuque & S. C. R. Co.*, 20 Iowa 188.—DISTINGUISHING *Brooks v. New York & E. R. Co.*, 13 Barb. (N. Y.) 594; *Corwin v. New York & E. R. Co.*, 13 N. Y. 42.—DISTINGUISHED IN *Tyson v. Keokuk & D. M. R. Co.*, 43 Iowa 207. FOLLOWED IN *Evans v. Burlington & M. R. R. Co.*, 21 Iowa 374.

There being no contract or charter obligation or statutory duty to maintain cattle-guards, none will be implied from the fact that the company has constructed them along the line where it enters and leaves cultivated fields, unless the lapse of time has raised the presumption of a grant or covenant. *Ward v. Paducah & M. R. Co.*, 4 Fed. Rep. 862.

The failure to stipulate in the donation of the right of way that cattle-guards and crossings must be provided does not deprive the donor from recovering for injury caused by want of them. They are incidents of railroad building. The company must build them for its own protection. *Heath v. Texas & P. R. Co.*, 37 La. Ann. 728.

4. Statutory duty to construct.*—The duty of placing suitable cattle-pits at the crossings of highways, etc., results from the requirement that a railroad shall be "securely fenced." *Indianapolis, P. & C. R. Co. v. Irish*, 26 Ind. 268.

The fact that Mo. Rev. St. 1889, art. 2, ch. 5, restraining animals from running at large, is in force in a county, does not relieve railroads of the duties imposed by section 2611 to fence their tracks and construct cattle-guards. *Cole v. Chicago, B. & Q. R. Co.*, 47 Mo. App. 624.—APPLYING *Morrow v. Missouri Pac. R. Co.*, 17 Mo. App. 103.

Nor do the facts that a crossing is at or near a depot, and that to construct a cattle-guard there would inconvenience the company excuse it from complying with the positive requirement of the statute that such protection be provided. *Tracy v. Troy & B. R. Co.*, 38 N. Y. 433; affirming 55 Barb. 529.—FOLLOWING *Bradley v. Buffalo, N. Y. & E. R. Co.*, 34 N. Y. 427.

* Cattle-guards a necessary part of statutory fence, see note, 20 AM. & ENG. R. CAS. 445.

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Under the statute of New Hampshire, railroad corporations are obliged to maintain fences on the sides of their roads, and to make cattle-guards, cattle-passes, and farm crossings for the convenience and safety of adjoining owners and all who are rightfully upon the lands, except where the corporations have paid the adjoining owners for building and maintaining the fences, and settled with them in regard to such guards, passes, and farm crossings. *Horn v. Atlantic & St. L. R. Co.*, 35 N. H. 169.—FOLLOWED IN *Smith v. Eastern R. Co.*, 35 N. H. 356.

The statute (Tex. Rev. St. art. 4243) authorizing the owner of an inclosure through which a track is run to construct and repair necessary cattle-guards "at the expense of the railway company, if it fails to do so," imposes no duty so to do upon the landowner. He may exercise his option without liability for contributory negligence in case of damages to his inclosure. *San Antonio & A. P. R. Co. v. Knoepfli*, 82 Tex. 270, 17 S. W. Rep. 1052.—FOLLOWING *Texas & St. L. R. Co. v. Young*, 60 Tex. 201; *Houston, E. & W. T. R. Co. v. Adams*, 63 Tex. 200.

5. Duty to construct as affected by contract.—An agreement of a railroad company to keep and maintain cattle-guards on each side of a person's land is limited by the time it should operate its road over his land, and need not be in writing, under the statute of frauds requiring agreements not to be performed within one year to be in writing. *Arkansas Midland R. Co. v. Whitley*, 49 Am. & Eng. R. Cas. 587, 54 Ark. 199, 15 S. W. Rep. 465.—FOLLOWING *Peter v. Compton, Skinner* 353. QUOTING *McPherson v. Cox*, 96 U. S. 404.

Where a railroad company, by agreement with a landowner, maintains cattle-guards and wing-fences, the grantee of such company is chargeable with notice of such cattle-guards and fences, and is thereby warned that there is some claim of right connected therewith. *Toledo, St. L. & K. C. R. Co. v. Fenstermaker*, 3 Ind. App. 151, 29 N. E. Rep. 440.

When a railway company makes cattle-guards on its railroad where it enters and leaves improved or fenced land, and such cattle-guards are insufficient, and the company then enters into an agreement with the occupant of the premises, that if he will take away his old fences near the cattle-

guards and move them to another line near the railroad, so as to inclose his premises at different points from where the land was inclosed when the first cattle-guards were built, the company would erect new cattle-guards at the places to which the fences were to be changed, and thereupon the occupant removes his fences and the company does not comply with its promise, but neglects to erect cattle-guards at the places where the road enters and leaves the land as newly fenced, it is liable for all damages sustained thereby. *Missouri Pac. R. Co. v. Lynch*, 15 Am. & Eng. R. Cas. 517, 31 Kan. 531, 3 Pac. Rep. 372.

6. Enforcement of duty to construct.—Mandamus is the proper remedy to compel a railroad company to construct the fences and cattle-guards required by law; and performance of the duty may be enforced by fine and imprisonment. *People v. Rochester & S. L. R. Co.*, 14 Hun (N. Y.) 371; modified and affirmed in 76 N. Y. 294; see 15 Hun 188.—REVIEWED IN *People v. New York C. & H. R. R. Co.*, 9 Am. & Eng. R. Cas. 1, 28 Hun (N. Y.) 543, 3 Civ. Pro. 11, 2 McCar. 345.

If any notice is required to be given a railway company to construct cattle-guards, where land is inclosed after the railway is built, notice served upon a station agent is sufficient. *Heskett v. Wabash, St. L. & P. R. Co.*, 13 Am. & Eng. R. Cas. 549, 61 Iowa 467, 16 N. W. Rep. 525.

7. At what places cattle-guards must be built, generally.—It is the duty of the company to erect cattle-guards, put up fences, or station watchmen at crossings of public roads and wherever cattle are in the habit of straying, or known to be liable to stray upon the track; and a failure to do so is negligence, rendering the company liable to passengers for all injuries occasioned thereby. *Wright v. Pennsylvania R. Co.*, 3 Pittsb. (Pa.) 116.

Where a railroad company is not obliged to fence, it is not obliged to place cattle-guards. *Stern v. Michigan C. R. Co.*, 76 Mich. 591, 43 N. W. Rep. 587. *Gulf, C. & S. F. R. Co. v. Simonton*, 2 Tex. Civ. App. 558, 22 S. W. Rep. 285.

8. Interference with the necessities and conveniences of company.—A railroad company need not fence or construct cattle-guards at points where they would interfere with the transaction of its business or endanger the safety of its em-

ployés. *Lake Erie & W. R. Co. v. Kneadle*, 19 Am. & Eng. R. Cas. 568, 94 Ind. 454.—FOLLOWING *Evansville & T. H. R. Co. v. Willis*, 93 Ind. 507.

It is not proper to put cattle-guards in a track at a point where the operations of the road may be required to go in the usual and ordinary course of business for the purpose of coupling, uncoupling, or switching cars or trains. Conditions might arise which would make it necessary for operatives to go between cars to couple or uncouple them at any point along the road; but where such occurrences, from the nature of the business, would be rare, the exemption from the duty of establishing suitable cattle-guards does not apply. *Indianapolis, D. & W. R. Co. v. Clay*, 4 Ind. App. 282, 28 N. E. Rep. 567, 30 N. E. Rep. 916.—QUOTING *Evansville & T. H. R. Co. v. Willis*, 93 Ind. 507; *Lake Erie & W. R. Co. v. Kneadle*, 94 Ind. 454.

If there is a superior obligation on the part of a railroad company not to make cattle-guards at the point where the railroad enters improved or fenced land, then it is the duty of the company to construct the same at the first point which will not interfere with the necessities and conveniences of the public and the company. *Missouri Pac. R. Co. v. Manson*, 13 Am. & Eng. R. Cas. 540, 31 Kan. 337, 2 Pac. Rep. 800. *Cleveland, C. & I. R. Co. v. Newbrander*, 11 Am. & Eng. R. Cas. 480, 40 Ohio St. 15.

The act of April 18, 1874 (71 Ohio L. 85), imposes upon a railroad company the duty of constructing and maintaining necessary cattle-guards wherever its road crosses a highway. This statute may be construed as allowing exceptions required by public necessity and convenience, and the proper use of a station-yard by the company. *Cleveland, C. & I. R. Co. v. Newbrander*, 11 Am. & Eng. R. Cas. 480, 40 Ohio St. 15.—REVIEWED IN *Pittsburg & L. E. R. Co. v. Cunningham*, 13 Am. & Eng. R. Cas. 529, 39 Ohio St. 327.

9. At entrances into inclosed fields, etc.—(1) *Iowa*.—Under Iowa Code, § 1288, a railroad company must maintain a cattle-guard wherever its road enters or leaves "fenced land," whether the fenced land be the land of another or its own right of way. *Robinson v. Chicago, R. I. & P. R. Co.*, 67 Iowa 292, 25 N. W. Rep. 249.

Section 1288 applies to lands which are improved or inclosed after the construction

of a railroad, as well as to those improved or inclosed before. *Heskett v. Wabash, St. L. & P. R. Co.*, 13 Am. & Eng. R. Cas. 549, 61 Iowa 467, 16 N. W. Rep. 525.

The statute is imperative, and in an action for failure to comply with its requirements, evidence to show that it was not suitable or proper to erect a fence in a particular place is inadmissible. *Mundhenk v. Central Iowa R. Co.*, 11 Am. & Eng. R. Cas. 463, 57 Iowa 718, 11 N. W. Rep. 656.—DISTINGUISHING *Davis v. Burlington & M. R. R. Co.*, 26 Iowa 550.

A company is liable for any injuries resulting from a failure to comply with the statute, and this duty and liability attach equally to its lessee. *Downing v. Chicago, R. I. & P. R. Co.*, 43 Iowa 96, 14 Am. Ry. Rep. 406.

Laws of 1862, ch. 169, § 3, apply as well to fences dividing lands of the same owner as to those constituting boundaries between different owners. *Smith v. Chicago, C. & D. R. Co.*, 38 Iowa 518.

(2) *Kansas*.—It is always the duty of a railway company operating a railroad to see that proper cattle-guards exist wherever its railroad enters or leaves improved or fenced land, whether such railway company owns the railroad or is simply operating it under a lease. *Missouri Pac. R. Co. v. Morrow*, 19 Am. & Eng. R. Cas. 630, 32 Kan. 217, 4 Pac. Rep. 87.—DISTINGUISHING *St. Louis, W. & W. R. Co. v. Curl*, 28 Kan. 622.—*Missouri Pac. R. Co. v. Ricketts*, 45 Am. & Eng. R. Cas. 485, 45 Kan. 617, 26 Pac. Rep. 50.

(3) *Texas*.—When a railroad passes through a field or inclosure, the statute (Tex. Rev. St. art. 4240) imposes upon the company the duty of placing sufficient cattle-guards or stops at the points where the road enters the inclosure, and a failure to discharge such duty renders the company liable to a party injured by such failure. *Gulf, C. & S. F. R. Co. v. London*, 3 Tex. App. (Civ. Cas.) 499.

If they fail so to do they are made liable to any person injured by such neglect for all damages resulting therefrom. The right is given the owner of any inclosure, in case of failure on the part of the railroad, to construct or repair such cattle-guards at the expense of said railroad. *Texas & St. L. R. Co. v. Young*, 13 Am. & Eng. R. Cas. 544, 60 Tex. 201.—DISTINGUISHING *Loker v. Damon*, 17 Pick. (Mass.) 288.—FOL-

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A failure to perform such duty will render a company liable for the injuries resulting therefrom, though such failure was attributable to the negligence of an independent contractor. *Gulf, C. & S. F. R. Co. v. Yell*, 3 Tex. App. (Civ. Cas.) 437. *Houston & G. N. R. Co. v. Meador*, 50 Tex. 77.

The statute does not prescribe any plan or kind of guards that shall be used, but the manifest intention of the statute is that they shall be so constructed as to be sufficient to prevent the depredations of stock of every description, and a failure to so construct and keep in repair will render the company liable. *Horan v. Taylor, B. & H. R. Co.*, 3 Tex. App. (Civ. Cas.) 515.

Under Pasch. Dig. art. 4925, providing that "each and every railroad company whose railroad passes through a field or inclosure is hereby required to place a good and sufficient cattle-guard or stop at the points of entering or leaving such field or inclosure," where, by reason of neglect to do this, a crop is damaged or destroyed, the company is liable for all such damage done throughout the entire limits of the field or inclosure. *Texas & P. R. Co. v. Dudley*, 1 Tex. App. (Civ. Cas.) 271.

10. At station grounds.—Railroad companies are not liable for not constructing cattle-guards at street crossings within their depot grounds and in use by them and by the public in transacting business with them. *Stern v. Michigan C. R. Co.*, 76 Mich. 591, 43 N. W. Rep. 587.

The rule that excuses a railroad company from fencing its track at a station excuses it from constructing cattle-guards there. *Robertson v. Atlantic & P. R. Co.*, 64 Mo. 412.—DISTINGUISHING *Walther v. Pacific R. Co.*, 55 Mo. 276.

11. At highway crossings.—The obligation to fence includes that of maintaining such cattle-guards as are necessary to prevent access by cattle from intersecting highways. *Wabash, St. L. & P. R. Co. v. Tretts*, 19 Am. & Eng. R. Cas. 601, 96 Ind. 450. *Louisville, N. A. & C. R. Co. v. Etaler*, 3 Ind. App. 562, 30 N. E. Rep. 32. *Ohio, I. & W. R. Co. v. Neady*, 5 Ind. App. 328, 32 N. E. Rep. 213. *Bradley v. Buffalo, N. Y. & E. R. Co.*, 34 N. Y. 427.—FOLLOWED IN *Spence v. Chicago & N. W. R. Co.*, 25 Iowa 139; *Rhodes v. Utica, I. & E. R. Co.*, 5 Hun (N. Y.) 344. QUOTED IN *Brady v. Renssel-*

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And a failure to build such cattle-guards imposes no greater or other liability than the failure to fence. *Peoria, D. & E. R. Co. v. Schiller*, 12 Ill. App. 443.

The fact that the road-crossing is at or near the depot, or in the company's yard, and that to make a cattle-guard there would inconvenience the company, is no excuse for not complying with the positive requirements of the statute. *Bradley v. Buffalo, N. Y. & E. R. Co.*, 34 N. Y. 427.—FOLLOWED IN *Tracy v. Troy & B. R. Co.*, 38 N. Y. 433.—*Greeley v. St. Paul, M. & M. R. Co.*, 19 Am. & Eng. R. Cas. 559, 33 Minn. 136, 53 Am. Rep. 16, 22 N. W. Rep. 179.—REVIEWING *Davis v. Burlington & M. R. R. Co.*, 26 Iowa 549.

12. At street crossings.—The statute requiring the erection of cattle-guards at road crossings applies as well to streets crossed by railroads in villages as to country highways. *Brace v. New York C. R. Co.*, 27 N. Y. 269.—NOT FOLLOWING *Vanderkar v. Rensselaer & S. R. Co.*, 13 Barb. (N. Y.) 390; *Parker v. Rensselaer & S. R. Co.*, 16 Barb. 315. REFERRING TO *Corwin v. New York & E. R. Co.*, 13 N. Y. 53.

But it seems that where a village street crosses a railroad running along another street the company is not bound to construct cattle-guards longitudinally along its track so as to impede the passage along the street crossing it. *Brace v. New York C. R. Co.*, 27 N. Y. 269. *Halloran v. New York & H. R. Co.*, 2 E. D. Smith (N. Y.) 257.

The statute of 1848 does not apply to streets in cities or villages. Cattle-guards in the streets of a city or village would be nuisances. *Vanderkar v. Rensselaer & S. R. Co.*, 13 Barb. (N. Y.) 390. *Parker v. Rensselaer & S. R. Co.*, 16 Barb. (N. Y.) 315.—NOT FOLLOWED IN *Brace v. New York C. R. Co.*, 27 N. Y. 269.

13. At farm crossings.—A railroad company is not required to construct or maintain cattle-guards or cross-fences at a private farm crossing. *Pennsylvania Co. v. Spaulding*, 35 Am. & Eng. R. Cas. 184, 112 Ind. 47, 13 N. E. Rep. 268.—DISTINGUISHING *Indianapolis, P. & C. R. Co. v. Thomas*, 84 Ind. 194.—*Filterling v. Missouri Pac. R. Co.*, 20 Am. & Eng. R. Cas. 454, 79 Mo. 504. *Dent v. St. Louis, I. M. & S. R. Co.*, 83 Mo. 496.—QUOTING *Brooks v. New York & E.*

R. Co., 13 Barb. (N. Y.) 597.—REVIEWED IN *Omaha & R. V. R. Co. v. Severin*, 30 Neb. 318.—*Brooks v. New York & E. R. Co.*, 13 Barb. (N. Y.) 594.

The term "wagon crossings," as used in section 54, ch. 34, Minn. Gen. St. 1878, requiring railroad companies to build and maintain "cattle-guards," refers to wagon roads used for public travel crossing railroads, and not to private ways or farm crossings. *Sather v. Chicago, M. & St. P. R. Co.*, 38 Am. & Eng. R. Cas. 283, 40 Minn. 91, 41 N. W. Rep. 458.—REVIEWED IN *Omaha & R. V. R. Co. v. Severin*, 30 Neb. 318.

The railroad corporations to which the provisions of Neb. Comp. St. 1889, ch. 7, art. 1, § 1, apply are required, under the penalty therein specified, to erect and maintain fences on both sides of their railroad "suitably and amply sufficient to prevent cattle, horses, sheep, and hogs from getting on the said railroad, except at the crossings of public roads and highways, and within the limits of towns, cities, and villages." This includes the space on either side opposite to private or farm crossings of the railroad, at which points such corporations are required to make or leave openings in such fence, with gates or bars to close and secure such openings, but are not required to put in cattle-guards at such private or farm crossings. *Omaha & R. V. R. Co. v. Severin*, 45 Am. & Eng. R. Cas. 122, 30 Neb. 318, 46 N. W. Rep. 842.—DISTINGUISHING *Boggs v. Chicago, B. & Q. R. Co.*, 54 Iowa 435, 6 N. W. Rep. 744; *Gray v. Burlington & M. R. R. Co.*, 37 Iowa 119. QUOTING *Brooks v. New York & E. R. Co.*, 13 Barb. (N. Y.) 594; *Jones v. Seligman*, 81 N. Y. 190. REVIEWING *Dent v. St. Louis, I. M. & S. R. Co.*, 83 Mo. 496; *Peoria, P. & J. R. Co. v. Barton*, 80 Ill. 72; *Sather v. Chicago, M. & St. P. R. Co.*, 40 Minn. 91.

Railroads are bound to construct and maintain sufficient cattle-guards at all farm crossings of their track, and are responsible for all damages resulting from their neglect of duty in this respect to cattle rightfully upon the crossing. *Chapin v. Sullivan R. Co.*, 39 N. H. 53, 564.—DISTINGUISHING *Horne v. Atlantic & St. L. R. Co.*, 36 N. H. 444. QUOTING *Jackson v. Rutland & B. R. Co.*, 25 Vt. 151. REVIEWING *Woolson v. Northern R. Co.*, 19 N. H. 267.—FOLLOWED IN *Mayberry v. Concord R. Co.*, 47 N. H. 391. RECONCILED

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14. At crossings of railroads.—Under Wis. S. & B. Ann. S' § 1810, a railroad company is bound to provide suitable guards or means to prevent domestic animals going upon its track through the openings in its fence made by the crossing of a private logging railroad. Except adjacent to depot grounds, a railroad company cannot in any case leave openings in its fences without providing gates, bars, or cattle-guards. *Caldon v. Chicago, St. P., M. & O. R. Co.*, 85 Wis. 527, 55 N. W. Rep. 955.

15. Sufficiency of cattle-guards, generally.—Cattle-guards are sufficient if in good repair and of the ordinary pattern. *Smead v. Lake Shore & M. S. R. Co.*, 23 Am. & Eng. R. Cas. 241, 58 Mich. 200, 24 N. W. Rep. 761.

A cattle-guard of which the pit is so shallow and the guard-rails so far apart that animals can step between them and walk over is not adapted to the purpose for which it was designed. *Wabash R. Co. v. Ferris*, 6 Ind. App. 30, 32 N. E. Rep. 112.

An open bridge upon which the railroad runs, commencing in a highway and constructed of string-pieces and cross-ties, with open spaces of six inches, is in no sense such a cattle-guard as the statute requires. *Ham v. Newburgh, D. & C. R. Co.*, 52 N. Y. S. R. 536.

Where there is a cattle-guard in a railroad track, it is the duty of the company to construct cross-fences from the fences on the side of the road to the railroad track, such cross-fences or other barriers being considered as necessary parts of the cattle-guard. *Edwards v. Kansas City, St. J. & C. B. R. Co.*, 74 Mo. 117. *Missouri Pac. R. Co. v. Manson*, 13 Am. & Eng. R. Cas. 540, 31 Kan. 337, 2 Pac. Rep. 800.

Where a cattle-guard and wing-fence are unnecessarily placed fifty feet from the line of the highway at a crossing, and an animal attempting to cross the railroad from the intervening space is killed by the cars, the company is liable. *Louisville, N. A. & C. R. Co. v. Porter*, 20 Am. & Eng. R. Cas. 446, 97 Ind. 267.—DISTINGUISHING *Bellefontaine R. Co. v. Suman*, 29 Ind. 40; *Jeffersonville, M. & I. R. Co. v. Lyon*, 72 Ind. 107; *Toledo, W. & W. R. Co. v. Howell*, 38

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10. Must prevent cattle from coming on track.*—Under the Ill. St. requiring railroad companies to construct cattle-guards that shall be reasonably sufficient to turn ordinary stock, an instruction that a company was liable for constructing a cattle-guard that did not prevent stock, no matter how breachy, from getting on the track, should be refused. *Chicago, B. & Q. R. Co. v. Evans*, 45 Ill. App. 79.

Under Iowa Code, § 1288, the cattle-guard required is not simply a pit under the track, but something extending clear across the right of way and preventing animals from crossing. *Heskett v. Wabash, St. L. & P. R. Co.*, 13 Am. & Eng. R. Cas. 549, 61 Iowa, 467, 16 N. W. Rep. 525.

The intention of the statute, Kan. Laws 1869, ch. 81, § 1, is to protect the owners and possessors of improved or fenced land, over which a railroad is constructed, against the depredations of domestic animals, and the term "proper cattle-guards" means such cattle-guards as are reasonably sufficient to prevent the ingress or egress of such animals into and out of the premises. *Missouri Pac. R. Co. v. Manson*, 13 Am. & Eng. R. Cas. 540, 31 Kan. 337, 2 Pac. Rep. 800.

Proper cattle-guards are such as will prevent cattle from passing along the right of way of the railway company into an improved or fenced field. *Missouri Pac. R. Co. v. Morrow*, 19 Am. & Eng. R. Cas. 630, 32 Kan. 217, 4 Pac. Rep. 87.

Mo. Rev. St. 1889, § 2611, only requires a cattle-guard that is ordinarily or usually sufficient to prevent stock from crossing it, and a jury called to try the sufficiency of a cattle-guard should so be informed by the instruction. *Cole v. Chicago, B. & Q. R. Co.*, 47 Mo. App. 624.

An open bridge, made with stringers and cross-timbers seven inches wide and six inches apart, is not a sufficient cattle-guard, within N. Y. Laws 1891, ch. 367, providing that railroad companies shall maintain cattle-guards at all road crossings sufficient to prevent horses from going on the tracks. *Ham v. Newburgh, D. & C. R. Co.*, 23 N. Y. Supp. 197.

* Cattle-guards must be effectual to keep cattle from track, see note, 20 AM. & ENG. R. CAS. 448.

It is the duty, by law, of the Vermont Central R. Co., to erect and maintain such fences and cattle-guards upon their road as will prevent horses and other animals from passing them. *Trow v. Vermont C. R. Co.*, 24 Vt. 487.—FOLLOWING Quimby v. Vermont C. R. Co., 23 Vt. 393.—QUOTED IN Case of Atlantic, M. & O. R. Co., 4 Hughes (U. S.) 157.

In determining the sufficiency of a cattle-guard, the question is not, could an animal, under any circumstances, cross it, but rather will it, under all ordinary circumstances, prevent animals from getting upon the track. *Wait v. Bennington & R. R. Co.*, 61 Vt. 268, 17 Atl. Rep. 284.

As to the owner the cattle-guards or stops which railroad companies are required to construct, under the Texas statute, are to be sufficient to protect his field and inclosure from depredations of stock of every description; but as to other parties the rule is not so exacting, but they must be so constructed as not to be a trap or snare to stock. *Horan v. Taylor, B. & H. R. Co.*, 3 Tex. App. (Civ. Cas.) 515.

17. Duty to keep in repair.—A railroad company which builds cattle-guards within the limits of a village street must keep them in repair. *Chicago & R. I. R. Co. v. Reid*, 24 Ill. 144.

A company which neglects when notified to repair a cattle-guard built by it at the request of an adjoining owner is not liable for damage resulting to a crop, although it has repaired the guard for thirty years. (Chalmers J., dissenting.) *Vicksburg & M. R. Co. v. Dixon*, 19 Am. & Eng. R. Cas. 617, 61 Miss. 119.

18. Snow and ice in cattle-guards.*—A railroad company is required to use ordinary care and diligence to keep cattle-guards free from snow and ice after it has notice, or could have acquired notice, in the exercise of ordinary care, that they were obstructed, and must remove the obstructions within a reasonable time. *Robinson Chicago, R. I. & P. R. Co.*, 79 Iowa 495, 44 N. W. Rep. 718.—FOLLOWING Grahman v. Chicago, St. P. & K. C. R. Co., 78 Iowa 564.—FOLLOWED IN Giger v. Chicago & N. W. R. Co., 80 Iowa 492.—*Giger v. Chicago & N. W. R. Co.*, 80 Iowa 492, 45 N. W. Rep. 906.—FOLLOWING Grahman v. Chicago, St. P.

* Duty of company to remove snow and ice, see note, 40 AM. & ENG. R. CAS. 220.

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& K. C. R. Co., 78 Iowa 564; *Robinson v. Chicago, R. I. & P. R. Co.*, 79 Iowa 495.—*Grahlman v. Chicago, St. P. & K. C. R. Co.*, 42 Am. & Eng. R. Cas. 588, 78 Iowa 564, 5 L. R. A. 813, 43 N. W. Rep. 529.—RECONCILING *Patten v. Chicago, M. & St. P. R. Co.*, 75 Iowa 459.—FOLLOWED IN *Robinson v. Chicago, R. I. & P. R. Co.*, 79 Iowa 495; *Giger v. Chicago & N. W. R. Co.*, 80 Iowa 492.—*Chicago, B. & Q. R. Co. v. Kennedy*, 22 Ill. App. 308.—FOLLOWING *Dunnigan v. Chicago & N. W. R. Co.*, 18 Wis. 28. QUOTING *Illinois C. R. Co. v. Swearingen*, 47 Ill. 206. REVIEWING *Illinois C. R. Co. v. Swearingen*, 33 Ill. 289.—*Indiana, B. & W. R. Co. v. Drum*, 21 Ill. App. 331.

Neither the winter season nor times when there are great or unusual accumulations of snow are excepted from the operation of the statute requiring the construction and maintenance of cattle-guards at crossings of public highways. *Chicago, B. & Q. R. Co. v. Kennedy*, 22 Ill. App. 308.

Reasonable care does not require a railway company, unless under extraordinary circumstances, to remove the natural accumulations of snow and ice from cattle-guards. *Blais v. Minneapolis & St. L. R. Co.*, 22 Am. & Eng. R. Cas. 571, 34 Minn. 57, 57 Am. Rep. 36, 24 N. W. Rep. 558.—CRITICISING *Dunnigan v. Chicago & N. W. R. Co.*, 18 Wis. 33.—FOLLOWED IN *Stacey v. Winona & St. P. R. Co.*, 40 Am. & Eng. R. Cas. 217, 42 Minn. 158, 43 N. W. Rep. 906.—*Stacey v. Winona & St. P. R. Co.*, 40 Am. & Eng. R. Cas. 217, 42 Minn. 158, 43 N. W. Rep. 905.—FOLLOWING *Blais v. Minneapolis & St. L. R. Co.*, 34 Minn. 57, 24 N. W. Rep. 558.

19. Compensation for constructing and repairing.—A railroad company exercising its powers subject to the provisions of the present constitution, and required by the act of 1874 (71 Ohio L. 85), passed since its incorporation, to construct and maintain cattle-guards at places on its road where public highways are or may be constructed across its track, is not entitled to compensation for making or maintaining such cattle-guards. *Lake Shore & M. S. R. Co. v. Sharpe*, 7 Am. & Eng. R. Cas. 543, 38 Ohio St. 150.—DISTINGUISHING *Illinois C. R. Co. v. Bloomington*, 76 Ill. 447.

20. Construction and repair by landowner.—Where the railway company fails to construct or keep in repair the necessary cattle-guards, the exercise of ordi-

nary care does not impose upon any one the necessity of assuming the risk of constructing or repairing them, by having the work done. A person through whose inclosure a railway runs may leave the whole matter of erecting or repairing cattle-guards in the hands of the railroad, without being chargeable with contributory negligence. *Texas & St. L. R. Co. v. Young*, 13 Am. & Eng. R. Cas. 544, 60 Tex. 201.—FOLLOWED IN *Houston, E. & W. T. R. Co. v. Adams*, 63 Tex. 200.

II. ACTIONS FOR FAILURE TO BUILD OR REPAIR.*

21. Injuries to animals.—The degree of negligence of which a company will be held guilty, in the omission to construct and maintain cattle-guards and fences, depends upon the locality of the road and of the particular place where the omission occurs. To fail to erect and maintain fences and cattle-guards for a considerable distance, at a place so public and common that it may reasonably be expected that cattle and horses will stray upon the track, is in law such a neglect of duty as will render the company liable for injuries arising solely from that cause. *Trow v. Vermont C. R. Co.*, 24 Vt. 487.—QUOTED IN *Norris v. Androscoggin R. Co.*, 39 Me. 273; *Kerwhacker v. Cleveland, C. & C. R. Co.*, 3 Ohio St. 172. REVIEWED IN *Huelsenkamp v. Citizens' R. Co.*, 37 Mo. 537.

Defendant railway company failed and neglected to construct or maintain cattle-guards where its line of railroad entered and left an inclosed pasture. During the time of such neglect the owner of the pasture attempted to keep his stock from straying by herding the same. One day the herder left the stock to go to dinner. While absent a cow strayed away, got into a creek, and mired down. *Held*, if the creek was at a great distance from the pasture, or if the miring of the cow was something extraordinary and not to be expected, and it could not be said that the neglect of the railway company was the proximate cause of the loss of the cow, the company would not be liable therefor. *Chicago, K. & N. R. Co. v. Hotz*, 47 Kan. 627, 28 Pac. Rep. 695.

22. Injuries to crops.—A company is liable for damages to crops, etc., resulting

* Failure to construct cattle-guards. Liability for damages to landowner compelled to herd cattle, see 49 AM. & ENG. R. CAS. 556, *abstr.*

from violation of a contract to make crossings and construct cattle-guards, on condition whereof the right of way was granted. *Eatman v. New Orleans Pac. R. Co.*, 35 La. Ann. 1018.

Land belonging to one person was inclosed, in common with that of another, at the time a railway was constructed through it, and subsequently a division fence was erected and the company notified to construct a cattle-guard thereat, which it failed to do. *Held*, that the company was liable for injury done to the crops upon the land set apart, by cattle which entered it from the railway, and that the measure of damages was the actual value of the crops destroyed. *Donald v. St. Louis, K. C. & N. R. Co.*, 44 Iowa 157.

23. Personal injuries.—The N. Y. act of 1892, making railroad companies liable for damages resulting from a failure to erect cattle-guards at crossings, as required therein to do, does not include an injury to a person and his team who are traveling on a highway. *Case v. New York C. & H. R. R. Co.*, 75 Hun (N. Y.) 527, 27 N. Y. Supp. 496, 57 N. Y. S. R. 653.

The plaintiff on a dark night, intending to go to the railway station, walked along the highway until he came to the railway crossing, and then turned to the left, intending to go along the track to the station, when he fell into the cattle-guard, which was within the limits of the highway, and was injured. *Held*, that he could not recover, for, assuming that the encroachment on the highway by the cattle-guard was illegal, it was in no way the cause of the accident, which resulted from the plaintiff leaving the highway to walk along the track, and would have happened without such encroachment. *Thompson v. Grand Trunk R. Co.*, 37 U. C. Q. B. 40.

24. Plaintiff's pleadings.—A count of a complaint which alleges that a railroad company "so negligently and carelessly left open its stock-gaps on that part of its road which runs through the said land of the plaintiff that" certain damages were suffered, is demurrable, where the duty prescribed by the statute is to construct cattle-guards and keep them in order, and not to keep them closed. *Birmingham Mineral R. Co. v. Parsons*, 56 Am. & Eng. R. Cas. 223, 100 Ala. 662, 13 So. Rep. 602.

A petition alleging that said company neglected and refused, for the period of

about one year, to place cattle-guards at the proper places on its right of way through plaintiff's lands, and that by reason of said failure and neglect his fields were thrown open to the public, and that his grass and corn-stalks that he had been saving for his cattle were thereby destroyed and lost to him, and that he could not prevent the said loss, is not demurrable on the ground that it claims remote damages, as the question of what actual damage was sustained was a matter to be proved by evidence at the trial. *Raridon v. Central Iowa R. Co.*, 19 Am. & Eng. R. Cas. 615, 65 Iowa 640, 22 N. W. Rep. 909.

A complaint, alleging injury to the complainant from the neglect of the company to erect cattle-guards, is not sustained by proof that the company had omitted to build fences. *Parker v. Rensselaer & S. R. Co.*, 16 Barb. (N. Y.) 315.

25. Defendant's pleadings.—An action was begun before a justice of the peace against a railway company to recover damages alleged to have been caused by the failure of the company to construct and maintain proper cattle-guards where its road enters and leaves the plaintiff's inclosure. The case was removed to the district court, where it was tried upon the plaintiff's bill of particulars. No pleading was filed by the company in either the justice's or the district court, and none was demanded or ordered. At the final trial the company offered to prove that when the injury happened it had not constructed, did not own, and was not operating the railroad which passed through the plaintiff's land. This offer was refused. *Held*, error. Although no pleading was filed by the company, it was entitled to introduce evidence in support of any defense which it had. *Denver, M. & A. R. Co. v. Congill*, 44 Kan. 325, 24 Pac. Rep. 475.

Where plaintiff sued for damages to his crops by cattle which entered his premises over the depot platform, which was partly within and partly outside his inclosure, and was not protected by cattle-guard or otherwise, a plea that plaintiff, by building a few yards of fence around the defendant's passenger depot, could have prevented all the damages, was good as against a general demurrer, and the court below erred in striking it out on plaintiff's exception. *Gulf, C. & S. F. R. Co. v. Simonton*, 2 Tex. Civ. App. 558, 22 S. W. Rep. 285.

26. Matters of defense, generally.*

—A railroad company cannot escape from liability for its failure to perform the statutory duty to make proper cattle-guards on its road where it enters or leaves improved or fenced land, on the ground that a contractor grading the road or laying track thereon neglected to put up proper guards. *Chicago, K. & W. R. Co. v. Hutchinson*, 45 Kan. 186, 25 Pac. Rep. 576.

Or on the ground that the cow killed was running at large and strayed upon the track at a highway crossing. *White v. Utica & B. R. R. Co.*, 15 Hun (N. Y.) 333.—QUOTING *Spinner v. New York C. & H. R. R. Co.*, 6 Hun (N. Y.) 600.

Nor is the case affected by the rate of speed at which the train was going at the time of the accident. *White v. Utica & B. R. R. Co.*, 15 Hun (N. Y.) 333.

27. Contributory negligence.—It is contributory negligence for the owner of crops, who has knowledge that straying animals may pass over defective cattle-guards and destroy the crops, not to use every means an ordinarily prudent person would use to protect them. *Ward v. Paducah & M. R. Co.*, 4 Fed. Rep. 862. *Missouri Pac. R. Co. v. Cox*, 2 Tex. App. (Civ. Cas.) 217.

Where a railroad fails to erect proper cattle-guards, and in consequence crops are injured, the owner is not bound to the exercise of extraordinary care to save his crops, even though that might have been successful. Whether he is negligent in his efforts to save them is a question of fact for the jury. *Smith v. Chicago, C. & D. R. Co.*, 38 Iowa 518.

Where he has applied to different persons connected with the railroad to have cattle-guards put in, and has reason to expect they would be, he is justified in planting his crops in the unprotected field. *Smith v. Chicago, C. & D. R. Co.*, 38 Iowa 518.

It is not the owner's duty to go upon the railway to repair the cattle-guard or to fence the road. *Downing v. Chicago, R. I. & P. R. Co.*, 43 Iowa 96, 14 Am. Ry. Rep. 406.

Where the plaintiff, relying on the defendant to do its duty in constructing certain cattle-guards, which it failed to do, thereby lost a crop of grass designated for fall and winter pasture—held, that he could

not be defeated in his action to recover by the fact that he might, had he anticipated defendant's failure, have made the grass into hay, and thus avoided the damages which he seeks to recover. *Raridan v. Central Iowa R. Co.*, 69 Iowa 527, 29 N. W. Rep. 599.

While the general rule is that one should ordinarily protect himself against the injurious consequences of the wrongful act of another, when it can be done with ordinary effort and without great expense, this rule does not apply to a landowner whose crops are destroyed by the failure of a railway company to erect and keep in repair proper cattle-guards. In such case the statute makes the company liable for resulting damages. *Houston, E. & W. T. R. Co. v. Adams*, 20 Am. & Eng. R. Cas. 246, 63 Tex. 200.—FOLLOWING *Texas & St. L. R. Co. v. Young*, 60 Tex. 201.—FOLLOWED IN *San Antonio & A. P. R. Co. v. Knoepfli*, 82 Tex. 270.

When a railway company secures a right of way across the land of the citizen, it has its option either to fence its right of way and pay for it, or rely on cattle-guards where it crosses an inclosure. If it relies on cattle-guards and so negligently constructs them that the crops of the landowner are destroyed by cattle, the company cannot shield itself from liability on the ground that the landowner was guilty of contributory negligence in not keeping up cattle-guards or building a fence on both sides of the company's right of way. *Houston, E. & W. T. R. Co. v. Adams*, 20 Am. & Eng. R. Cas. 246, 63 Tex. 200.

It is the duty of railroad companies to place cattle-guards at highway crossings wherever practicable, and they are liable for animals killed because of a failure to discharge this duty, although they may have been free from negligence in killing the animals, and although the owner may have been guilty of contributory negligence. *Welby v. Indianapolis & V. R. Co.*, 24 Am. & Eng. R. Cas. 371, 105 Ind. 55, 4 N. E. Rep. 410.—DISTINGUISHED IN *Heller v. Abbot*, 79 Wis. 409.

28. Evidence, generally.—(1) *What admissible.*—While the mere fact that a cattle-guard has become filled with ice is not evidence of the company's negligence, yet the fact that it is allowed to remain so for a long time may be considered by the jury in determining whether the company

* Failure to maintain cattle-guards. Neglect of contractor no defense, see 45 AM. & ENG. R. CAS. 488, *abstr.*

has properly guarded and protected its road. *Schnyler v. Fitchburg R. Co.*, 47 N. Y. S. R. 741, 20 N. Y. Supp. 287.

Evidence that a company made no attempt during the winter and after an accident to remove snow from cattle-guards is admissible as tending to show a failure to exercise any diligence or degree of care in respect to such cattle-guards. *Grahman v. Chicago, St. P. & K. C. R. Co.*, 42 Am. & Eng. R. Cas. 588, 78 Iowa 564, 5 L. R. A. 813, 43 N. W. Rep. 529.

In an action to recover damages for the killing of horses on a railroad through alleged insufficiency of a cattle-guard, testimony of a witness that he had seen cattle and colts cross another cattle-guard on defendant's road in the vicinity of the one complained of, was properly admitted, evidence having been introduced to show that the guards were alike, and one of defendant's witnesses having testified that the guard complained of was the best known and was in general use, but that if cattle and colts would freely cross it it would not be sufficient. *Lake Erie & W. R. Co. v. Helmericks*, 38 Ill. App. 141.

(2) *What inadmissible.*—Evidence as to whether the cattle-guard in question was the same as those in general use on the road is inadmissible, as such evidence would not establish or tend to establish that the cattle-guard was a sufficient one. *Schnyler v. Fitchburg R. Co.*, 47 N. Y. S. R. 741, 20 N. Y. Supp. 287. *Chicago, B. & Q. R. Co. v. Bryant*, 29 Ill. App. 17.

So also, evidence that another cattle-guard, constructed like the one in question, had proved sufficient was properly rejected. *Downing v. Chicago, R. I. & P. R. Co.*, 43 Iowa 96, 14 Am. Ry. Rep. 406.

Where the question is whether a railroad company was bound to protect a certain portion of its track by cattle-guards, etc., the jury must determine simply whether the place in question was used for depot purposes; and evidence as to whether it was or was not acquired by deed purporting to convey it for such purposes, is inadmissible. *Fowler v. Farmers' L. & T. Co.*, 21 Wis. 77.—REVIEWED IN *Dinwoodie v. Chicago, M. & St. P. R. Co.*, 70 Wis. 160, 35 N. W. Rep. 296.

29. Opinion evidence*—Experts.—In an action for damages done to plaintiff's

crops by reason of cattle passing into his field through and over improper cattle-guards on defendant's road, where the road enters the plaintiff's field, the main question of fact to be determined was whether the cattle-guards actually put in by the defendant were proper cattle-guards or not. Defendant introduced a witness who testified that he had been in the employment of defendant for about eight years, and that he had put in a great many cattle-guards for defendant during that time, but there was no evidence introduced tending to show that the witness knew anything about cattle or their nature or habits, and the defendant then asked the witness the following question: "I will ask you if it is not a fact that cattle get breachy with reference to these cattle-guards, the same as they do as to fences, and then is it not almost impossible for a cattle-guard to stop them?" Plaintiff objected to the question, and the court refused to permit it to be answered. *Held*, that the court did not commit error, for the reason that it had not been shown that the witness was a competent witness to testify with regard to cattle becoming breachy. *St. Louis & S. F. R. Co. v. Edwards*, 7 Am. & Eng. R. Cas. 547, 26 Kan. 72.

The court below did not err in permitting the plaintiffs to show that it was necessary to herd their cattle, and in permitting them to show the value of such herding by a witness who was not first shown to be an expert in such matters, where the only objection made to the evidence was that it was "incompetent, irrelevant, and immaterial." *Chicago, K. & N. R. Co. v. Behney*, 48 Kan. 47, 28 Pac. Rep. 980.

30. Instructions.—An instruction touching the liability of a railroad company for permitting snow and ice to remain in the cattle-guard, which fairly presents the law to the jury, is sufficient; and the question whether a reasonable time had elapsed for the removal of the snow and ice was for the jury. *Indiana, B. & W. R. Co. v. Drum*, 21 Ill. App. 331.—QUOTING *Dunigan v. Chicago & N. W. R. Co.*, 18 Wis. 28.

Where the evidence showed that defendant put in cattle-guards which were possibly sufficient, and that afterward they were

track dangerous. Opinion evidence not admissible to show dangerous condition, see 45 AM. & ENG. R. CAS. 487, *abstr.*

* Constructing cattle-guards so as to render

broken and rendered almost useless—*held*, that the court below did not err in refusing to give an instruction to the jury which embodied the following proposition: "Unless the jury believe from the evidence that said railway company did so fail to put in proper cattle-guards at such places, then they will find for the defendant." *St. Louis & S. F. R. Co. v. Edwards*, 7 *Am. & Eng. R. Cas.* 547, 26 *Kan.* 72.

Said instruction also embodied the further proposition: "If the jury believe from the evidence that the defendant railway company did put in such cattle-guards as were reasonably sufficient and proper, and such as are ordinarily in use in this country, then they will find for the defendant." *Held*, that said instructions should not have been given, for the additional reason that there was no evidence introduced on the trial showing what kind of cattle-guards "are ordinarily in use in this country." *St. Louis & S. F. R. Co. v. Edwards*, 7 *Am. & Eng. R. Cas.* 547, 26 *Kan.* 72.

31. Questions of fact for the jury.

—When the evidence is conflicting upon the question of negligence in maintaining a defective cattle-guard, the matter must be submitted to the jury. *Myron v. Michigan C. R. Co.*, 61 *Mich.* 387, 28 *N. W. Rep.* 146.

In an action to recover damages for injuries to horses claimed to have arisen from neglect to keep up proper cattle-guards, there being some testimony admitted without objection and having some tendency to prove the cattle-guard insufficient, the submission of the question to the jury—*held*, not to be error; a court of review will not consider the weight of evidence on writ of error. *Grand Rapids & I. R. Co. v. Judson*, 34 *Mich.* 506.—APPROVED IN *Atchison, T. & S. F. R. Co. v. Walton*, 3 *N. Mex.* 319.

32. Amount of recovery, generally.

—Where the suit is for failure to properly construct cow-pits according to contract, plaintiff is entitled to recover only the damages resulting from their improper construction, and not what it would cost to construct them properly and keep them in repair. *Indiana C. R. Co. v. Moore*, 23 *Ind.* 14.—EXPLAINED IN *Logansport, C. & S. W. R. Co. v. Wray*, 52 *Ind.* 578.

A cattle-guard is not an essential portion of a fence, within the meaning of the statute providing for the recovery of double damages for injuries to stock in cases where

railroad companies neglect to maintain fences; but under section 1288 of the Code a company is liable for single damages only, where stock is injured by reason of negligence in keeping a cattle-guard in repair. *Moriarty v. Central Iowa R. Co.*, 20 *Am. & Eng. R. Cas.* 438, 64 *Iowa* 696, 21 *N. W. Rep.* 143.

33. Damages for injuries to crops, pasture, etc.—In an action for injuries caused to growing crops in consequence of a failure to construct cattle-guards, the measure of damages is the market value of the crops when matured, less the expense of fitting them for the market, from the time of the injury, and diminished by whatever the value of the portion saved, if any, may be. *Smith v. Chicago, C. & D. R. Co.*, 38 *Iowa* 518.

Where crops were destroyed by cattle getting in through a defective cattle-guard, the true measure of damages is the value of the crops at the time they were destroyed. *Texas & St. L. R. Co. v. Young*, 13 *Am. & Eng. R. Cas.* 544, 60 *Tex.* 201.—FOLLOWING *Sabine & E. T. R. Co. v. Joachimi*, 58 *Tex.* 456.—*Texas & P. R. Co. v. Bayliss*, 62 *Tex.* 570. *Houston, E. & W. T. R. Co. v. Adams*, 20 *Am. & Eng. R. Cas.* 246, 63 *Tex.* 200.

In an action to recover for the loss of pasture through the neglect of defendant to construct cattle-guards, the jury was properly instructed that while the plaintiff could not, under the issue, recover the cost of herding his cattle upon the exposed pasture, yet, if the herding was rendered necessary by the failure of the defendant to construct the cattle-guards, the necessary cost of such herding might be considered in determining how much less the pasturage was worth than it would have been had the guards been constructed and maintained. *Raridan v. Central Iowa R. Co.*, 69 *Iowa* 527, 29 *N. W. Rep.* 599.

The court below did not err in instructing the jury that plaintiffs might recover for the value of the herding up to the value, but only up to the value, of the things belonging to themselves and others which might have been injured by the cattle if they had been permitted to run at large, and which things the plaintiffs had the right to protect, or which they were under obligation to protect, from the depredations of their own cattle. *Chicago, K. & N. R. Co. v. Behney*, 48 *Kan.* 47, 28 *Pac. Rep.* 980.

Where a railway company builds its road through a fenced pasture and fails and refuses to erect and maintain cattle-guards at the entrance and exit of its road to and from the pasture, the owner is entitled to recover damages for the loss of the pasture; or, if he puts his animals therein, to reasonable compensation for his efforts in preventing them from straying from the pasture and injuring the crops on his own premises, or from trespassing on the lands of other persons. *Nelson v. St. Louis & S. F. R. Co.*, 49 Kan. 165, 30 Pac. Rep. 178.—FOLLOWING Chicago, K. & N. R. Co. v. Behney, 48 Kan. 47.

34. Expenses incurred and time and labor expended by plaintiff.—The plaintiff is entitled not only to compensation for the crop actually destroyed, but also to reasonable compensation for the time and labor necessarily expended in any ordinary and reasonable effort to protect his crop and to prevent further and additional damages thereto; but he ought not to be allowed compensation beyond the injury or loss that might have been occasioned had no such effort been made. *St. Louis & S. F. R. Co. v. Ritz*, 19 Am. & Eng. R. Cas. 611, 33 Kan. 404, 6 Pac. Rep. 533.—FOLLOWING *St. Louis & S. F. R. Co. v. Sharp*, 27 Kan. 134.—FOLLOWED IN *Missouri Pac. R. Co. v. Ricketts*, 45 Kan. 617.—*Smith v. Chicago, C. & D. R. Co.*, 38 Iowa 518.

In an action for damages caused by the neglect of a company operating a railroad which it owns or leases to keep the cattle-guards in repair at the place the track enters and leaves the inclosed or fenced land of the complaining party, that party has the right to include in his claim for damages the value of his services and that of his children in driving out and herding stock to prevent further and additional damages. *Missouri Pac. R. Co. v. Ricketts*, 45 Am. & Eng. R. Cas. 485, 45 Kan. 617, 26 Pac. Rep. 50.—FOLLOWING *St. Louis & S. F. R. Co. v. Sharp*, 27 Kan. 134; *St. Louis & S. F. R. Co. v. Ritz*, 33 Kan. 408.

CATTLE-PASSES.

Damages for failure to maintain, see DAMAGES, 62.

CATTLE-PENS.

Delivery of cattle in, see CARRIAGE OF LIVE STOCK, 16.

Duty to construct, sufficiency, etc., see CARRIAGE OF LIVE STOCK, 3, 16, 53.

Exposure of cattle in, during storm, see CARRIAGE OF LIVE STOCK, 40.

When deemed nuisances, see NUISANCE, 7.

CAUSE OF ACTION.

Against carrier, when single, see CARRIAGE OF MERCHANDISE, 692.

Amendment, adding new, see PLEADING, 148, 149.

Arising abroad, suing foreign corporation on, see FOREIGN CORPORATIONS, 18.

Demurrer for failure of complaint to state facts sufficient to constitute, see PLEADING, 67.

— misjoinder of, see PLEADING, 66.

For causing death, survival of, see DEATH BY WRONGFUL ACT, 3, 84.

How to be pleaded in equity, see PLEADING, 82.

Joinder of, see ACTIONS, 11-13; ANIMALS, INJURIES TO, 335, 336; PLEADING, 31.

— in complaint for causing death, see DEATH BY WRONGFUL ACT, 149.

— two or more in one count, see ANIMALS, INJURIES TO, 333.

Merger of, in judgment, see ANIMALS, INJURIES TO, 304.

Misjoinder of, see ELEVATED RAILWAYS, 99.

Multifariousness as to, see PLEADING, 84.

On appeal from justice's court, see ANIMALS, INJURIES TO, 633.

Rule requiring separate statement of, see PLEADING, 32.

Statement of, in actions for torts, see PLEADING, 20-31.

— — plaintiff's pleading, see PLEADING, 12-17.

Survival of, see ABATEMENT, 14, 15; EJECTMENT, 15.

What is assignable, see ASSIGNMENT, 2-9.

CENTRAL PACIFIC R. CO.

Land grants to, see LAND GRANTS, 63-69.

1. Relation, as debtor, to the general government.—The relation of creditor and debtor exists between the United States and the Central Pacific railroad company, under the act granting aid to the latter, with like force and effect as if both were natural persons, the relation being private and having nothing to do with the power of the government as sovereign. (Per Sawyer, J.) *In re Pacific R. Com.*, 31 Am. & Eng. R. Cas. 598, 12 Sawy. (U. S.) 559, 32 Fed. Rep. 241.

The company is a state corporation, not subject to federal control any further than a natural person similarly situated would be. (Per Sawyer, J.) *In re Pacific R. Co.*, 31 *Am. & Eng. R. Cas.* 598, 12 *Sawy. (U. S.)* 559, 32 *Fed. Rep.* 241.

The company is absolute owner of the lands and bonds granted to it by the government, having complied with the act making the grant subject to the lien of the government to secure its advances, in the same way and to the same extent as a natural person in like situation. (Per Sawyer, J.) *In re Pacific R. Co.*, 31 *Am. & Eng. R. Cas.* 598, 12 *Sawy. (U. S.)* 559, 32 *Fed. Rep.* 241.—QUOTING *United States v. Central Pac. R. Co.*, 118 *U. S.* 238; *Sinking-fund Cases*, 99 *U. S.* 700.

The United States, as creditor, cannot institute a compulsory investigation into the private affairs of the company, or require it to exhibit its books and papers for inspection in any other way or to any greater extent than would be lawful in the case of private creditors and debtors. (Per Sawyer, J.) *In re Pacific R. Co.*, 31 *Am. & Eng. R. Cas.* 598, 12 *Sawy. (U. S.)* 559, 32 *Fed. Rep.* 241.

The United States, as creditor, have the same remedy as a private creditor, and no other, to compel payment of any moneys due them from the company as their debtor, or to prevent the latter from wasting its assets before the debt matures; and that remedy, if any, must be by a regular judicial proceeding in due course of law, and congress has no power to institute a roving legislative inquisition into the affairs of the company to ascertain what it has done or is doing with its money. (Per Sawyer, J.) *In re Pacific R. Co.*, 31 *Am. & Eng. R. Cas.* 598, 12 *Sawy. (U. S.)* 559, 32 *Fed. Rep.* 241.

The United States have no interest in expenditures of the company under vouchers which have not been charged against the government in the accounts between them; and the Pacific railway commission, under the act of congress of March 3, 1887, has no power to investigate such expenditures against the will of the company and its officers. *In re Pacific R. Co.*, 31 *Am. & Eng. R. Cas.* 598, 12 *Sawy. (U. S.)* 559, 32 *Fed. Rep.* 241.

2. Subsidy bonds — Road, when deemed completed.—Under the act of congress of July 1, 1862, providing for a loan of government bonds to build the

Central Pacific railroad, and providing further that "after the road is completed" five per cent. of the net earnings of the road should be applied annually to the payment of the bonds and interest, the road was completed, for the purpose of such payment, when so reported by the president of the company and accepted by the president of the United States for the purpose of issuing the bonds, though the acceptance was provisional and security was required that all deficiencies should be supplied. *United States v. Central Pac. R. Co.*, 99 *U. S.* 449.—FOLLOWING *Union Pac. R. Co. v. United States*, 99 *U. S.* 402.

3. Power of congress to amend charter.—The act of congress of 1864, conferring additional powers on the Central Pacific railroad, and changing the conditions on which subsidy bonds were to be issued to it, reserved to congress the right to amend its charter. *Central Pac. R. Co. v. Gallatin*, 99 *U. S.* 700.

To the extent of the privileges, immunities, rights, and powers granted the Central Pacific railroad by the United States, congress retains the right of amendment, and in this way may regulate its affairs, so far as not inconsistent with the original state charter. And this applies also to the Western Pacific company, organized under the laws of California to construct, by assignment from the Central Pacific, the road between San José and Sacramento. *Central Pac. R. Co. v. Gallatin*, 99 *U. S.* 700.—FOLLOWED IN *Greenwood v. Union Freight R. Co.*, 105 *U. S.* 13. QUOTED IN *People v. O'Brien*, 36 *Am. & Eng. R. Cas.* 78, 111 *N. Y.* 1, 18 *N. E. Rep.* 692, 19 *N. Y. S. R.* 173.

4. Validity and operation of amendatory act of May 7, 1878.—The act of congress of May 7, 1878, amending the act of July 1, 1862, entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean," and establishing a sinking fund to which should be paid the money due the United States on its indemnity bonds to the road and the compensation for government service to be retained, is within the power of congress, and not in conflict with the original state charters granted the several divisions of said road. *Central Pac. R. Co. v. Gallatin*, 99 *U. S.* 700.—QUOTED IN *Buffalo E. S. R. Co. v. Buffalo St. R. Co.*, 111 *N. Y.* 132, 19 *N. E. Rep.* 63, 19 *N. Y. S. R.* 574.

Moneys expended by the Central Pacific railroad in betterments, whereby the road is increased in value, are not "current expenses," to be deducted from gross earnings in determining the net amount upon which a percentage shall be paid to the United States, under the requirements of the act of congress of May 7, 1878. *United States v. Central Pac. R. Co.*, 138 U. S. 84, 11 *Sup. Ct. Rep.* 285.

5. Transfer of franchises and privileges from Union Pacific.—All the rights, privileges, and franchises, including government land grants and subsidy bonds of the Union Pacific railroad, were, by the act of congress of 1862, conferred on the Central Pacific railroad, except its corporate existence, which it already possessed under the laws of California; and that state, by implication, assented to what was done by congress. *Central Pac. R. Co. v. Gallatin*, 99 U. S. 700.

6. Powers under statutes of California.—Under the Cal. act 1861, p. 608, allowing the company "generally to possess all the powers and privileges for the purpose of carrying on the business of the corporation that private individuals and natural persons now enjoy," the corporation has power, upon a sufficient consideration, to guarantee the payment of the bonds of another railroad company. (McKinstry, J., dissenting.) *Low v. California Pac. R. Co.*, 52 Cal. 53, 21 *Am. Ry. Rep.* 199.—APPLIED IN *Tod v. Kentucky Union Land Co.*, 57 Fed. Rep. 47.

CERTAINTY.

- In complaint for injury to passenger, see CARRIAGE OF PASSENGERS, 543.
- — — killing stock, see ANIMALS, INJURIES TO, 382.
- contracts sought to be specifically performed, see SPECIFIC PERFORMANCE, 3.
- What essential to validity of contract, see CONTRACTS, 49.
- necessary in denials in answer, see PLEADING, 56.
- requisite in bill of particulars, see BILLS OF PARTICULARS, 4.
- — — contracts for right of way, see EMINENT DOMAIN, 200, 201.
- — — description of premises conveyed, see DEEDS, 15, 16.
- — — description of land condemned in judgment, see EMINENT DOMAIN, 846.

CERTIFICATES

- Of clerk of election, see MUNICIPAL AND LOCAL AID, 132.
- consolidation, see CONSOLIDATION, 17.
- division of opinions, see FEDERAL COURTS, 22.
- engineer, as to work done, see CONSTRUCTION OF RAILWAYS, 59, 60.
- incorporation, see INCORPORATION, 10.
- indebtedness, priority of, over mortgages, see MORTGAGES, 90.
- receivers, see RECEIVERS, VII.
- stock, cancellation of, see EQUITY, 11.
- — — transfers of, see STOCK, V.
- trial judge, use of, on appeal, see APPEAL, ETC., 138.
- Official, weight of, as evidence, see EVIDENCE, 265.
- To be filed by foreign corporations, see FOREIGN CORPORATIONS, 14.

CERTIFICATES OF INDEBTEDNESS.

1. Power to issue.—A railroad company, chartered with power to build its road and to issue bonds to pay therefor, has implied power to issue to contractors, in payment for work done, negotiable certificates of indebtedness, payable in money or bonds; and on such certificates made payable on demand, a demand without days of grace is sufficient. *Pusey v. New Jersey W. L. R. Co.*, 14 *Abb. Pr. N. S. (N. Y.)* 434.

2. Validity and effect.—All of several issues of certificates in settlement of dividends on preferred stock were authorized by nearly, if not entirely, unanimous votes of the corporation, followed by votes of the directors. They were issued from time to time from 1872 to 1875, inclusive. The company never denied, but always recognized, their validity by its corporate action, the repeated votes of its stockholders and directors, the representations of its officers, authorized to issue them, and by the issuing of new bonds, even after the bringing of this suit, to take up the certificates. *Held*, that it was a ratification, and that the defendant was estopped from denying their validity. *Chaffee v. Rutland R. Co.*, 16 *Am. & Eng. R. Cas.* 408, 55 *Vt.* 110.

The last two issues of certificates did not contain the convertibility clause, but they had always been converted into bonds the same as the earlier numbers; and the president of the defendant—the officer who had charge of converting them—told the plaintiff,

before he purchased, that they were convertible into bonds, and showed him the stockholders' vote to that effect. *Held*, that they should be treated the same as the other certificates. *Chaffee v. Rutland R. Co.*, 16 *Am. & Eng. R. Cas.* 408, 55 *Vt.* 110.

The company cannot now deny the consideration in the certificates, having always treated them as though given in surrender of a dividend actually earned and warranted, and issued in settlement of dividends. *Chaffee v. Rutland R. Co.*, 16 *Am. & Eng. R. Cas.* 408, 55 *Vt.* 110.

3. Actions on.—When a railroad issues to its employes certificates of indebtedness, and is afterward garnished on account of such indebtedness, it will not be liable if the payees of the certificates have sold the same before the service of garnishee process, notwithstanding such certificates are not negotiable in law. *Cairo & St. L. R. Co. v. Killenbergh*, 82 *Ill.* 295.

Certificates in settlement of dividends on preferred stock ran to the holder, went on the market, were purchased by the plaintiff, and the defendant had always treated him as though an original holder, and the certificates as running to bearer. *Held*, that the plaintiff could sustain the action in his own name, and that it was not a question of negotiability, but how the defendant had treated the certificates, etc. *Chaffee v. Rutland R. Co.*, 16 *Am. & Eng. R. Cas.* 408, 55 *Vt.* 110.

4. Taxation of.—Certificates issued by a railway company, not for circulation, but as evidence of indebtedness to its employes, are not within the meaning of the act of congress of Feb. 8, 1875, and are not subject to the tax imposed thereby, notwithstanding the fact that the employes to whom they were issued may have used them to discharge their debts to others. *Philadelphia & R. R. Co. v. Pollock*, 17 *Phila. (Pa.)* 537.

CERTIFIED COPIES.

Of public records, as evidence, see EVIDENCE, 227.

CERTIORARI

In proceedings to lay out streets over railroads, see CROSSING OF STREETS AND HIGHWAYS, 73, 115.

— United States supreme court, see FEDERAL COURTS, 21.

Review of justices' decisions on, see JUSTICE OF THE PEACE, 21.

To review condemnation proceedings, see EMINENT DOMAIN, 958-961.

— municipal aid proceedings, see MUNICIPAL AND LOCAL AID, XIV.

— proceedings to obtain right to cross another road, see CROSSING OF RAILROADS, 37.

1. When the writ will lie, generally.—Excessive damages is good ground for granting a *certiorari* to bring up proceedings of commissioners in assessing damages against a railroad company. *Ex parte New Jersey R. Co.*, 16 *N. J. L.* 393.

There is a remedy at law by *certiorari* for the landowner, not only against essential irregularities in the proceedings of corporations under the general railroad law affecting their right to condemn, but also against an unwarranted invasion of his rights where the proceedings are otherwise valid, as where the attempt is made to take more land than the company is authorized to take; and the constitutionality of the law itself may be inquired into on *certiorari*. *Central R. Co. v. Pennsylvania R. Co.*, 31 *N. J. Eq.* 475; reversed on another point in 32 *N. J. Eq.* 755.

An abutter, owning to the middle of a street, can use the writ of *certiorari* to test the validity of an ordinance which purports to confer the power to place posts upon his land lying in the street. *State (Green, pros.) v. Trenton*, 54 *N. J. L.* 92, 23 *Atl. Rep.* 281.

An abutting owner can maintain a *certiorari* to review an ordinance changing the grade of a street in front of his property; and if the change of grade is justified only as part of an entire scheme he may question the legality of the scheme. *Read v. Camden*, 54 *N. J. L.* 347, 24 *Atl. Rep.* 549; reversing 53 *N. J. L.* 322.

Where a jury summoned under 8 & 9 Vict. c. 18, § 68, has taken into consideration, in awarding the landowner's compensation, a claim as to which the jury had no jurisdiction, *certiorari* lies, although such excess of jurisdiction does not appear upon the face of the proceedings; and such excess of jurisdiction may be shown by affidavits. *Penny v. South Eastern R. Co.*, 7 *El. & Bl.* 660, 3 *Jur. N. S.* 957, 26 *L. J. Q. B.* 225.

2. — and when not.—A writ of *certiorari* removing condemnation proceedings

to the supreme court will not be retained by the court where the questions raised are such as can be raised by *certiorari* or appeal after the inquest of damages, and the retention of the writ is likely to do injury by delaying the proceedings. *Detroit W. T. & J. R. Co. v. Backus*, 14 Am. & Eng. R. Cas. 404, 48 Mich. 582, 12 N. W. Rep. 861. *Baltimore & H. de G. Turnpike Co. v. Northern C. R. Co.*, 15 Md. 193.—FOLLOWED IN *Cumberland & P. R. Co. v. Pennsylvania R. Co.*, 10 Am. & Eng. R. Cas. 357, 57 Md. 267.

Questions, which do not go to the jurisdiction of the court, to entertain railroad condemnation proceedings, and which can as well be raised on appeal, should not be brought up by *certiorari*. *Grand Rapids, L. & D. R. Co. v. Weiden*, 69 Mich. 572, 14 West. Rep. 59, 37 N. W. Rep. 872.

An order of court appointing commissioners in a condemnation proceeding is merely interlocutory, from which no appeal or writ of error will lie, and is not a sufficient basis upon which to issue a writ of *certiorari*. *State ex rel. v. Edwards*, 104 Mo. 125, 16 S. W. Rep. 117.

A party is not entitled to have a *certiorari* on account of any matter of which he might have availed himself at the trial. Therefore a railroad company when sued before a justice for lost goods cannot bring the case up on *certiorari*, on an allegation that the goods have been delivered, without showing why such fact was not proven as a defense at the trial before the justice. *Houston & T. C. R. Co. v. Simon*, 2 Tex. App. (Civ. Cas.) 80.

3. Issuing to county commissioners.—*Certiorari* will not be granted to quash the proceedings of county commissioners in determining the amount of compensation to be paid by a street-railway company for extending their track over a bridge the title to which has become vested in the commonwealth by the expiration of the franchise of the corporation which built it, because at the hearing they cited towns interested in the subject to appear before them, and also listened to suggestions from private persons; especially if no objection thereto was made at the time of the hearing. *Salem & S. D. R. Co. v. Essex County Com'rs*, 9 Allen (Mass.) 563.

4. Issuing to county court.—The action of a county court in subscribing to railroad stock and issuing bonds therefor is discretionary and not judicial, and there-

fore not the subject of review by *certiorari* from the Missouri appellate court. *In re Saline County*, 45 Mo. 52.

5. Issuing to circuit court.—A writ of *certiorari* will not lie to review the finding of damages in eminent domain proceedings before a circuit judge, where there is no question involved except a charge that the judge was a stockholder in the company, and did not allow damages enough. *Doolittle v. Galena & C. U. R. Co.*, 14 Ill. 381.

6. Issuing to justices of the peace.—Where a case was twice tried by a jury in a justice's court, who returned the same verdict both times, and the verdict was fully sustained by the evidence, it was error for the court to set the second verdict aside on *certiorari*. *Turner v. Rome St. R. Co.*, 81 Ga. 336, 6 S. E. Rep. 690.—FOLLOWING *Windsor v. Cruise*, 79 Ga. 635.

Inasmuch as the liability of a corporation for committing a trespass depends upon the orders and directions of the company to commit or not the act complained of, a *certiorari* is not a proper remedy to review the judgment of a justice of the peace, in a case of trespass. *Chicago & R. I. R. Co. v. Fell*, 22 Ill. 333.

Where judgment has been entered by a justice against a defendant who was in default, but who, within twenty days, entered bail for an appeal which he neglected to bring into court, *certiorari* will not avail to set aside an execution subsequently issued, even though the service of the summons be shown by the record to have been defective. Taking the appeal amounts to a recognition that the case was regularly before the justice, and is a waiver of the defect which otherwise would have been fatal. *Jones v. Delaware & H. Canal Co.*, 10 Phila. (Pa.) 570.

Where judgments against a railroad company obtained before a justice of the peace are each below \$20, and therefore below the amount giving the county court jurisdiction on appeal, it is not competent for a company to take up several suits by one *certiorari* and move to consolidate the judgments so as to give the court jurisdiction. *Galveston, H. & S. A. R. Co. v. Ware*, 2 Tex. App. (Civ. Cas.) 312.

Eight several suits were instituted against a railroad company before a justice of the peace, and separate judgments entered. The company moved them all to the county court by one *certiorari*, giving but one bond,

Held, that a *certiorari* being but another mode of appeal, different suits could not be removed under the one writ and one bond. *Galveston, H. & S. A. R. Co. v. Ware*, 2 *Tex. App. (Civ. Cas.)* 312.

Certiorari will lie only when the petition shows a meritorious cause of action or defense, which could not have been availed of below. Where the reason given for not urging the defense below is, that appellant had no information of the nature of appellee's claim save such as could be obtained from an inspection of plaintiff's account filed in the justice court, and from that appellant was justified in believing that the claim was based upon the refusal of appellant to allow plaintiff to ride on its road by virtue of a ticket purchased in San Antonio; and, knowing that appellant had no claim agent in San Antonio for sale of tickets, appellant had no reason to suspect that appellee upon the trial would swear, as he did, that he purchased the ticket described in his account from an agent of the appellant, and said testimony was a surprise to appellant—*held*, not a good excuse, and that the *certiorari* was properly dismissed. *Gulf, C. & S. F. R. Co. v. Coleman*, 2 *Tex. Civ. App.* 548, 21 *S. W. Rep.* 936.

7. Jurisdiction of federal court to issue.—The U. S. circuit court has no jurisdiction of a *certiorari* to a state court for the removal of proceedings by the state against a railroad company under the Illinois act of May 2, 1873. *Illinois v. Chicago & A. R. Co.*, 6 *Biss. (U. S.)* 107.

8. Application for the writ.—A writ of *certiorari* in cases involving interference with important works ought not to be allowed unless applied for as soon as practicable; and if granted after the expiration of the twenty days allowed for an appeal in proceedings to condemn land, will not be sustained unless the delay in suing it out is satisfactorily explained. *Dunlap v. Toledo, A. A. & G. T. R. Co.*, 46 *Mich.* 190, 9 *N. W. Rep.* 249.

An affidavit for a writ of *certiorari* under N. Y. Laws 1880, ch. 269, to review an assessment, may be made by the superintendent of the relator, where the company has no "director or general officer residing in the county." *People ex rel. v. Cheetham*, 45 *Hun (N. Y.)* 6, 9 *N. Y. S. R.* 580, 20 *Abb. N. Cas.* 44.

The failure of relators—railroad corporations—to furnish a written statement to the

assessors of a town, as required by 1 N. Y. Rev. St. 414, § 2, on application for the writ of *certiorari* under the provisions of Laws 1880, ch. 269, to review an assessment, did not deprive relators of the right to review the determination of the assessors, but subjected them only to the penalty imposed by statute. *People ex rel. v. Cheetham*, 45 *Hun (N. Y.)* 6, 9 *N. Y. S. R.* 580, 20 *Abb. N. Cas.* 44. *People ex rel. v. Pitman*, 9 *N. Y. S. R.* 469, 45 *Hun* 588.

9. Who are the proper relators.—

A town is not the proper relator for the review of proceedings to bond it in aid of a railroad. The party entitled to a *certiorari* must have an interest in the proceedings that are intended to be reviewed by it. *People v. Morgan*, 65 *Barb. (N. Y.)* 473.

A petition was brought by residents of a town, who were legal voters and owners of real estate therein, for a writ of *certiorari* to quash the proceedings of the board of railroad commissioners approving the proposed relocation of two stations on the line of a railroad and their union in one station. *Held*, that the petition must be dismissed, because none of the petitioners were parties to the original proceedings before the board, and none of them showed such a state of facts as would entitle them to a private remedy if the action of the board was unauthorized or illegal. *Cunningham v. Railroad Com'rs*, 158 *Mass.* 104, 32 *N. E. Rep.* 959.

10. Return to the writ.—A proceeding to appropriate the right of way to a railroad company over lands alleged to belong to an unknown non-resident, which was regular upon its face, would not be set aside or interfered with upon the mere allegations of the petition in the *certiorari* proceeding, that the owner was known, not notified, etc., when such allegations were not supported by the return to the writ, nor by any proof contained in the record. *Everett v. Cedar Rapids & M. R. Co.*, 28 *Iowa* 417.

If the return shows affirmatively that, upon the facts found by assessors in a proceeding for bonding a town, the determination was correct, that is sufficient. It is not necessary for the assessors to state the number of taxpayers whose consents were adjudged to be valid, and how many were rejected as invalid. That detail, if admissible, can only be obtained by a further return. *People v. Morgan*, 65 *Barb. (N. Y.)* 473.

As N. Y. Laws 1880, ch. 269, providing for the review of assessments by *certiorari* were passed before and remained in force after Code Civ. Pro. § 2132, regulating the time within which a writ of *certiorari* must be made returnable, took effect, its provisions were, by virtue of the express provisions of §§ 2132, 2147 of said Code, in no way varied or affected by the adoption of said Code. *People ex rel. v. Low*, 40 Hun (N. Y.) 176.

11. What questions are raised for review.—*Certiorari* is a common-law writ, and can bring up for review only such facts as appear on the face of the record. Hence, where this writ is invoked against proceedings by the state board of equalization for the assessment of railroad property, inasmuch as the evidence below touching its value is not required to be preserved in the record, it cannot be examined, nor the appraisalment of the board, based thereon, disturbed by the supreme court. *Hannibal & St. J. R. Co. v. State Board of Equalization*, 64 Mo. 294.—FOLLOWED IN *House v. Clinton County Court*, 67 Mo. 522.

Upon *certiorari* to condemnation proceedings, the point that the statute is unconstitutional in authorizing the taking of land before compensation, is prematurely raised. *Grand Rapids, L. & D. R. Co. v. Weiden*, 69 Mich. 572, 14 West. Rep. 59, 37 N. W. Rep. 872.

On *certiorari* to the supreme court, in a proceeding to assess damages for land taken by a railroad, the court cannot look into the facts of the case. *Pennsylvania R. Co. v. Bruner*, 55 Pa. St. 318.—FOLLOWING *Reitenbaugh v. Chester Valley R. Co.*, 21 Pa. St. 100; *Ohio & P. R. Co. v. Bradford*, 19 Pa. St. 363.

12. Remanding case for rehearing.—Under the Georgia Code, § 4067, relating to the hearing of a *certiorari*, the superior court has the right to remand for a rehearing in the justice's court, where the case involves both law and facts, though there is no dispute as to the facts. So held, in an action for killing a cow by a railroad train. *Rome R. Co. v. Ransom*, 78 Ga. 705, 3 S. E. Rep. 626.

A suit against a railroad company for damages to personalty must, if error be found on *certiorari*, be remanded for a new trial. *Mitchell v. Western & A. R. Co.*, 66 Ga. 242.

CESTUI QUE TRUST.

Rights, generally, see TRUSTS AND TRUSTEES. When entitled to land damages, see EMINENT DOMAIN, 441.

CHALLENGES.

To jurors, in condemnation proceedings, see EMINENT DOMAIN, 541-544.
— on trial, generally, see TRIAL, IV.

CHAMPERTY; MAINTENANCE.

As ground of abatement, see ABATEMENT, 3. What constitutes, see also ATTORNEYS, 13, 14.

1. What contracts are champertous.*—An agreement by an attorney with one who has a claim against a railroad company for damages resulting from negligence to prosecute a suit therefor in the client's name, and to pay all expenses for a certain share of what might be recovered, is champertous, and the company, after the recovery of a judgment against them and pending an appeal, having settled the suit with the client without the knowledge of the attorney, and with knowledge of his interest, is fully released from all claim on his part, and the court will afford him no relief. (Brewer, J., dissenting.) *Atchison, T. & S. F. R. Co. v. Johnson*, 11 Am. & Eng. R. Cas. 1, 29 Kan. 218.

2. What contracts are not champertous.—An assignment of a claim for negligent injury, with an agreement to pay a part of the amount recovered to the assignor, is not champertous. *Vimont v. Chicago & N. W. R. Co.*, 13 Am. & Eng. R. Cas. 176, 19 Am. & Eng. R. Cas. 215, 64 Iowa 513, 21 N. W. Rep. 9.—FOLLOWED IN *Hawley v. Chicago, B. & Q. R. Co.*, 71 Iowa 717, 29 N. W. Rep. 877.

The formation of an association to secure a reasonable compensation for the unlawful killing or damaging of stock belonging to the members, and in case of refusal by the company to pay the same to appeal to the courts and jointly to pay all expenses of the litigation, including the fees of attorneys, is not champertous under Tenn. Code, § 2450. *Mobile & O. R. Co. v. Etheridge*, 16 Lea (Tenn.) 398.

* Law of champerty, see note, 11 AM. & ENG. R. CAS. 11.

Illegal contracts with attorneys, see note, 15 AM. & ENG. R. CAS. 382.

3. Champerty as a defense.—Where an attorney suing as "administrator," to recover for a death by wrongful act, under Mill. & V. Code Tenn., §§ 3130, 3134, makes a champertous agreement with the beneficiaries, it may be pleaded as a defense to the suit under sections 2445-2458, investing courts of law with equity powers for the purpose of discovering and preventing the offense of champerty. *Byrne v. Kansas City, Ft. S. & M. R. Co.*, 55 Fed. Rep. 44.

Whilst a champertous agreement between a plaintiff and his attorney for the prosecution of a certain suit is against public policy and void, it does not affect the right of the plaintiff to prosecute his action against the defendant in the suit, for the prosecution of which the champertous agreement was made. *Pennsylvania Co. v. Lombardo*, 49 Ohio St. 1, 29 N. E. Rep. 573.—QUOTING *Hilton v. Woods*, L. R. 4 Eq. Cas. 432. REVIEWING *Key v. Vattier*, 1 Ohio 132; *Weakly v. Hall*, 13 Ohio 167; *Stewart v. Welch*, 41 Ohio St. 483.

4. Maintenance.*—It is not maintenance for a person to purchase shares in a railway company for the purpose of instituting a suit to restrain the carrying out of an agreement alleged to be illegal. *Hare v. London & N. W. R. Co.*, 7 Jur. N. S. 1145, *Johns*, 722.

CHANGE.

In grade of street, damages to abutting owner for, see CROSSING OF STREETS AND HIGHWAYS, 119.

— location of farm crossings, see FARM CROSSINGS, 10.

— periods of limitation, by statutes, see LIMITATIONS OF ACTIONS, 16.

Of citizenship or domicile, see CITIZENSHIP, ETC., 5.

— destination of goods, evidence of, see CARRIAGE OF MERCHANDISE, 754.

— gauge, see CONSTRUCTION OF RAILWAYS, 7.

— grade of city street, see STREETS AND HIGHWAYS, III.

— — streets, ordinances for, see MUNICIPAL CORPORATIONS, 17.

— location of highway at point of crossing, see CROSSING OF STREETS AND HIGHWAYS, 27.

— motive power by consent of city, see ELECTRIC RAILWAYS, 8.

— name of railroad, see NAME OF RAILROAD, 1.

* As to the law of maintenance, see note, 11 AM. & ENG. R. CAS. 11.

— — road seeking municipal aid, see MUNICIPAL AND LOCAL AID, 205.

— place of trial of condemnation proceedings, see EMINENT DOMAIN, 540.

— plan of road, reassessment of damages on, see EMINENT DOMAIN, 472.

— remedy by statute, as ground of abatement, see ABATEMENT, 10.

— route, see LOCATION OF ROUTE, 17-24.

— charter provisions as to, see CHARTERS, 68.

— effect of on donation to railroad, see MUNICIPAL AND LOCAL AID, 204.

— — — liability of carrier, see CARRIAGE OF MERCHANDISE, 165.

— — — municipal subscription, see MUNICIPAL AND LOCAL AID, 151, 219.

— — — prior mortgage, see MORTGAGES, 45.

— new application for assessment of damages after, see EMINENT DOMAIN, 498.

— use, when a "taking" of land, see EMINENT DOMAIN, 157.

— — an additional servitude, see EMINENT DOMAIN, 163, 164.

— venue, see TRIAL, 11.

CHANGE BILLS.

1. General nature, and effect.—The ordinary dray ticket used in commercial cities as a mode of keeping accounts of drayage between the merchant and drayman is not a change bill, in the sense of the laws of this state forbidding the issuance and circulation of change bills. *State v. Fisk*, 3 Sneed (Tenn.) 695.

Change bills emitted on a pledge of a state railroad, its fixtures, property, and revenues for their redemption, and not exclusively on the faith of the state, are not bills of credit, within the meaning of the constitution of the United States. *Western & A. R. Co. v. Taylor*, 6 Heisk. (Tenn.) 408.

2. Enforcement of payment.—The emission of change bills being lawful in Georgia, their payment may be enforced in Tennessee. *Western & A. R. Co. v. Taylor*, 6 Heisk. (Tenn.) 408.

The holder of change bills, redeemable in current bank-notes, has the right to recover the value of current bank-bills in circulation at the place of presentation, at the time of presentation and protest, or at the beginning of suit, at his option, and is not restricted to the value of the bills of Georgia banks at such time and place. *Western & A. R. Co. v. Taylor*, 6 Heisk. (Tenn.) 408.

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CHARACTER.

Of action against elevated railway company,
see ELEVATED RAILWAYS, 62.

— deceased, evidence as to, see DEATH, ETC.,
276.

— to show due care, see DEATH BY WRONG-
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— injured person, evidence of, see EVIDENCE,
53.

— plaintiff, as affecting measure of damages,
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CHARGE OF COURT.

See INSTRUCTIONS.

CHARGES.

Against income, while road is in hands of
trustees, see MORTGAGES, 145.

Amount of, and lien therefor, see also EXPRESS
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Averment as to payment of, see CARRIAGE OF
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Canal tolls, see CANALS, 6, 7.

Carrier's lien for, on baggage, see BAGGAGE,
91-94.

Collection of, when does not imply contract
for through carriage, see CARRIAGE OF
MERCHANDISE, 608.

Condition as to payment of, by consignee,
before delivery, see BILLS OF LADING, 98.

Contract to pay, by agent of shipper, in ex-
cess of his authority, see CARRIAGE OF
MERCHANDISE, 386.

Costs in suits for overcharges, see COSTS,
10.

Deduction of, from recovery against carrier,
see CARRIAGE OF MERCHANDISE, 762.

Distress for collection for, see DISTRESS, 2.

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I. GENERALLY.

1. Implied contract to pay charges

—Where common carriers receive goods the ordinary course of their business to be carried from one place to another, in the absence of any special contract the law implies that they are to be paid the usual and customary compensation. *Newstadt v. Adams*, 5 Duer (N. Y.) 43.

In regard to the payment of freight, and the implication of a promise, intermediate consignees stand in the same attitude, as respects the carrier of the goods, as the ultimate consignees and owners assume. *Canfield v. Northern R. Co.*, 18 Barb. (N. Y.) 586.

**2. Express contract with manu-
facturer.**—Where a carrier agrees to transport articles at as low a rate as a road upon which plaintiff's manufactory is situated, if plaintiff will remove the manufactory to its line of road, it is liable in damages upon its failure to perform its agreement, plaintiff having removed the factory. *Louisville, N. A. & C. R. Co. v. Flanagan*, 32 Am. & Eng. R. Cas. 532, 113 Ind. 488, 12 West. Rep. 190, 14 N. E. Rep. 370.—ADHERED TO IN *Cleveland, C., C. & I. R. Co. v. Closser*, 126 Ind. 348.

3. Carrier cannot alienate its tolls.—A railway company cannot alienate the tolls to arise from any portion of its line. Such an agreement is *ultra vires* and contrary to public policy. *Shrewsbury & B. R. Co. v. London & N. W. R. Co.*, 4 De G., M. & G. 115, 17 Jur. 845, 22 L. J. Ch. 682.

II. LEGISLATIVE REGULATION.

1. By Charters or General Laws.

4. How far a charter is a contract, as to right to fix charges.—The state may limit the amount of charges for fares and freights, unless restrained by some contract in the charter, even though the company's income may have been pledged as security for the payment of obligations incurred upon the faith of the charter. *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 155, 16 Am. Ry. Rep. 169.—FOLLOWING *Munn v. Illinois*, 94 U. S. 113.—COMMENTED ON IN *Hardy v. Atchison, T. & S. F. R. Co.*, 18 Am. & Eng. R. Cas. 432, 32 Kan. 698. DISTINGUISHED IN *Illinois C. R. Co. v. Stone*, 18 Am. & Eng. R. Cas. 416, 20 Fed. Rep. 468. EXPLAINED IN *Carton v. Illinois C. R. Co.*, 6 Am. & Eng. R. Cas. 305, 59 Iowa 148; *Ruggles v. People*, 91 Ill. 256.

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FOLLOWED IN *Stone v. Farmers' L. & T. Co.*, 23 Am. & Eng. R. Cas. 577, 116 U. S. 307; *Peik v. Chicago & N. W. R. Co.*, 94 U. S. 164; *People v. Wabash, St. L. & P. R. Co.*, 7 Am. & Eng. R. Cas. 628, 104 Ill. 476; *Dow v. Beidelman*, 34 Am. & Eng. R. Cas. 322, 125 U. S. 680; *Winona & St. P. R. Co. v. Blake*, 94 U. S. 180. NOT FOLLOWED IN *Thomas v. Wabash, St. L. & P. R. Co.*, 40 Fed. Rep. 126, 7 L. R. A. 145. QUOTED IN *Wisconsin C. R. Co. v. Taylor County*, 1 Am. & Eng. R. Cas. 532, 52 Wis. 37; *Storrs v. Pensacola & A. R. Co.*, 29 Fla. 617. REVIEWED IN *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557.—*Beckman v. Saratoga & S. R. Co.*, 3 Paige (N. Y.) 45.—QUOTED IN *Blake v. Winona & St. P. R. Co.*, 19 Minn. 418 (Gil. 362).

A state may limit railroad charges within the state unless it has surrendered that right by some positive charter contract, and unless the act of regulation comes within the laws of the United States regulating interstate commerce. *Stone v. Farmers' L. & T. Co.*, 23 Am. & Eng. R. Cas. 577, 116 U. S. 307, 6 Sup. Ct. Rep. 334, 388, 1191.—FOLLOWING *Baltimore & O. R. Co. v. Maryland*, 21 Wall. (U. S.) 456; *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 155; *Peik v. Chicago & N. W. R. Co.*, 94 U. S. 164; *Winona & St. P. R. Co. v. Blake*, 94 U. S. 180; *Ruggles v. Illinois*, 108 U. S. 531.—APPLIED IN *Mercantile Trust Co. v. Texas & P. R. Co.*, 50 Am. & Eng. R. Cas. 559, 51 Fed. Rep. 529. FOLLOWED IN *Chicago, St. P., M. & O. R. Co. v. Becker*, 35 Fed. Rep. 883.—*Georgia R. & B. Co. v. Smith*, 35 Am. & Eng. R. Cas. 511, 128 U. S. 174, 9 Sup. Ct. Rep. 47.—FOLLOWING *Stone v. Farmers' L. & T. Co.*, 116 U. S. 307; *Dow v. Beidelman*, 125 U. S. 680.—DISTINGUISHED IN *Richmond & D. R. Co. v. Trammel*, 53 Fed. Rep. 196. QUOTED IN *Storrs v. Pensacola & A. R. Co.*, 29 Fla. 617.

A charter provision that "the board of directors shall have power to establish such rates of toll for the conveyance of persons or property upon the same as they shall from time to time by their by-laws determine, and to levy and collect the same for the use of the said company," when taken in connection with a proviso that all by-laws, rules, and regulations of the company "shall not be repugnant to the constitution and laws of the United States or of this state," will not amount to an undertaking on the part of the state which will prevent

it from fixing by statute a maximum of such rates of toll. *Ruggles v. Illinois*, 11 Am. & Eng. R. Cas. 49, 108 U. S. 526, 2 Sup. Ct. Rep. 832.—FOLLOWED IN *Stone v. Farmers' L. & T. Co.*, 23 Am. & Eng. R. Cas. 577, 116 U. S. 307; *Illinois C. R. Co. v. Illinois*, 108 U. S. 541.

The right to fix and regulate the rates to be charged for the transportation of persons and property is not incidental to the police power of the state, and an act making it lawful for a railroad company to fix and regulate its own charges is a contract whose obligation the legislature cannot impair by regulation of such rates. *Illinois C. R. Co. v. Stone*, 18 Am. & Eng. R. Cas. 416, 20 Fed. Rep. 468, *Stone v. Yazoo & M. V. R. Co.*, 21 Am. & Eng. R. Cas. 6, 62 Miss. 607, 52 Am. Rep. 193.—DISTINGUISHED IN *Mobile and O. R. Co. v. Sessions*, 28 Fed. Rep. 592.

A grant to a railroad company, in general terms, of authority to fix its rates of compensation is not a renunciation of legislative power to secure reasonable rates. Every presumption is against such renunciation. But where it is clear that the legislature intended to partially renounce such control by conferring upon the company the right to fix its rates within limits, the fixing of such limits in the charter is a specification of what will be a reasonable exercise of the authority conferred, and is to that extent a renunciation of the state's control. *Stone v. Yazoo & M. V. R. Co.*, 21 Am. & Eng. R. Cas. 6, 62 Miss. 607, 52 Am. Rep. 193.

A railway corporation formed under the general incorporation act of Oregon has a vested right to collect and receive a reasonable compensation for the transportation of persons and property over its road which the legislature cannot impair or destroy. *Ex parte Koehler*, 21 Am. & Eng. R. Cas. 52, 23 Fed. Rep. 529.—FOLLOWING *Wells v. Oregon R. & N. Co.*, 8 Sawy. (U. S.) 614, 15 Fed. Rep. 561.

Under the present constitution of Arkansas (art. 12, §§ 6-11) the general assembly may alter or repeal any general law regulating the rates of charges for the carriage of passengers without impairing the obligation of any contract; in such manner, however, that no injustice shall be done to the corporations. *St. Louis & S. F. R. Co. v. Gill*, 47 Am. & Eng. R. Cas. 462, 54 Ark. 101, 15 S. W. Rep. 18.

Conceding that the charters of railroads

are contracts, the constitutional power of the legislature to prohibit unjust discrimination in freights still exists, and rests in the right of the legislature to prescribe the methods by which to enforce a common-law duty that such companies voluntarily assume when they exercise the functions of a common carrier. Such legislation is in no respect a violation of their charters. *Chicago & A. R. Co. v. People ex rel.*, 67 Ill. 11, 2 Am. Ry. Rep. 242.

The legislature may at all times regulate the exercise of a railroad franchise by general laws passed for the peace, good order, health, comfort, and welfare of society; but it cannot, under the color of such laws, destroy or impair the franchise or any right or power essential to its beneficial exercise. And the power granted to a railroad company to adjust its tariff of charges is one essential to the enjoyment of its franchise. But on the other hand, regardless of legislation, the company will be responsible for its breach of duty as a common carrier in charging exorbitant freights or making unjust discriminations. *Sloan v. Pacific R. Co.*, 61 Mo. 24.

The provision in the twelfth section of the general railroad act of Ohio, of February 11, 1848 (S. & C. 273), that no reduction shall be made in the rates of fare and charges for freight allowed to companies organized under said act, unless where their net profit for the previous ten years amounts to ten per cent. on their capital, is in the nature of a contract and binding on the state; and railroad companies organized under said act, before the adoption of the constitution of 1851, and who have not relinquished their right to be governed by said act, and had not realized a net profit of ten per cent. on their capital for the ten years next preceding the passage of the act of March 30, 1875 (72 Ohio L. 142), are not bound by provisions of the latter act reducing their rates of fare or freight below those allowed by section 12 of said act of 1848. *Iron R. Co. v. Lawrence Furnace Co.*, 29 Ohio St. 208.

5. Effect of certain charter restrictions.—The restrictions as to rates contained in the sixteenth section of the charter of the Camden and A. R. & T. Co. extends to the whole route from Philadelphia to New York, as well upon the water as upon the railroad. *Camden & A. R. & T. Co. v. Briggs*, 22 N. J. L. 623; affirming 21 N. J. L. 406.

The charter of a railroad company provided "that the toll on any species of property shall not exceed an average of four cents per ton per mile, nor upon each passenger an average of two cents per mile." *Held*, that the company might charge for transportation in addition to the toll. The word "toll" meant a sum paid by individuals for the right of passage or transportation over the road in their own cars. *Boyle v. Philadelphia & R. R. Co.*, 54 Pa. St. 310.—QUOTED IN *Commonwealth v. New York, P. & O. R. Co.*, 48 Am. & Eng. R. Cas. 633, 145 Pa. St. 200, 22 Atl. Rep. 806.

A railroad charter provided that the maximum charges for toll and transportation shall not exceed four cents per ton per mile for freight. A subsequent act amended the proviso so as to read "average charges for toll and transportation." *Held*, that the company might impose more than four cents per mile on some charges, so that by making others less the general average should not exceed four cents. *Hersh v. Northern C. R. Co.*, 74 Pa. St. 181, 6 Am. Ry. Rep. 531.—APPROVED IN *Ragan v. Aiken*, 9 Am. & Eng. R. Cas. 201, 9 Lea (Tenn.) 609.

The charges against plaintiff, averaged by the whole amount of business of the company, were less than 4 per cent.; by that done for him alone they were more than 5 per cent. *Held*, that the former was the proper estimate and that the charges were not excessive. *Hersh v. Northern C. R. Co.*, 74 Pa. St. 181, 6 Am. Ry. Rep. 531.

A charter prescribed a maximum rate for the transportation of heavy articles by the hundred pounds, and of articles of measurement by the cubic foot, without further definition in the act itself. *Held*, that whether cotton in bales should be charged as a heavy article or as an article of measurement depended upon the meaning of those terms as used in the charter, to be ascertained by proof of the custom prevailing at the time of the passage of the act. *Bonham v. Charlotte, C. & A. R. Co.*, 3 Am. & Eng. R. Cas. 302, 13 So. Car. 267.

6. Power of state to regulate charges by statutes.*—The legislature may prescribe rates of transportation and the same will be presumed to be reasonable

* Power of legislature to control railroads in fixing rates and fares, see notes, 35 AM. & ENG. R. CAS. 518; 49 *Id.* 7; 3 L. R. A. 661.

until the contrary is shown; but the judiciary are the final judges of what is reasonable or what "impairs" the vested right of the corporation to a reasonable compensation for its services. *Ex parte Koehler*, 21 *Am. & Eng. R. Cas.* 52, 23 *Fed. Rep.* 529.

A state has the power to regulate railroad charges for transit of persons and property within the state, and the fact that the exercise of such power might affect the value of the railroad's property and franchises cannot touch the question of the power. *Piek v. Chicago & N. W. R. Co.*, 6 *Biss. (U. S.)* 177.

The powers of government are not lost by non-user. Thus, the fact that a state legislature does not exercise a reserved power of regulating the tolls charged by a railroad company, for twenty years after granting the charter, does not impair the power. *Chicago, B. & Q. R. Co. v. Iowa*, 94 *U. S.* 155, 16 *Am. Ry. Rep.* 169.

The new constitution of Illinois, art. 11, § 15, which provides that "the general assembly shall pass laws to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different roads," is a recognition of the fact that there may be discriminations which are not unjust; and by implication it restrains the power of the legislature to a prohibition of those which are unjust. *Chicago & A. R. Co. v. People ex rel.*, 67 *Ill.* 11, 2 *Am. Ry. Rep.* 242.

Railroad companies are common carriers engaged in a public employment affecting the public interest, and are subject to legislative control as to their rates of fare and freight just as any natural person, who is a common carrier, is subject to legislative control. *Laurel Fork & S. H. R. Co. v. West Virginia Transp. Co.*, 25 *W. Va.* 324.

The right to regulate and fix at their pleasure the charges of railroad companies for transportation of freight and passengers is one of the powers of the state inherent in every sovereignty, to be exercised by the legislature from time to time at its pleasure; and therefore one legislature cannot by a charter granted to a railroad company, though it be for valuable consideration, confer on a railroad company a right to charge certain fixed rates for the transportation of freight and passengers, and stipulate that this rate of charge shall not be changed by future legislatures. If that be done, it will not be regarded as a contract, but in

legal effect as nothing more than a license to enjoy this privilege conferred on the corporation for a time, subject to future legislative or constitutional control. *Laurel Fork & S. H. R. Co. v. West Virginia Transp. Co.*, 25 *W. Va.* 324.

7. Rules of construction of such statutes.—Statutes authorizing railway companies to levy charges upon the public must, in case of ambiguity, be construed favorably for the public. *Stockton & D. R. Co. v. Barrett*, 11 *C. & F.* 598, 8 *Scott N. R.* 641, 7 *M. & G.* 870. *Barrett v. Stockton & D. R. Co.*, 2 *M. & G.* 134, 2 *Scott N. R.* 337, 11 *C. & F.* 590.

A consolidated railway company cannot complain of the injustice of an act regulating railway passenger tolls because of its effect upon one of its constituent roads. The operation of the act must be judged by its effects on the net earnings of the entire road. *St. Louis & S. F. R. Co. v. Gill*, 47 *Am. & Eng. R. Cas.* 462, 54 *Ark.* 101, 15 *S. W. Rep.* 18.

An act classifying railroads according to their length and providing a schedule of passenger tolls for each class must be judged, as to its effect upon any given class, by its effect upon railroads of that class operated under usual or ordinary conditions. *St. Louis & S. F. R. Co. v. Gill*, 47 *Am. & Eng. R. Cas.* 462, 54 *Ark.* 101, 15 *S. W. Rep.* 18.

The provision of the act of 1848, that the reduction of the rates shall not be such "as to reduce the future probable profits below said per centum," does not make it a condition to the validity of the reduction that the future profits shall in fact equal that sum. While that provision enjoins upon the legislative body the duty of exercising its deliberate judgment upon the facts before it in regard to the probable future profits, it will be presumed that in the enactment of legislation on the subject that body has properly and in good faith performed the duty and regulated the rates accordingly. *Iron R. Co. v. Lawrence Furnace Co.*, 54 *Am. & Eng. R. Cas.* 475, 49 *Ohio St.* 102, 30 *N. E. Rep.* 616.

8. Constitutionality of statutes.*—So much of Ala. act of 1873, p. 62, entitled "An act regulating the charges of transpor-

* Freight charges; constitutionality of statutes regulating, see notes, 21 *AM. & ENG. R. CAS.* 50; 19 *Id.* 486.

tation of freight upon railroads," as relates to the transportation of passengers is unconstitutional, not being mentioned in the title. *Evans v. Memphis & C. R. Co.*, 56 Ala. 246, 18 Am. Ry. Rep. 350.

Under the act incorporating the C. C. R. R. Co., the legislature may prescribe rates for the carriage of freight and passengers by said company, without violating constitutional provisions. *In re Senate Bill No. 69*, 15 Colo. 601, 26 Pac. Rep. 157.

An act of the legislature which forbids any discriminations whatever, whether just or unjust, in charges for transporting the same class of freight over equal distances, even though moving in opposite directions, and does not permit the companies to show that the discrimination is not unjust, is in violation of the spirit of the constitutional provisions for the protection of life, liberty, and property, and which guarantees the right of trial by jury, and which gives the right in all criminal prosecutions to appear and defend in person and by counsel. *Chicago & A. R. Co. v. People ex rel.*, 67 Ill. 11, 2 Am. Ry. Rep. 242.

An act of the legislature making any discrimination in charges for freight a penal offense, and providing for a forfeiture of franchises for any wilful violation of the act, without any other penalty for the first offense, is in violation of the constitutional provision which requires all penalties to be proportioned to the nature of the offense, and also of Ill. Const. art. 11, § 15, under which a law is framed which only authorizes the penalty to extend to forfeiture of franchises and property, "when necessary for that purpose." *Chicago & A. R. Co. v. People ex rel.*, 67 Ill. 11, 2 Am. Ry. Rep. 242.

Ill. act of April 15, 1871, entitled "an act to establish a reasonable maximum rate of charges for the transportation of passengers on railroads in this state," is constitutional, and does not impair a charter previously given to a railroad company where its directors were given the power to fix the rates of toll and to alter the same. *Ruggles v. People*, 91 Ill. 256.—EXPLAINING *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 155. QUOTING *Shields v. Ohio*, 95 U. S. 319.—*American Coal Co. v. Consolidation Coal Co.*, 46 Md. 15.

Ill. act of May 2, 1873, to prevent extortion and unjust discrimination by railroads, is constitutional, and is not in violation of

the contract between the state and the railroad companies, growing out of granting and accepting their charters containing power to establish such rates of toll for the conveyance of persons and property as they shall, from time to time, direct and determine in the by-laws. *Illinois C. R. Co. v. People*, 1 Am. & Eng. R. Cas. 188, 95 Ill. 313.—REVIEWED IN *St. Louis, A. & T. H. R. Co. v. Hill*, 14 Ill. App. 579.

A law fixing a maximum rate of toll for carriage of passengers and freight on all railroads in the state is, as to a company whose charter does not expressly grant it authority to charge any toll for such services, constitutional. *Blake v. Winona & St. P. R. Co.*, 19 Minn. 418 (Gil. 362).—QUOTING *Beekman v. Saratoga & S. R. Co.*, 3 Paige (N. Y.) 45.—FOLLOWED IN *State v. Winona & St. P. R. Co.*, 19 Minn. 434 (Gil. 377).—*Chicago, M. & St. P. R. Co. v. Ackley*, 94 U. S. 179, 16 Am. Ry. Rep. 176.—FOLLOWING *Peik v. Chicago & N. W. R. Co.*, 94 U. S. 164.

Miss. statute of March 11, 1884, "to provide for the regulation of freight and passenger rates on roads in the state," impairs no contract between the state and the Mobile and Ohio railroad, contained in the charter of the company; nor does the statute deny to the company the equal protection of the law, nor deprive it of its property without due process of law, within the meaning of the 14th amendment to the U. S. constitution. *Stone v. Farmers' L. & T. Co.*, 23 Am. & Eng. R. Cas. 577, 116 U. S. 307, 6 Sup. Ct. Rep. 334, 388, 1191.—FOLLOWED IN *Georgia R. & B. Co. v. Smith*, 128 U. S. 174.

Said statute is not in conflict with the state constitution, as an attempt to confer both legislative and judicial powers on the railroad commission created thereby. *Stone v. Farmers' L. & T. Co.*, 23 Am. & Eng. R. Cas. 577, 116 U. S. 307, 6 Sup. Ct. Rep. 334, 388, 1191.—FOLLOWING *Stone v. Yazoo & M. V. R. Co.*, 62 Miss. 607; *Stone v. Natchez, J. & C. R. Co.*, 62 Miss. 646.—EXPLAINED IN *Wellman v. Chicago & G. T. R. Co.*, 83 Mich. 592.

Where certain rates of fare and toll are fixed by the charter a subsequent act, inflicting severe penalties on the company for exceeding the charter rates, is no violation of the contract of the charter, and is not unconstitutional as an *ex post facto* law. *Camden & A. R. & T. Co. v. Briggs*,

22 *N. J. L.* 623; *affirming* 21 *N. J. L.* 406.

W. Va. Acts 1872-73, ch. 227, establishing a reasonable maximum rate of charges for the transportation of passengers and freight, is within the constitutional power of the legislature, and to be applicable to all railroads in the state, whether their charters were granted before or since its passage, and notwithstanding provisions in the charters authorizing the roads to charge a fixed rate declared to be irreducible by the legislature. *Laurel Fork & S. H. R. Co. v. West Virginia Transp. Co.*, 25 *W. Va.* 324.

9. When carrier is subject to regulation.—Common carriers exercise a quasi public office and are subject to legislative control. *Whitehead v. Wilmington & W. R. Co.*, 9 *Am. & Eng. R. Cas.* 168, 87 *N. Car.* 255.

If a railroad is made absolutely open to every one who chooses to ride and transport goods upon it, it is to be deemed as constructed for a public purpose, notwithstanding the government may allow a private corporation to own and operate it, and to receive compensation therefor, provided it is a road for which the government exercises the right of eminent domain, and retains the right to limit or restrict the compensation for freight and fare. *Leavenworth County Com'rs v. Miller*, 7 *Kan.* 479, 1 *Am. Ry. Rep.* 259.—*QUOTING* *Swan v. Williams*, 2 *Mich.* 427; *Miners' Ditch Co. v. Zellerbach*, 37 *Cal.* 543; *Osbourn v. United States Bank*, 9 *Wheat.* (U. S.) 738; *Talbot v. Hudson*, 16 *Gray* (Mass.) 423; *People v. Salem*, 20 *Mich.* 485; *Aurora v. West*, 9 *Ind.* 74.

A railroad corporation organized under the laws of Missouri subsequent to the going into effect of the present constitution and the laws passed thereunder classifying and regulating the charges of railroads for carriage of freight, is subject to the provisions of such constitution and laws. It cannot claim exemption therefrom on the ground that it has purchased the privileges and franchises of a railroad corporation whose existence antedates that of the constitution and said laws. *Owen v. St. Louis & S. F. R. Co.*, 25 *Am. & Eng. R. Cas.* 371, 83 *Mo.* 454.

In an action *qui tam*, etc., against the Erie railway company for taking unlawful tolls on parts of their lines within New Jer-

sey, the company may properly be considered as a corporation of the state, and amenable as such to the provisions of the act of March 17th, 1870, respecting unlawful tolls. *McGregor v. Erie R. Co.*, 35 *N. J. L.* 115.—*REVIEWED IN* *Pennsylvania R. Co. v. People*, 31 *Ohio St.* 537.

Whether or not a corporation owning a railroad in Wisconsin would have a right to take tolls as an attribute of ownership, without any franchises to do so, still, where it has accepted a franchise to take tolls, it must be held to take the right under the grant and subject to the power of the legislature to alter the same. *Attorney-General v. Chicago & N. W. R. Co.*, 35 *Wis.* 425.

Those provisions of ch. 273, Laws of 1874, which limit the tolls chargeable by the Chicago and Northwestern railway company and the Chicago, Milwaukee and St. Paul railway company, upon their lines of railway within the state, are valid, and are applicable to the road of the last-named company, extending from Milwaukee to Prairie du Chien, which it owns as successor to the property and franchises of the "Milwaukee and Waukesha railroad company." But this decision relates only to cases where the transportation is wholly within this state. As to commerce between states, nothing is decided. *Attorney-General v. Chicago & N. W. R. Co.*, 35 *Wis.* 425.

Where a railway company is given absolute power by act of parliament to fix charges, this power is not rendered conditional by a subsequent clause requiring all the charges made to be equal. The condition only attaches after the power has been exercised. *Great Western R. Co. v. Sutton*, *L. R.* 4 *H. L. Cas.* 226, 38 *L. J. Ex.* 177, 18 *W. R.* 92.

10. Effect of statutory restrictions.—The repeal by Ala. Acts 1875, p. 269, of the act providing for state aid to railroads, does not release them from the restraints imposed by section 15 as to tolls, etc. The penalties imposed by Acts 1873, p. 62, are not repealed by Acts 1875, p. 243. *Mobile & M. R. Co. v. Steiner*, 61 *Ala.* 559.—*DISAPPROVING* *Potomac Coal Co. v. Cumberland & P. R. Co.*, 38 *Md.* 226. *QUOTING* *Chicago & A. R. Co. v. Chicago, V. & W. Coal Co.*, 79 *Ill.* 121, *Parker v. Great Western R. Co.*, 7 *M. & G.* 253.

The act of the general assembly of Arkansas, approved February 27, 1885, prohibiting the collecting of freight in excess of that

specified in the bill of lading, was not intended to give validity to stipulations in bills of lading which are the result of fraud or mistake. *Baird v. St. Louis, I. M. & S. R. Co.*, 42 Am. & Eng. R. Cas. 281, 41 Fed. Rep. 592.

The N. Y. Railroad Act of 1850, ch. 140, fixes no tariff or freight rate. This is a subject of contract solely. The agreement to carry is a consideration for the agreement to pay the freight. The liability to pay freight is the consideration for the agreement to carry. The parties may fix such reasonable rates as they may agree upon, and they may make such limitations to the liability of the carrier as they think proper. *Nelson v. Hudson River R. Co.*, 48 N. Y. 498, 2 Am. Ry. Rep. 305.—DISTINGUISHED IN *Lamb v. Camden & A. R. Co.*, 4 Daly (N. Y.) 483. REVIEWED IN *Witting v. St. Louis & S. F. R. Co.*, 28 Mo. App. 103.

By the phrase "its capital," in the proviso of § 12 of the Ohio act of Feb. 11, 1848 (1 S. & C. 271), is meant the capital stock of the company; and railroad companies incorporated under that act, or by a special act which confers upon the company the powers and makes it subject to the restrictions and provisions of that act, whose net profits on an average of the ten years next previous to the passage of the act of March 30, 1875 (72 O. L. 143), amounted to a sum equal to ten per centum per annum upon the actual capital stock of the company, are bound by the provisions of the last-named act reducing the rates which may be charged for the transportation of persons or property upon the road of such company. *Iron R. Co. v. Lawrence Furnace Co.*, 54 Am. & Eng. R. Cas. 475, 49 Ohio St. 102, 30 N. E. Rep. 616.

An issue of additional stock, while the act of March 30, 1875, was in force, for amounts ascertained by computing interest on the original subscription, will not take the company out of the operation of the statute, although for the year in which it was issued the net profits of the company were not equal to ten per cent. of the aggregate amount of the capital stock and such new issue. *Iron R. Co. v. Lawrence Furnace Co.*, 54 Am. & Eng. R. Cas. 475, 49 Ohio St. 102, 30 N. E. Rep. 616.

A letter from the agent of a railroad to certain shippers contained the following statement of rates: "The rate on iron from Rising Fawn to Chattanooga shall be, six

dollars to Chattanooga and five dollars to any point beyond the Nashville, Chattanooga and St. Louis railroad per load of 2268 pounds." Held, that the reasonable construction of this contract was that the rate should be six dollars per car load when shipped from Rising Fawn only to Chattanooga, and five dollars when shipped to any point beyond Chattanooga. The low rate did not apply to iron shipped at Chattanooga. *Alabama G. S. R. Co. v. Cureton*, 68 Ga. 824.

The charter of a railroad provided that individuals might place cars on the road, and on goods that the company might charge "any sum not exceeding four cents per ton per mile for toll, and three cents per ton per mile for transportation." Held, that the company might charge the aggregate of the two sums, or seven cents per ton per mile. *Cumberland Valley R. Co.'s Appeal*, 62 Pa. St. 218.

Section 90 of the Railways Clauses Consolidation Act 1845, which provides that all tolls charged by a railway company shall be at all times charged equally to all persons, and after the same rate, in respect of all goods of the same description, passing only over the same portion of the line of railway under the same circumstances, and that no reduction or advance in any such tolls shall be made directly or indirectly in favor of or against any particular company or person traveling upon or using the railway, does not prevent the company from making a special charge for goods carried over their railway, in pursuance of a traffic agreement with another company under section 87 of the act. *Hull, B. & W. R. J. R. & D. Co. v. Yorkshire & D. C. & I. Co.*, 30 Am. & Eng. R. Cas. 84, 18 Q. B. D. 761.

11. Texas acts making an overcharge penal.—A statute prescribing a penalty for an overcharge on freight does not operate as to packages weighing less than 100 pounds—that amount being the unit of weight fixed by the statute. *Gulf, C. & S. F. R. Co. v. Lamkin*, 23 Am. & Eng. R. Cas. 652, 3 Tex. App. (Civ. Cas.) 106.—FOLLOWING *Murray v. Gulf, C. & S. F. R. Co.*, 22 Am. & Eng. R. Cas. 464, 63 Tex. 407.

The statute providing a penalty for an overcharge in freight is not repealed by the act of April 10, 1883. *Gulf, C. & S. F. R. Co. v. Lamkin*, 23 Am. & Eng. R. Cas. 652, 3 Tex. App. (Civ. Cas.) 106.

Tex. Rev. St. arts. 4256, 4257, establishing reasonable maximum rates to be charged by railroad companies for passengers and freights, do not apply to express matter and messengers. *Texas Exp. Co. v. Texas & P. R. Co.*, 4 Woods (U. S.) 370, 6 Fed. Rep. 426.

12. Power of state to regulate charges as affected by interstate commerce law.—The provisions of Ill. Rev. St. 1874, p. 817, § 87, imposing a penalty upon railroad companies in case of unjust discrimination in rates for the carriage of freight, applies to all railroad companies within the state, whether organized there or in some other state, and moreover applies to all cases where freight is transported from points within to points without the state, or from points without to points within the state. *People v. Wabash, St. L. & P. R. Co.*, 7 Am. & Eng. R. Cas. 628, 104 Ill. 476.

The provisions of said section are not in conflict with article 1, section 8 of the constitution of the United States. *People v. Wabash, St. L. & P. R. Co.*, 7 Am. & Eng. R. Cas. 628, 104 Ill. 476.—FOLLOWING *Peik v. Chicago & N. W. R. Co.*, 94 U. S. 164; *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 155. QUOTING *Hall v. De Cuir*, 95 U. S. 487.—CRITICISED IN *Hardy v. Atchison, T. & S. F. R. Co.*, 18 Am. & Eng. R. Cas. 432, 32 Kan. 698. FOLLOWED IN *Wabash, St. L. & P. R. Co. v. People*, 105 Ill. 236, 106 Ill. 652; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557. QUOTED IN *Providence Coal Co. v. Providence & W. R. Co.*, 26 Am. & Eng. R. Cas. 42, 15 R. I. 303.

In the absence of any showing to the contrary, a single and entire contract to carry freight for a gross sum from a point in this state to a point in another state necessarily implies that such sum is charged proportionately for the carriage on every part of the entire distance; and charging a greater sum by a railroad company for freight to a point in another state from a point in this state is an unjust discrimination, prohibited by the statute, where it is not shown that such inequality in the charges is all for carriage entirely beyond the limits of this state. *Wabash, St. L. & P. R. Co. v. People*, 12 Am. & Eng. R. Cas. 10, 106 Ill. 652.

Iowa Act of 1862, ch. 169, § 2, is not in conflict with article 1, section 8 of the constitution of the United States, on the ground that it infringes on the right of con-

gress to regulate commerce between the several states. Such acts are in the nature of police regulations—indisputably within the legislative power of the state. *Fuller v. Chicago & N. W. R. Co.*, 31 Iowa 187, 1 Am. Ry. Rep. 383.

The state has the power, originally, to prescribe for a railroad company created by it the rates of compensation to be charged by the company for carrying passengers and freights within its borders; and any exercise of this power which does not hinder or burden interstate commerce or obstruct the freedom thereof by discriminating against persons or property of other states is not a violation of article 1, section 8 of the constitution of the United States, which vests in congress the power "to regulate commerce among the states." *Stone v. Yazoo & M. V. R. Co.*, 21 Am. & Eng. R. Cas. 6, 62 Miss. 607, 52 Am. Rep. 193.—REVIEWING *Baltimore & O. R. Co. v. Maryland*, 21 Wall. (U. S.) 456; *Peik v. Chicago & N. W. R. Co.*, 94 U. S. 164.

The Chicago and Northwestern railway company was, by its charter, and the charters of other companies consolidated with it, authorized "to demand and receive such sum or sums of money for the transportation of persons and property, and for storage of property, as it shall deem reasonable." The constitution of Wisconsin in force when the charters were granted provides that all acts for the creation of corporations within the state "may be altered or repealed by the legislature at any time after their passage." Held, that the legislature had power to prescribe a maximum of charges to be made by said company, for transporting persons or property within the state, or taken up outside the state and brought within it, or taken up inside and carried without. *Peik v. Chicago & N. W. R. Co.*, 94 U. S. 164, 16 Am. Ry. Rep. 413.—FOLLOWING *Munn v. Illinois*, 94 U. S. 113; *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 155.—APPLIED IN *Mercantile Trust Co. v. Texas & P. R. Co.*, 50 Am. & Eng. R. Cas. 559, 51 Fed. Rep. 529. COMMENTED ON IN *Hardy v. Atchison, T. & S. F. R. Co.*, 18 Am. & Eng. R. Cas. 432, 32 Kan. 698. DISTINGUISHED IN *Illinois C. R. Co. v. Stone*, 18 Am. & Eng. R. Cas. 416, 20 Fed. Rep. 468; *Mobile & O. R. Co. v. Sessions*, 28 Fed. Rep. 592. EXPLAINED IN *Carton v. Illinois C. R. Co.*, 6 Am. & Eng. R. Cas. 305, 59 Iowa 148. FOLLOWED IN *People*

v. Wabash, St. L. & P. R. Co., 7 Am. & Eng. R. Cas. 628, 104 Ill. 476; *Stone v. Farmers' L. & T. Co.*, 23 Am. & Eng. R. Cas. 577, 116 U. S. 307; *Chicago, M. & St. P. R. Co. v. Ackley*, 94 U. S. 179; *Winona & St. P. R. Co. v. Blake*, 94 U. S. 180. QUOTED IN *Providence Coal Co. v. Providence & W. R. Co.*, 26 Am. & Eng. R. Cas. 42, 15 R. I. 303. REVIEWED IN *Stone v. Yazoo & M. V. R. Co.*, 21 Am. & Eng. R. Cas. 6, 62 Miss. 607; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557.

13. Power of state over roads chartered or regulated by laws of United States.—A railroad corporation organized under the laws of the United States is subject to the control of the state within which it is situated as to its rates of transportation therein, where there is nothing in the act creating the company to indicate an intent on the part of congress to remove the corporation in all its operations from the control of the state. *Reagan v. Mercantile Trust Co.*, 58 Am. & Eng. R. Cas. 699, 154 U. S. 413, 14 Sup. Ct. Rep. 1060.

Semle, that the fact that a railroad company operates its line in more than one state may sometimes be significant as to the reasonableness of rates imposed in one of the states within which its line is operated. *Reagan v. Mercantile Trust Co.*, 58 Am. & Eng. R. Cas. 699, 154 U. S. 413, 14 Sup. Ct. Rep. 1060.

The various acts of congress, declaring defendant's railroad to be a post and military route and national highway for postal, military, and all other governmental service, and granting lands, and a right of way over government lands, confer no immunity from state regulation of passenger tolls. *St. Louis & S. F. R. Co. v. Gill*, 47 Am. & Eng. R. Cas. 462, 54 Ark. 101, 15 S. W. Rep. 18.

2. By Commissioners.

14. When carriers are subject to commission.*—Ga. Act of Dec. 18, 1885, § 12, chartering the Georgia Railroad and Banking Co., and giving to it the exclusive right of transportation of persons and property over its railroad, so long as it shall

* State power to regulate freights and fares, see notes, 9 L. R. A. 754; 11 Id. 452.

Power of board of transportation of Nebraska to fix rates, see note, 32 Am. & Eng. R. Cas. 437.

see fit to exercise that right, and the charges of transportation and convenience did not exceed a certain specified rate, is not a contract between the state and the railroad company that the latter might charge whatever it choose, within the prescribed limits; and the company is subject to the provisions of subsequent legislation providing for a commission to regulate railroad tariffs. *Georgia R. & B. Co. v. Smith*, 35 Am. & Eng. R. Cas. 511, 128 U. S. 174, 9 Sup. Ct. Rep. 47. *Georgia R. & B. Co. v. Smith*, 9 Am. & Eng. R. Cas. 385, 70 Ga. 694.

The Oreg. act of 1885 excepts goods intended in good faith to be shipped to points beyond the limits of the state. *Held*, that the rates for goods intended for San Francisco might be fixed between one point in Oregon and another, without regard to the act, such goods coming within the exception. *Ex parte Koehler*, 21 Am. & Eng. R. Cas. 58, 25 Fed. Rep. 73.

Where a railway company has guaranteed dividends on the stock of a canal company, and a statute prohibits the canal company from reducing the authorized tolls and rates without the consent of the railway company, the railway commissioners, under the Regulation of Railways Act 1873, § 11, have no jurisdiction in a proceeding in which the railway company is not represented, to reduce the tolls of the canal company below the maximum authorized. *Warwick Canal Co. v. Birmingham Canal Co.*, L. R. 5 Ex. D. 1, 48 L. J. Ex. D. 550, 40 L. T. 846.

15. Schedules unreasonably low will not be enforced.*—Where a schedule of rates fixed by legislative authority is too low to pay the cost of necessary service, appliances, repairs, and interest on bonds, and then leave something for dividends, its enforcement will be enjoined. *Chicago & N. W. R. Co. v. Dey*, 35 Fed. Rep. 866, 1 L. R. A. 744, 2 Int. Com. Rep. 325.

And in such a case it is no defense that plaintiff is a foreign corporation and may retire when the business ceases to be profitable, or that it operates through other states where no rates are fixed, which will enable it to make profit. *Chicago & N. W.*

* Unreasonably low rates. Rates that would constitute a taking of property without compensation, see 54 Am. & Eng. R. Cas. 472, *abstr.*

Jurisdiction of federal court to restrain enforcement of rates fixed by state railroad commissioners, see note, 3 L. R. A. 238.

R. Co. v. Dey, 35 Fed. Rep. 866, 1 L. R. A. 744, 2 Int. Com. Rep. 325.

Nor is it a defense that the reduced rates may increase the volume of business and make it the more remunerative in the future. *Chicago & N. W. R. Co. v. Dey*, 35 Fed. Rep. 866, 1 L. R. A. 744, 2 Int. Com. Rep. 325.—FOLLOWED IN *Chicago, St. P., M. & O. R. Co. v. Becker*, 35 Fed. Rep. 883. QUOTED IN *Tozer v. United States*, 52 Fed. Rep. 917.

Where the actual cost for switching cars in a city exceeds the compensation fixed thereby by a schedule of rates prepared by state railroad commissioners, the schedule cannot be enforced. *Chicago, St. P., M. & O. R. Co. v. Becker*, 35 Fed. Rep. 883.—FOLLOWING *Railroad Com. Cases*, 116 U. S. 331, 6 Sup. Ct. Rep. 344.

The rates established by the railroad commission of Texas under the Railroad Commission Act of 1891, and enforced against the defendant railroad companies, entail such a loss of revenue as to compel the companies to operate their lines at a loss, or to deprive them of the power to pay interest on their bonded indebtedness, and are therefore unreasonably low and confiscatory, and the court will enjoin the commission from putting or continuing in effect the established tariff, and other parties from instituting suits contemplated by the act for the enforcement of claims arising out of its provisions, or out of the tariff prescribed by the commission. *Mercantile Trust Co. v. Texas & P. R. Co.*, 50 Am. & Eng. R. Cas. 559, 51 Fed. Rep. 529.—QUOTING *Chicago & G. T. R. Co. v. Wellman*, 143 U. S. 344, 12 Sup. Ct. Rep. 400.—FOLLOWED IN *Richmond & D. R. Co. v. Trammel*, 53 Fed. Rep. 196.

16. Missouri act of 1887 construed.—Mo. act of 1887 declares that "It shall be the duty of the railroad commissioners to see that all schedules of rates adopted by common carriers are reasonable and just, and they may, upon complaint of any person, or upon their own motion without complaint, make inquiry from time to time, and determine whether the schedule of rates prepared and adopted by any common carrier is reasonable and just." *Held*, that the word "may" should be construed as "shall," as the statute is evidently intended to be mandatory. *Winsor Coal Co. v. Chicago & A. R. Co.*, 52 Fed. Rep. 716.

Under the statute causes of action which

arose more than three years before the institution of the suit were barred, and where this fact appears on the face of the petition it may be taken advantage of on demurrer. *Winsor Coal Co. v. Chicago & A. R. Co.*, 52 Fed. Rep. 716.—FOLLOWING *Henoch v. Chaney*, 61 Mo. 129; *Bliss v. Prichard*, 67 Mo. 181; *Young v. Kansas City, St. J. & C. B. R. Co.*, 33 Mo. App. 509.

17. Powers of Iowa commission under act of 1888.—The Iowa act of April 5, 1888, empowers the state railroad commissioners to make a full schedule of maximum rates of transportation charges after the investigation of any complaint. The schedule so made will apply to all points within the state, and will not be limited to the matter set out in the complaint. *Chicago, B. & Q. R. Co. v. Dey*, 38 Fed. Rep. 656.

18. Constitutionality of proceedings under Minn. act of March 9, 1885.—Where rates for switch charges are fixed by a commission under a statute (Minn. act of March 9, 1885) providing for mandamus to compel compliance, and allowing an aggrieved corporation, if such proceeding be not taken in a certain time, to take an appeal to the court, to be proceeded with as a civil action—it constitutes due process of law. *Chicago, M. & St. P. R. Co. v. Becker*, 32 Fed. Rep. 849.

19. Under English statutes.—Under the Railway and Canal Traffic Act 1854, § 2, the railway commissioners have no jurisdiction to grant an injunction to restrain a railway company from making charges for the conveyance of passengers in excess of those authorized by their special acts, but without any undue preference, this not constituting a breach of the company's obligation under the statute. *Great Western R. Co. v. Railway Com'rs*, L. R. 7 Q. B. D. 182, 50 L. J. Q. B. D. 483, 45 L. T. 206, 29 W. R. 901; *affirming* 45 L. T. 65.

The mere refusal by a railway company to receive and forward the traffic of persons in general except upon prepayment of charges somewhat in excess of the maximum authorized rates is not a denial of "reasonable facilities," nor subjecting the senders of such traffic to "undue or unreasonable prejudice or disadvantage" within the meaning of the Railway and Canal Traffic Act 1854 (17 & 18 Vict. c. 31), § 2, or the Regulation of Railways Act 1873 (36 & 37 Vict. c. 48), and the railway commissioners have no

jurisdiction under those acts to restrain a railway company from making such charges, and cannot give themselves jurisdiction by finding as a fact that the demand of prepayment of such charges is a denial of "reasonable facilities" or subjecting persons or their traffic to "undue or unreasonable prejudice or disadvantage," within 17 & 18 Vict. c. 31, § 2. *Queen v. Railway Com'rs*, 40 Am. & Eng. R. Cas. 59, 22 Q. B. D. 642. —QUOTING *South Eastern R. Co. v. Railway Com'rs*, 6 Q. B. D. 586; *Great Western R. Co. v. Railway Com'rs*, 7 Q. B. D. 182; *Bennett v. Manchester, S. & L. R. Co.*, 6 C. B. N. S. 707. REVIEWING *South Eastern R. Co. v. Railway Com'rs*, 5 Q. B. D. 217.

A railway company in whose favor the railway commissioners have decided an application against such company cannot be required by the commissioners, under the Regulation of Railways Act 1873, to pay the costs to the unsuccessful applicant. *Foster v. Great Western R. Co.*, L. R. 8 Q. B. D. 515, 51 L. J. Q. B. D. 233, 46 L. T. 74, 30 W. R. 398, 4 N. & M. 58; reversing L. R. 8 Q. B. D. 25, 51 L. J. Q. B. D. 51, 45 L. T. 538.—DISTINGUISHED IN *Butcher v. Pooler*, L. R. 24 Ch. D. 273, 52 L. J. Ch. 930, 49 L. T. 573. FOLLOWED IN *Re Wood's Estate*, 35 W. R. 65, 31 Ch. D. 613.

III. JUST AND REASONABLE CHARGES.

20. At common law charges must be reasonable.*—At common law a person holding himself out as a carrier of goods is not under any obligation to treat all customers equally. The obligation which the common law imposes upon him is to accept and carry all goods delivered to him for carriage according to his profession, unless he has some reasonable excuse for not doing so, on being paid a reasonable compensation for so doing; and if the carrier refuses to accept such goods, an action will lie against him for so refusing; and if the customer, in order to induce the carrier to perform his duty, pays, under protest, a larger sum than was reasonable, he can recover back the surplus beyond what the carrier was entitled to receive, in an action for

money had and received, as being money extorted from him. *Scott v. Midland R. Co.*, 33 U. C. Q. B. 580.

There is no common-law rule requiring a carrier to charge equal rates. These must merely not be excessive. The commonness of the duty to carry for all does not involve a commonness of compensation. The tariff of rates, or what is charged to one party, is but matter of evidence to determine whether a charge to another is reasonable. *Johnson v. Pensacola & P. R. Co.*, 16 Fla. 623.—COMMENTING ON *Chicago & A. R. Co. v. People*, 67 Ill. 11; *Vincent v. Chicago & A. R. Co.*, 49 Ill. 33; *Chicago, B. & Q. R. Co. v. Parks*, 18 Ill. 460. DISAPPROVING *McDuffie v. Portland & R. R. Co.*, 52 N. H. 453. DISTINGUISHING *Messenger v. Pennsylvania R. Co.*, 36 N. J. L. 407.—DISTINGUISHED IN *Scofield v. Lake Shore & M. S. R. Co.*, 23 Am. & Eng. R. Cas. 612, 43 Ohio St. 571. QUOTED IN *Gibbes v. Greenville & C. R. Co.*, 18 So. Car. 38; *Avinger v. South Carolina R. Co.*, 29 So. Car. 265, 7 S. E. Rep. 493.

The common law imposes no duty upon common carriers to charge a higher rate for transporting goods a longer distance than like goods a shorter distance. But carriers are not permitted to charge extortionate rates. *Illinois & St. L. R. Co. v. Beaird*, 24 Ill. App. 622.

Railroad companies as quasi public corporations exercising franchises granted in consideration of accommodations afforded the public are required and may be compelled by the courts to afford reasonable and impartial facilities of transportation. Their charges, when not regulated by a charter or by statute, must be reasonable, and the courts will determine whether their charges are reasonable. *Ragan v. Aiken*, 9 Am. & Eng. R. Cas. 201, 9 Lea (Tenn.) 609, 42 Am. Rep. 684.

A charter provision granting the power to take "tolls from all persons, property, merchandise, and other commodities transported on their road, provided only the net profits of the road shall never exceed 25 per cent. per annum," does not relieve the company from the obligation imposed upon a common carrier under the common law, as applied to common carriers by rail. The charter does not give the carrier an option to discriminate at will, provided only the net profits of the road do not exceed a certain limit. *Samuels v. Louisville & N. R.*

* Railway charges must be reasonable, see notes, 29 AM. & ENG. R. CAS. 55, 9 L. R. A. 759.

Unreasonably low rates. Rates that would constitute a taking of property without compensation, see 54 AM. & ENG. R. CAS. 472, *abstr.*

Co., 30 *Am. & Eng. R. Cas.* 79, 31 *Fed. Rep.* 57.

21. Rules by which reasonableness of charges is determined.—In considering the question of the reasonableness of charges, the principle is not what profit it may be reasonable for a railway company to make, but what it is reasonable to charge to the person who is charged. *Canada Southern R. Co. v. International Bridge Co.*, 8 *App. Cas.* 723, 4 *Ry. & C. T. Cas.* xviii.

The fact that there are ordinary rates in practical operation on a railway for the carriage of goods with ordinary liability is very strong evidence that an agreement between the railway company and a customer for the carriage of good at another rate is reasonable. *Manchester, S. & L. R. Co. v. Brown*, 8 *App. Cas.* 703, 53 *L. J. Q. B. D.* 124, 4 *Ry. & C. T. Cas.* xviii.

22. When reasonableness of charge for jury.—Whether the rate of freight fare fixed by a railroad company, under section 12 of the Ohio act of February 11, 1848 (S. & C. 271), for distances less than thirty miles be reasonable or not, is a question of fact to be determined by the circumstances of each case. *Peters v. Marietta & C. R. Co.*, 18 *Am. & Eng. R. Cas.* 492, 42 *Ohio St.* 275, 51 *Am. Rep.* 814.—FOLLOWING *Smith v. Pittsburg, Ft. W. & C. R. Co.*, 23 *Ohio St.* 10.

It is for the jury to pass upon the reasonableness of the percentage charged upon the declared value of any animal extra to the sum to which, by the conditions, the liability of the company is limited. *Harri-son v. London, B. & S. C. R. Co.*, 2 *B. & S. L.* 122, 8 *Jur. N. S.* 740, 31 *L. J. Q. B.* 113, 6 *L. T.* 466.—OVERRULED IN *Ashendon v. London, B. & S. C. R. Co.*, *L. R.* 5 *Ex. D.* 190, 42 *L. T.* 586, 28 *W. R.* 511, 44 *J. P.* 203.

23. When charges must also be equal.—Freight charges must in all cases be reasonable to shippers, and when the circumstances and conditions are the same they must likewise be equal. *Bayles v. Kansas Pac. R. Co.*, 40 *Am. & Eng. R. Cas.* 42, 13 *Colo.* 181, 5 *L. R. A.* 480, 2 *Int. Com. Rep.* 643, 22 *Pac. Rep.* 341. *Camblos v. Philadelphia & R. R. Co.*, 4 *Brews. (Pa.)* 563, 9 *Phila.* 411.

Freight which is transportable partly upon the receiving company's own road and partly beyond it can be received by them as consigned for the ulterior destination. They may, as common carriers, en-

gage in the accessorial business, with horse power, of collecting freight which is to be transported upon their own railroad, and delivering it at the places of destination; but they cannot monopolize wholly or partly this accessorial business, or promote the monopoly of it by any one else, or appropriate preferential advantages for conducting it to their own profit. *Camblos v. Philadelphia & R. R. Co.*, 4 *Brews. (Pa.)* 563, 9 *Phila.* 411.

24. General power to take tolls not exclusive, and only authorizes reasonable charges.—A statute which grants to a railroad company the right "from time to time to fix, regulate, and receive the tolls and charges by them to be received for transportation," does not deprive the state of its power, within the limits of its general authority, as controlled by the constitution of the United States, to act upon the reasonableness of the tolls and charges so fixed and regulated. *Stone v. Farmers' L. & T. Co.*, 23 *Am. & Eng. R. Cas.* 577, 116 *U. S.* 307, 6 *Sup. Ct. Rep.* 334, 388, 1191.—FOLLOWING *Baltimore & O. R. Co. v. Maryland*, 21 *Wall. (U. S.)* 456; *Chicago, B. & Q. R. Co. v. Iowa*, 94 *U. S.* 155; *Peik v. Chicago & N. W. R. Co.*, 94 *U. S.* 164; *Winona & St. P. R. Co. v. Blake*, 94 *U. S.* 180; *Ruggles v. Illinois*, 108 *U. S.* 531.—FOLLOWED IN *Stone v. Illinois C. R. Co.*, 116 *U. S.* 347.

Oreg. Laws 532, § 36, declaring a railway corporation formed thereunder to be a common carrier, and empowering it "to collect and receive such tolls or freights for transportation of persons or property thereon as it may prescribe," authorizes it to take reasonable tolls, not inconsistent with its charter and obligation as a common carrier, and no more; and, so far, it constitutes a contract between the corporation and the state, the obligation of which the latter cannot impair nor any court disregard. *Wells v. Oregon R. & N. Co.*, 8 *Sauv. (U. S.)* 600, 15 *Fed. Rep.* 561.

What is reasonable compensation, under section 36, when the parties cannot agree is a question to be determined by the court; but in allowing a provisional injunction, requiring a railway corporation to furnish an express company with the facilities theretofore enjoyed by it over and upon its road, the court will assume that the compensation paid for such past facilities is reasonable, and require them to be furnished under the injunction at the same rates. *Wells v.*

Oregon R. & N. Co., 8 *Sawyer*, (U. S.) 600, 15 *Fed. Rep.* 561.

Unjust and unreasonable charges, as well as undue and unjust discriminations, by carriers are prohibited by the Ark. act of March 24, 1887. While a carrier may classify freights and fix rates, it cannot by an arbitrary classification justify an unjust or unreasonable charge. *Little Rock & Ft. S. R. Co. v. Bruce*, 55 *Ark.* 65, 17 *S. W. Rep.* 363.

25. Rates fixed by legislature final.

—It is the province of the legislature, and not the courts, to decide what is a reasonable charge by railroads. And where the legislature has acted, even if the rates are improperly fixed, the redress is by appeal to the legislature, not the courts. *Peik v. Chicago & N. W. R. Co.*, 94 *U. S.* 164, 16 *Am. Ry. Rep.* 413. *Wellman v. Chicago & G. T. R. Co.*, 45 *Am. & Eng. R. Cas.* 249, 83 *Mich.* 592, 47 *N. W. Rep.* 489.—COMMENTING ON *Munn v. Illinois*, 94 *U. S.* 113. EXPLAINING *Stone v. Farmers' L. & T. Co.*, 116 *U. S.* 307; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 *U. S.* 418.

A railroad company cannot recover, for the transportation of property, more than the maximum fixed by the Wis. act of March 11, 1874, by showing that the amount charged was no more than a reasonable compensation for the services rendered. *Chicago, M. & St. P. R. Co. v. Ackley*, 94 *U. S.* 179, 16 *Am. Ry. Rep.* 176.—FOLLOWING *Peik v. Chicago & N. W. R. Co.*, 94 *U. S.* 164.—FOLLOWED IN *Winona & St. P. R. Co. v. Blake*, 94 *U. S.* 180.

IV. EXCESSIVE CHARGES; OVERCHARGES.

1. What are Deemed Such.

26. Generally.—The ultimate test of what is a reasonable or unreasonable charge by a common carrier, and a lawful or an unlawful charge in a given case, is a mixed question of law and fact, to be reached by the verdict of the jury under proper instructions from the court, or perhaps by the action of what is sometimes called a railroad commission, under statutes, state or national, on that subject. *Samuels v. Louisville & N. R. Co.*, 30 *Am. & Eng. R. Cas.* 79, 31 *Fed. Rep.* 57.

Under § 12 of its charter, the Georgia R. & B. Co. can only charge fifty cents per 100 pounds, on heavy articles, for 100 miles, and in that proportion for a less distance. *Arnold v. Georgia R. & B. Co.*, 50 *Ga.* 304.

To hold a railroad company liable to the penalties provided in the Illinois act to prevent extortion, etc., approved May 2, 1873, it must be shown that it charged more than the maximum rates fixed by the board of railroad and warehouse commissioners. Until these rates are fixed no liability can be incurred for unreasonable or extortionate charges, and, when made, the taking of the rates named, or less rates, will not incur the penalty, even though the proof shows them to be more than fair and reasonable rates. *Chicago, B. & Q. R. Co. v. People*, 77 *Ill.* 443, 8 *Am. Ry. Rep.* 92.—REVIEWED IN *McGrew v. Missouri Pac. R. Co.*, 114 *Mo.* 210.

A rate charge exceeding the maximum allowed by statute for through transmission over defendant road and a connecting road, pursuant to an agreement therewith, will not be held to be excessive if, after deducting transshipment, elevator, and demurrage charges necessitated by the existence of the two roads, the balance of the charge is less than the maximum. *Owen v. St. Louis & S. F. R. Co.*, 25 *Am. & Eng. R. Cas.* 371, 83 *Mo.* 454.

A railroad company, as a common carrier, cannot legally increase the charges for transportation by wrongfully diverting freight from its proper course in transit. *Burlington & M. R. R. Co. v. Chicago Lumber Co.*, 15 *Neb.* 390, 19 *N. W. Rep.* 451.

A railway company, restrained in its charges to a certain sum per mile, may charge for the number of miles over which it actually carries the goods, although there is a more direct and shorter route, providing the route adopted is a reasonable one. *London & S. W. R. Co. v. Myers*, 39 *L. J. C. P.* 57, 21 *L. T.* 460, 18 *W. R.* 69.

A clause in a special act of a railway company providing that where goods are carried on the company's railway, or partly on its railway and partly on some other of which it is a joint owner or which it has a right to use, for a less distance than six miles, the company shall be entitled to take tolls as for six miles, and providing that tolls for goods carried over the company's line and over portions of such other lines shall be computed as if the company's line and the portions of the other lines formed one railway, does not entitle the company to split a contract for the carriage of goods passed over the line of which it is sole owner, for a distance of less than six miles, and over another line of which the company

was part owner, for a distance of more than six miles; the six-mile clause does not apply to such a case. *Lancashire & Y. R. Co. v. Gidlow*, 42 L. J. Ex. 129, 21 W. R. 649.

27. Under Texas statutes.—Under Rev. St. art. 4257, a railroad has the right to charge for the carriage of any quantity of freight less than one hundred pounds the same amount which it is entitled to charge for one hundred pounds; one hundred pounds being the unit fixed by the statute. *Murray v. Gulf, C. & S. F. R. Co.*, 22 Am. & Eng. R. Cas. 464, 63 Tex. 407.—QUOTING State ex rel. v. Mobile & M. R. Co., 59 Ala. 322; *Mobile & M. R. Co. v. Steiner*, 61 Ala. 559. REVIEWING *Knox v. South Carolina R. Co.*, 5 So. Car. 22.—FOLLOWED IN *Gulf, C. & S. F. R. Co. v. Lamkin*, 23 Am. & Eng. R. Cas. 652, 3 Tex. App. (Civ. Cas.) 106.—*Gulf, C. & S. F. R. Co. v. Lamkin*, 23 Am. & Eng. R. Cas. 652, 3 Tex. App. (Civ. Cas.) 106.—FOLLOWING *Murray v. Gulf, C. & S. F. R. Co.*, 63 Tex. 407.

Where two lines of railroad are under but one management, and freight is shipped over both on a through bill of lading, one company receiving the entire freight, the two lines will only be entitled to make a freight charge as upon one road, and receiving a greater charge, though less than what they would be entitled to receive if independent roads, would render them liable for the statutory penalty for an overcharge. *Missouri Pac. R. Co. v. Kuthman*, 2 Tex. App. (Civ. Cas.) 406.

The words "discrimination in freight charges," as used in the Texas act of April 10, 1883, § 10, when properly construed, include an overcharge for the transportation of freight, and mean the same as the word "overcharge," under Rev. St. art. 4258. *Missouri Pac. R. Co. v. Parkhurst*, 3 Tex. App. (Civ. Cas.) 198.

A railroad company which receives freight and delivers the same to a connecting carrier is not liable for an overcharge by the connecting carrier, under Sayles' Tex. Civ. St. art. 4258, prescribing a penalty of \$500 against any railroad for exacting a freight rate higher than the maximum fixed by § 4257 of said statutes. *Gulf, C. & S. F. R. Co. v. Adair*, 4 Tex. App. (Civ. Cas.) 55, 14 S. W. Rep. 1076.

A freight charge from Shreveport, La., to the Texas line in excess of the limits of the charter of the Southern Pacific R. Co., is

2 D. R. D.—40.

not a violation of such charter, nor does an action arise from such overcharge. *Knight v. Southern Pac. R. Co.*, 41 Tex. 406.

2. Freight in Parcels or in Bulk.

28. When higher parcel rate may be charged.—It is not unreasonable for a railway company to charge a lower or tonnage rate for separate parcels all directed to the same person, and a higher or parcel rate for similar parcels addressed to different persons. *Baxendale v. Eastern Counties R. Co.*, 4 C. B. N. S. 63, 27 L. J. C. P. 137.

Where a railway company is permitted to charge more than the tonnage rate for small parcels, provided that articles sent in large aggregate quantities, although made up of separate parcels, should not be deemed small parcels, the term being applicable only to parcels in separate packages, it may charge the parcel rate for packages of articles of similar classes, but not separate packages of one article all consigned to one consignee. *Parker v. Great Western R. Co.*, 6 El. & Bl. 77, 2 Jur. N. S. 325, 25 L. J. Q. B. 209.

Where a person sends a parcel of coffee and afterwards another parcel of coffee, both consigned to himself and for the same train, and gives notice when the first parcel is left that more will probably be sent, the company is justified in charging for them as separate parcels. *Parker v. Great Western R. Co.*, 6 El. & Bl. 77, 2 Jur. N. S. 325, 25 L. J. Q. B. 209.

Where a railway company charges a tonnage rate for packages exceeding 112 lbs. in weight, and a higher rate for packages under 112 lbs., the person who sends goods consisting partly of packages exceeding 112 lbs. and partly of packages under 112 lbs., cannot require the company to aggregate them and charge tonnage rates for the whole; but the company is bound only to aggregate the small parcels and charge tonnage rates for them if, when aggregated, they exceed 112 lbs. in weight. *Sutton v. London & S. W. R. Co.*, 37 L. T. 158.

Where by statute a railway company is allowed to charge what it thinks fit for "smalls," the charge is subject to a clause in a former statute requiring it to be made equally to all persons. *Sutton v. Great Western R. Co.*, 3 H. & C. 800, 11 Jur. N. S. 879, 35 L. J. Ex. 18, 13 W. R. 1091, 13 L. T. 221.

29. When not.—A greater charge for the carriage of a package containing several parcels belonging to different persons, than for a package containing parcels all belonging to one person, is illegal. *Crouch v. Great Northern R. Co.*, 11 Ex. 742, 25 L. J. Ex. 137.

The defendant by its special act was bound to charge the public alike; and the fact that a person was a common carrier did not justify it in charging him more than the rest of the public, although it might charge for packed parcels at a higher rate than ordinary packages. *Crouch v. Great Northern R. Co.*, 9 Ex. 556, 7 Railw. Cas. 787, 23 L. J. Ex. 148.

An act authorizing a railway company to charge at so much per ton per mile, and amending a former act empowering it to charge for the carriage of parcels, overrides the provisions of the former act so far as concerns parcels exceeding 500 lbs. weight, but not as to parcels below that weight. *Garton v. Bristol & E. R. Co.*, 1 B. & S. 112, 7 Jur. N. S. 1234, 30 L. J. Q. B. 273, 9 W. R. 734.

30. When parcel rates do not apply
—Parcels in bulk.—The charge of a railroad company for transporting packed parcels by rail, of the full sum which would be payable in the aggregate if they were not packed and were charged for severally, cannot be rightfully imposed upon the public generally, or upon express carriers or other middlemen. *Camblos v. Philadelphia & R. R. Co.*, 4 Brews. (Pa.) 563, 9 Phila. 411.—NOT FOLLOWED IN *Wells v. Oregon R. & N. Co.*, 8 Sawy. (U. S.) 600, 15 Fed. Rep. 561.

A railway company has no right to open a package to ascertain whether it contains separate parcels addressed to different persons. *Crouch v. London & N. W. R. Co.*, 2 C. & K. 789.

A railway company required to charge equally to all is guilty of an inequality of charge if it charges a carrier for each parcel contained in a package of parcels at the parcel rate instead of at the tonnage rate on the aggregate weight, as charged to the public generally. *Baxendale v. London & S. W. R. Co.*, 4 H. & C. 130, 35 L. J. Ex. 108, L. R. 1 Ex. 137, 12 Jur. N. S. 274, 14 W. R. 458, 14 L. T. 26.

A railway company allowed to fix its charges for the carriage of small parcels when not sent in large aggregate quantities,

but unconnected with parcels of like nature, and required to charge equally to all persons, is restricted to a reasonable charge, and is not justified in making an increased charge for the conveyance of packed parcels, where it is shown that no additional risk or expense is incurred in the carrying thereof. *Piddington v. South Eastern R. Co.*, 5 C. B. N. S. 111, 4 Jur. N. S. 953, 27 L. J. C. P. 295.

A company was authorized to fix such sum in respect of small parcels (not exceeding 500 pounds weight) as to them should seem fit. *Held*, such provision did not extend to articles sent in large aggregate quantities, though made up of separate and distinct parcels, such as bags of sugar, coffee, etc., but only to single parcels unconnected with parcels of a like nature which might be sent upon the railway at the same time. *Edwards v. Great Western R. Co.*, 11 C. B. 588, 2 Ry. & C. T. Cas. 16.

31. Charging at car-rate for less than car-load.—Where a railway company which carried certain bulky commodities at a certain rate per ton gives notice to a shipper that it will only carry such commodities at a certain minimum rate per truck (capable of carrying three tons), whether filled or not, the rate per ton thereby being far less than the ordinary rate, and the shipper, although objecting to these terms, continues to send such commodities, sometimes in quantities less than three tons, he is bound to pay at the rate charged per truck, and is not entitled to be charged at the minimum rate per ton for the quantities actually carried. This is nothing unreasonable in such a requirement, and even if there is, the remedy is under 17 & 18 Vict. c. 51. *Great Western R. Co. v. Toorner*, 11 W. R. 464.

32. Milk in quantities and in cans under Mass. statute.—Under Mass. Pub. St. ch. 112, §§ 192-194, the authority vested in the board of railroad commissioners is not to consider the general subject of rates, but to "ascertain at what rates facilities for the carriage of milk under contract or in large quantities are furnished by the railroad corporation," and to compare them with the tariff for the carriage of milk by the can, so as to fix rates, by the can, "fairly proportionate with such contract or large quantity rates." The order when made is to have the force and effect of a criminal statute, which calls for strictness

and regularity in proceedings under it. *Littlefield v. Fitchburg R. Co.*, 158 Mass. 1, 32 N. E. Rep. 859.

33. Ad valorem charge on package.

—A carrier who has agreed to carry a parcel without inquiry as to its value cannot afterward claim an additional compensation, on finding the parcel of greater value than he supposed. It is not the duty of the shipper, in such a case, to state the value. *Baldwin v. Liverpool & G. W. Steamship Co.*, 74 N. Y. 125, 30 Am. Rep. 277; *affirming* 11 Hun 496.—DISTINGUISHING *Magnin v. Dinsmore*, 62 N. Y. 35. FOLLOWING *Batson v. Donovan*, 4 B. & Ald. 29.

Where a carrier, under such circumstances, refuses to deliver the property to the consignee, without the payment of an additional sum, which is accordingly paid, an action may be maintained to recover it back as having been paid under duress of goods. *Baldwin v. Liverpool & G. W. Steamship Co.*, 74 N. Y. 125, 30 Am. Rep. 277; *affirming* 11 Hun 496.

3. Long and Short Hauls.

34. Competition as justifying different rates.*—Notwithstanding *Oreg.* act of February 20, 1885, § 4, prohibiting the charging more for a short haul than for a longer one in the same direction, this may be done when the rate for the long haul is caused by other lines competing for business at the point from whence the long haul is made, and where the line forms part of a line consisting largely of water-carriage between two principal points, there being a competing line between these points. *Ex parte Koehler*, 21 Am. & Eng. R. Cas. 58, 25 Fed. Rep. 73.

35. Group rates.—The provision in the Texas statute prohibiting the charging of a greater rate to one shipper than to another for the same or a shorter haul, does not prohibit the making of a "group rate," or the charging of the same price for a shorter as for a longer haul. *Texas & P. R. Co. v. Kuteman*, 55 Am. & Eng. R. Cas. 507, 54 Fed. Rep. 547, 4 C. C. A. 503.

* Freight rates as affected by distance and competing lines, see 34 AM. & ENG. R. CAS. 590, *abstr.*

Competition justifies lower rates for long than for short haul, see note, 29 AM. & ENG. R. CAS. 60.

"Similar circumstances and conditions," see note, 54 AM. & ENG. R. CAS. 397.

36. Rates as affected by distance.*

—Mass. St. 1874, ch. 372, § 140, prohibiting any railroad corporation from charging or receiving more for transporting freight "to any station on its road" than for transporting "the like class and quantity of freight from the same original point of departure to a station at a greater distance on its road in the same direction," applies only to transportation over its own road, and not over other roads, for which it charges and receives nothing, except as collecting agent of the other corporations. *Commonwealth v. Worcester & N. R. Co.*, 124 Mass. 561, 18 Am. Ry. Rep. 418.—REVIEWED IN *Osgood v. Concord R. Co.*, 21 Am. & Eng. R. Cas. 44, 63 N. H. 255.

Where a railroad company is authorized to demand and receive compensation for transportation of property "not exceeding five cents per ton per mile, when the same is transported a distance of thirty miles or more, and in case the same is transported for a less distance than thirty miles, such reasonable rate as may be from time to time fixed by the company," it is unreasonable, as a matter of law, that the company should fix for a less distance than thirty miles a greater sum than the maximum allowed for full thirty miles. *Campbell v. Marietta & C. R. Co.*, 23 Ohio St. 168.—FOLLOWING *Smith v. Pittsburg, Ft. W. & C. R. Co.*, 23 Ohio St. 17.

4. Rates on Freights of Different Classes.

37. Classifying cotton in bales.—

Where a railroad charter prescribes a maximum rate for the transportation of heavy articles by the hundred pounds, and of articles of measurement by the cubic foot, without further definition in the act itself, it is properly left to the jury to determine whether cotton bales are heavy articles or articles of measurement, within the meaning which custom had given to those terms at the date of the charter. *Elder v. Charlotte, C. & A. R. Co.*, 13 So. Car. 279.

What evidence is sufficient to show that cotton packed in bales was classified by common carriers as a heavy article and not as an article of measurement, see *Bonham v. Charlotte, C. & A. R. Co.*, 9 Am. & Eng. R. Cas. 418, 16 So. Car. 633.

* Distance as an element in adjusting railway rates, see note, 21 AM. & ENG. R. CAS. 61.

38. Classifying heavy articles.—

Where a railroad charter authorized the company "to charge for the transportation of passengers at a rate not exceeding 7½ cents per mile, and for the transportation of goods by weight not exceeding 50 cents per 100 pounds per 100 miles," the company could only charge the charter rate for heavy articles for the actual distance of transportation. *Knox v. South Carolina R. Co.*, 5 So. Car. 22.—DISTINGUISHED IN *Ragan v. Aiken*, 9 Am. & Eng. R. Cas. 201, 9 Lea (Tenn.) 609. REVIEWED IN *Murray v. Gulf, C. & S. F. R. Co.*, 22 Am. & Eng. R. Cas. 464, 63 Tex. 407.

Under Mo. Rev. St. § 834, regulating freight charges by railroads, saw-logs belong to class "J." *Burkholder v. Union Trust Co.*, 23 Am. & Eng. R. Cas. 656, 82 Mo. 572.

5. Remedy of Party Paying.

39. When action at law will lie, generally.*—One who is charged more than the ordinary rate by a railway company which is required to carry equally for all, may recover back the excess. *Crouch v. London & N. W. R. Co.*, 2 C. & K. 789.

Overcharges made by a railway company may be recovered back as money had and received. *Parker v. Great Western R. Co.*, 7 M. & G. 253, 7 Scott N. R. 835, 8 Jur. 194, 13 L. J. C. P. 105, 3 Railw. Cas. 563.—COMMENTED ON IN *Finnie v. Glasgow & S. W. R. Co.*, 2 MacQ. H. L. Cas. 177. QUESTIONED IN *Parker v. Great Western R. Co.*, 15 Jur. 109.—*Great Western R. Co. v. Sutton*, L. R. 4 H. L. Cas. 226, 38 L. J. Ex. 177, 18 W. R. 92.

Where a railway company, sometimes intentionally and sometimes by mistake, charges a shipper heavier rates than are set out in the bills published by it, he may recover the excess paid. *Garton v. Bristol & E. R. Co.*, 1 B. & S. 112, 7 Jur. N. S. 1234, 30 L. J. Q. B. 273, 9 W. R. 734.

The 17 & 18 Vict. c. 31 does not interfere with the right of a party to recover back overcharges. *Baxendale v. Eastern Counties R. Co.*, 4 C. B. N. S. 63, 27 L. J. C. P. 137.

* Action to recover overcharges. Common law and statutory remedies, see 54 AM. & ENG. R. CAS. 443, *abstr.*

Refusal to pay overcharges. Action for failure to deliver freight, see 55 AM. & ENG. R. CAS. 516, *abstr.*

When a carrier offers to carry the goods of a shipper for a certain price per car-load, and the shipper accepts such offer and ships the goods thereunder, the carrier is bound thereby, and cannot be heard to say he will not abide by its terms; and if a greater sum is retained by the carrier upon sale of the goods, it will be required to respond to the shipper for such excess. *Atchison & N. R. Co. v. Miller*, 18 Am. & Eng. R. Cas. 545, 16 Neb. 661, 21 N. W. Rep. 451.

In ordinary cases between individuals, where a person has no power to enforce an unjust claim but by legal remedies, and another pays it, he cannot recover it; both parties are on an equal footing. But when they are not on an equal footing and money is paid, not by compulsion of law but by compulsion of circumstances—as when it is paid to release goods from illegal restraint which cannot otherwise be reasonably effected, or to compel the performance of a duty by others in order to enjoy or obtain a right—it may be recovered back. Under this head may be classed moneys paid under color of title or charges on turnpikes and railroads. *McGregor v. Erie R. Co.*, 35 N. J. L. 89.—REVIEWING *Fearnley v. Morley*, 5 B. & C. 25; *Parker v. Great Western R. Co.*, 7 M. & G. 253.—*Mount Pleasant Mfg. Co. v. Cape Fear & Y. V. R. Co.*, 42 Am. & Eng. R. Cas. 469, 106 N. Car. 207, 10 S. E. Rep. 1046.

Under a grant to a railroad company of a right to take such tolls as it shall think reasonable, it seems that a person aggrieved by the exaction of unreasonable tolls would still have a remedy by an action at law, and that the courts would have power to determine whether the tolls charged were reasonable in fact. *Attorney-General v. Chicago & N. W. R. Co.*, 35 Wis. 425.

Plaintiff hired K., a cartman, to transport goods from the freight-house of the defendant to his store at a certain price per ton, giving him no authority to pay the freight upon the goods. K. paid the charges out of his own money and collected the amounts so paid from plaintiff, without his knowledge that K. had advanced the charges. These bills for freight included "back charges" paid by the defendant for freight upon connecting roads, which were falsely made out by defendant's clerk having charge of the business, by overcharging the amounts which defendant had so paid. Held, that plaintiff could not recover back the overpayments, on the ground that they were

made by mistake, and that plaintiff had no knowledge, or means of knowledge, at the time of the payment, of their correctness, as the payments were not made by him nor with his money, and K. was not his agent to make such payments. *Worthington v. New York C. R. Co.*, 6 *Lans. (N. Y.)* 257.

40. Paying under protest.*—At common law, one from whom a carrier has exacted excessive charges may recover back the excess; and it is not necessary that the payment should have been made under protest. *Heiserman v. Burlington, C. R. & N. R. Co.*, 16 *Am. & Eng. R. Cas.* 46, 63 *Iowa* 732, 18 *N. W. Rep.* 903.—FOLLOWED IN *Louisville, E. & St. L. Con. R. Co. v. Wilson*, 132 *Ind.* 517.

A consignee of goods, if he desires to do so, may submit to the wrong of an overcharge, tender the overcharge under protest, and, if the money be accepted, he may afterwards recover back the amount wrongfully exacted. But this is merely a right or privilege accorded by law, and he is under no duty to exercise the privilege. *Loomis v. Wabash, St. L. & P. R. Co.*, 17 *Mo. App.* 340. *Beckwith v. Frisbie*, 32 *Vt.* 559.—DISTINGUISHING *Skeate v. Beale*, 11 *Ad. & El.* 983, 39 *E. C. L.* 516. QUOTING *Shaw v. Woodcock*, 7 *B. & C.* 73; *Atlee v. Backhouse*, 3 *M. & W.* 650; *Parker v. Great Western R. Co.*, 7 *M. & G.* 253, 49 *E. C. L.* 252; *Parker v. Bristol & E. R. Co.*, 7 *Eng. L. & Eq.* 528; *Maxwell v. Griswold*, 10 *How. (U. S.)* 243. REVIEWING *Astley v. Reynolds*, 2 *Strange* 915; *Smith v. Bromley*, 2 *Dougl.* 696; *Cartwright v. Rowley*, 2 *Esp.* 723; *Harmony v. Bingham*, 12 *N. Y.* 99.

The Erie railway company must be considered as running on the Long Dock railroad under the Paterson and Hudson river charter and rates. They cannot charge as common carriers. The additional charge of four cents per one hundred pounds (for terminal expenses) on freights destined for Jersey City or New York, and upon all freights from Jersey City or New York, is unlawful; having been paid involuntarily and under protest, it may be recovered back by the parties paying. *McGregor v. Erie R. Co.*, 35 *N. J. L.* 89.—QUOTED IN *Peters v. Marietta & C. R. Co.*, 42 *Ohio St.* 275; *West Virginia Transp. Co. v. Sweetzer*, 22 *Am. & Eng. R. Cas.* 469, 25 *Va.* 434.

Where under a statute making it unlaw-

*Overcharges paid under protest may be recovered back, see note, 51 *AM. REP.* 820.

ful to charge for the carriage of freight higher rates than those prescribed in the act, plaintiff was compelled by defendant to pay higher rates, and paid them under protest, the subsequent repeal of the statute would not deprive him of the right to recover damages for the unlawful overcharge. *Graham v. Chicago, M. & St. P. R. Co.*, 3 *Am. & Eng. R. Cas.* 289, 53 *Wis.* 473, 10 *N. W. Rep.* 609.—DISTINGUISHED IN *Young v. Kansas City, St. J. & C. B. R. Co.*, 33 *Mo. App.* 50.

The fact that a shipper pays overcharges under protest and for the purpose of obtaining possession of his goods does not disqualify him from recovering such overcharges in an action for money had and received. *Lancashire & Y. R. Co. v. Gidlow (No. 2)*, *L. R.* 7 *H. L. Cas.* 517, 32 *L. T.* 573, 24 *W. R.* 144.

A shipper who objects to charges as excessive, but pays under protest, is entitled to recover back the amount of any excess of what was fair and reasonable, although he did not make any tender of any specific sum as a fair and reasonable charge. *Parker v. Bristol & E. R. Co.*, 6 *Ex.* 702, 6 *Railw. Cas.* 776.

The whole sum paid in excess of what is a fair and reasonable charge is recoverable from the railway company to which payment was made under protest, although it had received a portion of it as agent only of another and connecting railway. *Parker v. Bristol & E. R. Co.*, 6 *Ex.* 702, 6 *Railw. Cas.* 776.

The court of bankruptcy has no jurisdiction to make an order to compel a railway company to repay to a receiver of an insolvent trader a sum which he has paid to the railway company under protest on its refusal to deliver goods which he had purchased with his own money and sent to the trader until the amount which the trader owed for freight due at the time of his bankruptcy was paid. *Ex parte Great Western R. Co.*, *L. R.* 22 *Ch. D.* 470, 52 *L. J. Ch. D.* 734, 48 *L. T.* 196, 31 *W. R.* 419.

41. When payment not voluntary.—The payment of an overcharge of freight to a railroad company engaged as a common carrier of goods is not a voluntary payment within the ordinary meaning of that term, and a shipper has the right to sue upon his contract and recover back the excess of freight paid over the contract rate. *Louisville, E. & St. L. Con. R. Co. v.*

Wilson, 54 Am. & Eng. R. Cas. 452, 132 Ind. 517, 32 N. E. Rep. 311.—FOLLOWING *Heiserman v. Burlington*, C. R. & N. R. Co., 16 Am. & Eng. R. Cas. 46, 63 Iowa 732; *Chicago & A. R. Co. v. Chicago*, V. & W. Coal Co., 79 Ill. 121; *Mobile & M. R. Co. v. Steiner*, 61 Ala. 559. NOT FOLLOWING *Evershed v. London & N. W. R. Co.*, 3 Q. B. D. 134; *Arnold v. Georgia R. & B. Co.*, 50 Ga. 304.—*Tutt v. Ide*, 3 Blatchf. (U. S.) 249.—APPROVING *Parker v. Great Western R. Co.*, 7 M. & G. 253; *Parker v. Bristol & E. R. Co.*, 7 Eng. L. & Eq. 528.—*Lafayette & I. R. Co. v. Pattison*, 41 Ind. 312.—QUOTED IN *West Virginia Transp. Co. v. Sweetzer*, 22 Am. & Eng. R. Cas. 469, 25 W. Va. 434. REVIEWED IN *Peters v. Marietta & C. R. Co.*, 42 Ohio St. 275.

A payment of an overcharge in the belief that the demand is proper, and without the knowledge that it is wrongfully exacted, is not voluntary and may be recovered back. *Cook v. Chicago, R. I. & P. R. Co.*, 45 Am. & Eng. R. Cas. 291, 81 Iowa 551, 46 N. W. Rep. 1080.

A shipper has a right to have his goods transported at legal rates over the usual line of a common carrier of such goods; and if, to procure the services of such carrier, the shipper is compelled to pay illegal rates established by the carrier, the payment is not such a voluntary payment as will preclude recovering back the illegal charge; nor will it preclude such recovery if the payments, by arrangement of parties, are made at the end of each month. *Peters v. Marietta & C. R. Co.*, 18 Am. & Eng. R. Cas. 492, 42 Ohio St. 275, 51 Am. Rep. 814.—APPROVING *Parker v. Great Western R. Co.*, 7 M. & G. 253. QUOTING *New York C. R. Co. v. Lockwood*, 17 Wall. (U. S.) 379; *McGregor v. Erie R. Co.*, 35 N. J. L. 89; *Mobile & M. R. Co. v. Steiner*, 61 Ala. 559. REVIEWING *Lafayette & I. R. Co. v. Pattison*, 41 Ind. 312; *Chicago & A. R. Co. v. Chicago*, V. & W. Coal Co., 79 Ill. 121.—REVIEWED IN *West Virginia Transp. Co. v. Sweetzer*, 22 Am. & Eng. R. Cas. 469, 25 W. Va. 434.

If a person be engaged in buying oil in an oil region and shipping it over a railroad, and there is no other outlet for this oil except over this railroad, and under these circumstances he agrees to pay to the railroad company more than its legal rate of charge for the freight of such oil, and does make such payments from time to time, in order

that he may get his oil transported to market in the only manner in which he can transport it, though such payments are made after each shipment of oil has been made and the oil delivered, such person must be considered as making such payment not voluntarily, but by compulsion, and he has a right, in an action for money had and received for his use, to recover back the excess of freight so paid by him over the amount which the railroad company had a legal right to charge, or to offset this excess against the railroad company's charge if it brings an action of assumpsit against such shipper. *West Virginia Transp. Co. v. Sweetzer*, 22 Am. & Eng. R. Cas. 469, 25 W. Va. 434.—DISAPPROVING *Potomac Coal Co. v. Cumberland & P. R. Co.*, 38 Md. 226. QUOTING *Parker v. Great Western R. Co.*, 7 M. & G. 253; *McGregor v. Erie R. Co.*, 35 N. J. L. 89; *New York C. R. Co. v. Lockwood*, 17 Wall. (U. S.) 379; *Lafayette & I. R. Co. v. Pattison*, 41 Ind. 312; *Chicago & A. R. Co. v. Chicago*, V. & W. Coal Co., 79 Ill. 121. REVIEWING *Mobile & M. R. Co. v. Steiner*, 61 Ala. 560; *Peters v. Marietta & C. R. Co.*, 42 Ohio St. 275.

42. Acquiescence by shipper.*—

Where a carrier fixes an excessive freight rate, which a shipper pays for many years without objection, he will be deemed to have acquiesced in such rate as reasonable, and cannot sue to recover the excess as unreasonable. *Killmer v. New York C. & H. R. Co.*, 23 Am. & Eng. R. Cas. 659, 100 N. Y. 395, 53 Am. Rep. 194, 3 N. E. Rep. 293; affirming 30 Hun 86.—DISTINGUISHING *Evershed v. London & N. W. R. Co.*, 3 Q. B. D. 144. L. R. 3 App. Cas. 1029; *Great Western R. Co. v. Sutton*, 3 H. & C. 800. L. R. 4 H. L. Cas. 226; *Lancashire & Y. R. Co. v. Gidlow*, L. R. 7 H. L. Cas. 517; *Parker v. Great Western R. Co.*, 7 M. & G. 253.—QUOTED IN *Langdon v. New York, L. E. & W. R. Co.*, 29 N. Y. S. R. 656. REVIEWED IN *Root v. Long Island R. Co.*, 40 Am. & Eng. R. Cas. 55, 114 N. Y. 300, 21 N. E. Rep. 403, 23 N. Y. S. R. 226.

43. Remedy under English statutes.—The only remedy where it is alleged that there has been a breach of § 2 of the Railway and Canal Traffic Act 1854, is by application to the railway commissioners

* Limitation of action to recover excessive charges, see note, 45 AM. & ENG. R. CAS. 299.

under § 3; and the only remedy they can give has regard to the future, not the past; and therefore past payments alleged to be overcharges by reason of being contrary to the act cannot be recovered by action. *Rhynney R. Co. v. Rhynney Iron Co.*, 25 Q. B. D. 146.—FOLLOWING *Manchester, S. & L. R. Co. v. Denaby M. Colliery Co.*, 14 Q. B. D. 209.

A carrier, having a contract for his own benefit with the military authorities for the carriage of military stores and baggage, produced to a railway company the military route or order for the conveyance of military stores and baggage, accompanied by a military escort, and required the company to carry them at the low rates prescribed by the 5 & 6 Vict. c. 55, § 20, and 7 & 8 Vict. c. 85, § 12; but the company insisted upon charging the ordinary rate, which was paid by the carrier. *Held*, that he could not recover back the excess as money had and received to his use. *Robertson v. Great Southern & W. R. Co.*, 11 Ir. C. L. 63, 3 Ry. & C. T. Cas. xi.

The plaintiff, a carrier, sent goods by the defendants to be carried on their line, as also on that of the G. W., a continuous line; he objected to the charges as excessive, but paid the amount claimed under protest, making no tender of any sum as a reasonable charge. *Held*, that he was entitled to recover back the amount paid above what was a fair and reasonable charge in any action for money had and received, and that the whole sum so overpaid was recoverable against the defendants, though a portion of it was received by them as agents of the G. W. railway company. *Parker v. Bristol & E. R. Co.*, 6 Railw. Cas. 776, 1 Ry. & C. T. Cas. 16.

44. Pleadings in such actions.—Where a suit was brought against a railroad company on account of alleged overcharges beyond a reasonable rate, but the declaration did not allege either that no rates had been fixed for the defendant's road or that the charges were beyond the rates so fixed, it was demurrable. *Sorrell v. Central R. Co.*, 75 Ga. 509.

Where in an action to recover excess of freight the complaint charged that the excess so charged and received by the defendant was \$2800, but it did not appear by affirmative allegation that it was paid by the plaintiffs, the inference will be indulged that it was, as they were the shippers, and

the complaint will be good as against a demurrer. *Louisville, E. & St. L. Con. R. Co. v. Wilson*, 54 Am. & Eng. R. Cas. 452, 132 Ind. 517, 32 N. E. Rep. 311.

In an action against a railroad company for charging over tolls, it is sufficient if the declaration conform to the act under which it is drawn, and unnecessary that it aver that defendant is not within the exceptions in Va. Code 1873, ch. 61, §§ 1, 58. *Norfolk & W. R. Co. v. Pendleton*, 86 Va. 1004, 11 S. E. Rep. 1062. *Norfolk & W. R. Co. v. Pendleton*, 88 Va. 350, 13 S. E. Rep. 709.

It was not necessary to allege in the declaration that the rates prescribed by Va. Code of 1860, ch. 61, § 19, applied to the road of defendant, nor that different rates had not been prescribed by law. *Hart v. Baltimore & O. R. Co.*, 6 W. Va. 336.

45. Evidence.—In an action to recover back excessive freight paid under protest, based upon a special contract, to carry for less than the amount paid, plaintiff cannot recover without proving such a contract as will bind the company. *Michigan C. R. Co. v. Edwards*, 33 Mich. 16.

Evidence of plaintiff's declarations to the drayman who delivered the goods to him, to the effect that he thought the freight charges were too high, is admissible on the part of plaintiff, as showing a fact connected with the payment of the overcharge. *Fulmer v. Chicago & N. W. R. Co.*, 31 Iowa 187, 1 Am. Ry. Rep. 383.

Parol testimony is admissible in an action for overcharges, to show what the charges were, although there was a written contract of shipment. *Scammon v. Kansas City, St. J. & C. B. R. Co.*, 41 Mo. App. 194.

In an action to recover back excess of freight payments compulsorily made beyond the legal rates of charge, there is no necessity for the plaintiff to prove that he demanded the repayment of such excess by the railroad company before instituting such suit. *West Virginia Transp. Co. v. Sweetzer*, 22 Am. & Eng. R. Cas. 469, 25 W. Va. 434.

On January 28, 1887, petitioner entered into a contract with the agent of a receiver of a railroad for shipment of goods from New York to Texas at cut freight rates. The steamer at New York refused to receive the goods, and Feb. 12, 1887, the receiver guaranteed the contract, and the goods were shipped March 1st. On March 4th the petitioner was informed that the

time had expired and the former rates were restored. In an action to recover back a charge above the agreed rate, petitioner testified that nothing was said to him as to limitation of time of shipment; and the agent of the receiver was under the impression that he had mentioned it. *Held*, that the direct testimony of the petitioner and the conduct of the parties showed that no immediate shipment was contemplated. *Easton v. Houston & T. C. R. Co.*, 32 *Fed. Rep.* 897.

Where, in an action against a railroad company by a shipper to recover the excess of charges on cotton shipped by him over and above what was reasonable, the only testimony bearing on the question of the reasonableness of the charges paid by him was that the rates of freight on compressed cotton shipped from Montgomery or Selma were about fifty per cent. in excess of the rates paid by him on uncompressed cotton shipped from Opelika, a point sixty-six miles less in distance than Montgomery, and 116 miles less in distance than Selma, from the terminus of the road to which the cotton was shipped—it being common knowledge that compressing cotton bales reduces their bulk about one half—the testimony was wholly insufficient to furnish a basis for determining the reasonableness of the charges, and the court did not err in refusing to submit that question to the jury. *Lotspeich v. Central R. & B. Co.*, 18 *Am. & Eng. R. Cas.* 490, 73 *Ala.* 306.

The plaintiff brought an action against the defendant, a railroad company, to recover back freight paid in excess of that charged to other shippers. The evidence showed that the favored parties were extensive shippers of cattle over the same route as that used by plaintiff, and that they made an arrangement at the end of the route, the point of destination, with three trunk lines, to even up the live-stock tonnage between these lines, the "eveners" being required to make special purchases and shipments when necessary to maintain the agreed division of business, whether the market justified it or not; they to receive commissions on all the stock shipped by them, or other persons, over these roads. This contract was in operation when plaintiff shipped his stock. *Held*, that, in the absence of any evidence that defendants were parties to the arrangement with the "eveners," plaintiff cannot recover. *Roths-*

child v. Wabash, St. L. & P. R. Co., 30 *Am. & Eng. R. Cas.* 76, 92 *Mo.* 91, 10 *West. Rep.* 72, 4 *S. W. Rep.* 418.

46. Remedy by injunction.—An injunction will not be granted to prevent a railway company from charging a carrier otherwise than equal with all other persons. *Sutton v. South Eastern R. Co.*, 11 *Jur. N. S.* 935, 35 *L. J. Ex.* 38, *L. R.* 1 *Ex.* 32, 14 *W. R.* 133, 13 *L. T.* 438, 4 *H. & C.* 325.

An injunction will not be granted before trial to restrain an overcharge for packed parcels. *Sutton v. South Eastern R. Co.*, 11 *Jur. N. S.* 935, 35 *L. J. Ex.* 38, *L. R.* 1 *Ex.* 32, 14 *W. R.* 130, 13 *L. T.* 438, 4 *H. & C.* 325.

Where the bill for an injunction to prevent a shipper from instituting a number of suits against a railroad company to recover for alleged overcharges in freight alleges that the said shipper intends to sue to recover certain sums for overcharge on each car of lumber shipped by him, and avers that the rates established and charged are less than the maximum rates fixed by law, the maintenance of the company's rates is the real subject of dispute, and determines the jurisdictional value of the amount in controversy; and this value not being liquidated or fixed by law, the alleged value, especially on demurrer to the bill, must govern. *Texas & P. R. Co. v. Kuteman*, 55 *Am. & Eng. R. Cas.* 507, 54 *Fed. Rep.* 547.

On a bill filed by the American Coal Company against defendant railroad company for an injunction prohibiting the latter from demanding or receiving from the complainant higher rates for transporting coal over the road of the defendant than were fixed and prescribed by the Md. act of 1876, ch. 64, it appeared that the complainant, which was a coal-mining company, with its tram-road connecting with the railroad of the defendant, and depending entirely upon the latter for the means of transporting its coal to market, was specially damaged by the illegal exactions by the defendant of excessive freights. *Held*, that the complainant was entitled to an injunction as prayed. *American Coal Co. v. Consolidated Coal Co.*, 46 *Md.* 15.

The terminal freight stations of two railroads in an inland city were connected by a track a mile long, part of which belonged to the first road and the rest to the second. The first road gave notice that its rate for

transportation of coal from a seaport to the city would be \$1.75, and from the seaport to the city for stations on the second road \$1.25 per ton. *Held*, that the lesser rate did not apply to coal which was ordered to be transported from the seaport to the city and delivered there at the terminal freight station of the second road, without being transferred for further transportation or delivery; and an injunction requiring the company to carry at the lower rate should be refused. *Wellington v. Norwich & W. R. Co.*, 107 Mass. 582.

An injunction will not be granted to compel a common carrier to transport goods at the rate fixed at law, but it will issue to prevent a railway company, bound by law to transport goods, from entering into an agreement not to transport them at the rates fixed by law. *Rogers L. & M. Works v. Erie R. Co.*, 20 N. J. Eq. 379.

Private individuals cannot file a bill against a railroad for charging a higher rate of tolls than allowed by its charter, where it appears that the injury to plaintiffs is no greater than to the people at large. The remedy is by information in the name of the state. *Cumberland Valley R. Co.'s Appeal*, 62 Pa. St. 218.

Several persons, each conducting an individual business that required shipping by rail, but having nothing in common, cannot file a joint bill against a railroad for discrimination in, and overcharge of, freight rates. *Cumberland Valley R. Co.'s Appeal*, 62 Pa. St. 218.

On a bill filed to restrain a railroad from charging more than the charter rate for freight in private cars, it is error to restrain the road from charging more than on freight carried in its own cars, and from allowing drawbacks. Such decree is *ultra* the bill. *Cumberland Valley R. Co.'s Appeal*, 62 Pa. St. 218.

47. Measure of damages—Interest.*

—If a statute has fixed maximum rates for carriage, all charges beyond these rates is the excess recoverable. *Heiserman v. Burlington, C. R. & N. R. Co.*, 16 Am. & Eng. R. Cas. 46, 63 Iowa 732, 18 N. W. Rep. 903.

The measure of damages where the statute has been repealed is the amount paid in

excess of the rates then allowed by law, with interest at least from the commencement of the action. *Graham v. Chicago, M. & St. P. R. Co.*, 3 Am. & Eng. R. Cas. 289, 53 Wis. 473, 10 N. W. Rep. 609.

A railway company refusing to carry, at the ordinary rate, packed parcels tendered by a carrier, whereby he is obliged to send them by a more circuitous route and at a greater expense, is not entitled to recover damages for an alleged loss of business. *Crouch v. Great Northern R. Co.*, 11 Ex. 742, 25 L. J. Ex. 137.

Before judgment, the penalty allowed by the act of March 30, 1875, for overcharges for carrying freight or passengers does not bear interest. *Iron R. Co. v. Lawrence Furnace Co.*, 54 Am. & Eng. R. Cas. 475, 49 Ohio St. 102, 30 N. E. Rep. 616.—QUOTING *Higley v. Beverly First Nat. Bank*, 26 Ohio St. 81.

48. Overcharge on through

freights.—A railroad company guaranteeing delivery of cotton shipped over its own road and connecting lines, at a specified rate of freight, and giving a bill of lading containing a provision that "it is understood that railroads connecting with this line recognize its bill of lading and will settle freight bill accordingly," is liable for the whole amount of overcharges made and collected by its connecting carriers; and it cannot evade liability by urging a stipulation in the bill of lading that it shall not be liable for damages to the cotton after leaving its own line of road, as such stipulation has no application to freight rates. *Little Rock & Ft. S. R. Co. v. Daniels*, 32 Am. & Eng. R. Cas. 479, 49 Ark. 352, 5 S. W. Rep. 584.

A shipper cannot complain because a railway, in violation of its contract with a connecting railway, deducts more than its share of the freight charges or lays an additional charge on the shipper without sharing with such connecting line. *Arkansas & L. R. Co. v. Smith*, 42 Am. & Eng. R. Cas. 348, 53 Ark. 275, 13 S. W. Rep. 929.

Where a shipper applies to the station agent of an initial carrier for a through rate for goods to a distant point, requiring the goods to be carried over several distinct lines of railway, and the station agent in turn makes inquiry of the general freight agent of an intermediate carrier, and receives from him the through rate from the point where the goods are to be received by

* Statutes prohibiting overcharges—construction—who may sue—malice—measure of damages, see note, 21 AM. & ENG. R. CAS. 47.

such intermediate carrier to the place of destination, however the intermediate carrier may thereby become bound to the initial carrier, it does not thereby become liable to the shipper for the negligence or overcharge of carriers subsequent to itself. Whatever guaranty the transaction may have implied, as to the conduct and charges of subsequent carriers, must be regarded as personal between the intermediate and initial carriers. *Hill v. Burlington, C. R. & N. R. Co.*, 9 Am. & Eng. R. Cas. 21, 60 Iowa 196, 14 N. W. Rep. 249.

Where, by mistake of an agent of a line composed of several companies, a car-load of corn, contracted to be sent to Springvale, was miscarried to a station near Springfield and back again to the starting-point, the owner was not liable for the expenses of such miscarriage, although it was uncertain whether an original billing to Springvale, N. H., was the fault of the shipper or of a railway clerk. *Jones v. Boston & A. R. Co.*, 63 Me. 188.

If the company receipts for goods to be transported to a point beyond its line for a definite sum named, and the consignor is charged a larger sum therefor, the receipting company is responsible to him for the excess. *Detroit & B. C. R. Co. v. McKenzie*, 9 Am. & Eng. R. Cas. 15, 43 Mich. 609, 5 N. W. Rep. 1031.

In an action to recover such excess, a variance in describing the defendant's undertaking as one for the carriage of the goods for the whole distance is immaterial. *Detroit & B. C. R. Co. v. McKenzie*, 9 Am. & Eng. R. Cas. 15, 43 Mich. 609, 5 N. W. Rep. 1031.

When freight is shipped over connecting lines, no action lies against the last carrier to recover back a charge in excess of rate agreed upon by the first carrier in the absence of proof that the first carrier, who gave the bill of lading, had authority to bind the connecting lines by its contract rate of shipment, or that the last carrier agreed to refund the sum paid in excess of the amount agreed by the first shipper to be charged. *Mount Pleasant Mfg. Co. v. Cape Fear & Y. V. R. Co.*, 42 Am. & Eng. R. Cas. 498, 106 N. Car. 207, 10 S. E. Rep. 1046.—*FOLLOWING Schneider v. Evans*, 25 Mich. 241; *Condict v. Grand Trunk R. Co.*, 4 Lans. (N. Y.) 106.

Where, in such action against the last carrier, it was in evidence that the agent of

such carrier at the point of destination stated to the consignee that he would not let consignee have the freight without payment of a certain sum (which was largely in excess of the rate specified in the bill of lading), but if, after an investigation made with the roads over which the car came, there was an overcharge, it would be refunded; that he would try and get it corrected, as there was evidently an overcharge from the bill of lading, but it would have to go through all the roads over which it came; also wrote letters to the consignee, stating in one that "the overcharge had been filed and should come in next month. In cases of overcharge the railroad does not allow goods taken without full amount being paid, and when overcharge is worked up by all the roads, the G. C. agent will remit same back"; and in another: "Enclosed will find message I received from G. F. A., Mr. Kyle. It seems we are unfortunate on overcharges. Hope this one will be adjusted now. I have done all that is possible or necessary on my part to do in presenting the case to the general freight agent"; and there was also evidence that he had communicated assignee's claim to the general transportation agent—*held*, that there was sufficient evidence to go to the jury that the defendant company assumed to refund the amount overcharged, if an investigation showed such overcharge to have been made, and the court below erred in instructing the jury to find a verdict for defendant. *Mount Pleasant Mfg. Co. v. Cape Fear & Y. V. R. Co.*, 42 Am. & Eng. R. Cas. 498, 106 N. Car. 207, 10 S. E. Rep. 1046.

Where the rate paid, under protest, was for through freight, the shipper could recover the excess over the local freight rate in an action against the company. *Pennsylvania R. Co. v. Canfield*, 46 Pa. St. 211.

A person who pays excessive charges under protest is entitled to recover back the excess over the proper charge, and this recovery may be had against a company which accepts goods and makes charges for a carriage over its own line and over a connecting line. *Parker v. Bristol & E. R. Co.*, 6 Railw. Cas. 776, 6 Ex. 702.

40. Effect of agreement to pay excessive rate.—Where a freight rate has been agreed on, and the shipper has no other outlet, and the railroad demands a higher rate, he may ship, and sue, and recover back the excess of freight above the

contract price. *Chicago & A. R. Co. v. Chicago, V. & W. Coal Co.*, 79 Ill. 121.— FOLLOWED in Louisville, E. & St. L. Con. R. Co. v. Wilson, 132 Ind. 517. QUOTED IN West Virginia Transp. Co. v. Sweetzer, 22 Am. & Eng. R. Cas. 469, 25 W. Va. 434. REVIEWED IN Peters v. Marietta & C. R. Co., 42 Ohio St. 275.

When unexpected difficulties occur in the transportation of property by a carrier, and the consignor agrees, in view of them, to pay a sum for the carriage, in addition to what had been previously fixed upon, and pays the same, he cannot recover it back as paid without consideration. *Detroit & B. C. R. Co. v. McKenzie*, 9 Am. & Eng. R. Cas. 15, 43 Mich. 609, 5 N. W. Rep. 1031.

50. Rebates; right to recover.—In an action for the recovery, for the use of third persons, of certain rebates claimed to be due upon freight shipped, an order directed to the company by the shippers requesting such payments to be made to them must be held to refer only to sums already due or to become due on freight shipped at the date thereof. Payment by the company to a subsequent assignee was a good defense against the makers of the order; and as to the beneficiaries named, the same would be good so far only as in equity they were the owners of the claim sued upon. *Chicago & N. W. R. Co. v. Becker*, 33 Ill. App. 290.

In an action to recover a rebate which plaintiff alleged the company agreed to allow him on freight shipped by him over its road, it was not error to deny defendant's motion to require plaintiff to make his petition more definite and certain by stating where and by what officers of defendant the alleged contract was made, whether it was oral or in writing, and if in writing, that plaintiff be required to file it in court for defendant's inspection, where it appeared that the contract was not in writing and the petition alleged a contract, set out its terms, averred a breach thereof, and the amount of damages claimed for the breach. *Christie v. Missouri Pac. R. Co.*, 32 Am. & Eng. R. Cas. 413, 94 Mo. 453, 7 S. W. Rep. 567, 13 West. Rep. 688.—DISTINGUISHING *Hannibal & St. J. R. Co. v. Knudson*, 62 Mo. 569.

In an action to recover a rebate, where the sole defense was that no contract allowing a rebate had been made as alleged by plaintiff, and where the evidence tended to show that the sum claimed by plaintiff had been paid by him and received by de-

fendant, an instruction in effect telling the jury they might from such defense infer that the sums claimed had been received by defendant was not improper. *Christie v. Missouri Pac. R. Co.*, 32 Am. & Eng. R. Cas. 413, 94 Mo. 453, 7 S. W. Rep. 567, 13 West. Rep. 688.

51. Rates as affected by wrong classification.—The hirer of a car for the transportation of a car-load of household goods must pay the increased rate charged for potatoes, bacon, vinegar, and salt carried in limited quantities for sale and barter, these not being household goods. *Smith v. Findley*, 34 Kan. 316, 8 Pac. Rep. 871.

A petition under Mo. Rev. St. ch. 21, art. 3, alleging that plaintiff shipped two car-loads of saw-logs over defendant's road, a distance of over 25 miles and under 50, for which the legal rate of freight was \$28, but that defendant charged an excess over said rate of \$3.20, which plaintiff paid, and asking judgment for that amount, is sufficient. *Burkholder v. Union Trust Co.*, 23 Am. & Eng. R. Cas. 656, 82 Mo. 572.

Mo. Rev. St. 1879, ch. 21, art. 3, concerning railroad classification and charges, has repealed the common law, and the only remedy for an overcharge by a carrier is that given by the statute. *Young v. Kansas City, St. J. & C. B. R. Co.*, 33 Mo. App. 509.—DISTINGUISHING *Graham v. Chicago, M. & St. P. R. Co.*, 53 Wis. 473; *Heiserman v. Burlington, C. R. & N. R. Co.*, 63 Iowa 732.

A company, in making defense in a suit for a penalty for excessive charges, is not estopped from showing that forty-eight packages, alleged to have been overcharged, could have been charged at a higher rate, or that they were all, or in part, express matter and not fully charged as such, or that by small packages the company could have charged more. *McGregor v. Erie R. Co.*, 35 N. J. L. 115.

In a suit against a railroad company for overcharging on certain freight, by rating cotton as "measurement freight" instead of "weight freight" (the company's charges being limited per foot as well as per hundred pounds), it was error to admit the evidence of merchants and shippers to prove that, by custom, cotton was "weight freight" and not "measurement freight." The company might lawfully rate cotton either by measurement or weight, but could not charge according to both standards on the

same lot of freight. *Central R. Co. v. Hearne*, 32 Tex. 546.

In a suit for overcharge, the bill of lading stipulated that the rate should be \$120 per car, and that the articles shipped were "for farm purposes." The place of destination was on a connecting road, which refused to deliver the goods until \$235 was paid. The answer set up that the contracting road had an agreement with the other road whereby the latter would carry farming goods at reduced rates, such as stipulated for in the bill of lading, and that plaintiff falsely represented that the goods were for farming purposes. *Held*, that the answer was sufficient on demurrer. *Fry v. Louisville, N. A. & C. R. Co.*, 22 Am. & Eng. R. Cas. 442, 103 Ind. 265, 2 N. E. Rep. 744.

52. Statutory penalties, generally.*

—The Kansas act of 1883, giving a full and ample remedy to the shipper for the recovery back for any excess of overcharges received by the common carrier beyond reasonable compensation, is a substitute for the remedy provided in such case at common law. The statute does not permit the shipper to recover the excess of overcharges exacted by the common carrier, but allows three times the excess, or treble damages, with attorney's fee and costs. (Laws of 1883, ch. 124; Gen. St. of 1889, §§ 1333, 1334, 1342.) *Beadle v. Kansas City, Ft. S. & M. R. Co.*, 51 Kan. 248, 32 Pac. Rep. 910.—CRITICISING *Beadle v. Kansas City, Ft. S. & M. R. Co.*, 48 Kan. 379. DISTINGUISHING *Clark v. Merchants' & M. Transp. Co.*, 151 Mass. 352, 24 N. E. Rep. 49; *Cook v. Chicago, R. I. & P. R. Co.*, 81 Iowa 551, 46 N. W. Rep. 1080; *Heiserman v. Burlington, C. R. & N. R. Co.*, 63 Iowa 732.

53. — Iowa statutes. — Iowa Laws 1862, ch. 169, § 2, imposing on railroads a penalty for overcharging, does not prevent a recovery in a single action both of the penalty and the amount wrongfully collected. *Fuller v. Chicago & N. W. R. Co.*, 31 Iowa 187, 1 Am. Ry. Rep. 383.

It is not necessary for the plaintiff to show that the overcharge was wilful on the part of the company. *Fuller v. Chicago & N. W. R. Co.*, 31 Iowa 211, 1 Am. Ry. Rep. 377.

Said section is not in conflict with the

* Is the continuous payment of overcharges without protest a bar to the statutory action to recover three times the amount of the overcharges? see note, 23 AM. & ENG. R. CAS. 662.

constitution of the United States (art. 1, § 8) in that it seeks to regulate commerce between the several states. *Fuller v. Chicago & N. W. R. Co.*, 31 Iowa 211, 1 Am. Ry. Rep. 377.

Under Iowa Acts, 15th Gen. Assem. ch. 68, fixing a maximum rate for freight charges, and providing that a higher charge shall be "punished by a forfeiture of \$500 to the school fund," and that the company "shall forfeit and pay to the person injured five times the amount of the charges," etc., an action under the first clause will not bar an action under the second. *Herriman v. Burlington, C. R. & N. R. Co.*, 9 Am. & Eng. R. Cas. 339, 57 Iowa 187, 9 N. W. Rep. 378, 10 N. W. Rep. 340.

54. — Missouri statutes.—Mo. Laws 1887 (Ex. Sess.), p. 15, §§ 1, 10, 11, standing alone, would seem to entitle the shipper to recover triple damages from the carrier for exacting unreasonable and unjust freight charges, whenever a jury might deem the rate unreasonable or unjust; but looking at the whole act, in connection with antecedent legislation, *in pari materia*, the triple liability does not arise where the carrier has not charged a rate in excess of the maximum rate established by the railroad commissioners, or the maximum rate permitted by the statute in the absence of any action thereon by the commissioners. *Winsor Coal Co. v. Chicago & A. R. Co.*, 52 Fed. Rep. 716.

The common-law right of action was superseded by the remedies provided by the statute. *Winsor Coal Co. v. Chicago & A. R. Co.*, 52 Fed. Rep. 716.

In an action to recover the penalties for overcharges for transportation by a railroad company (Rev. St. §§ 833, 834, 835), the fact that the petition states the maximum rate to be less than that allowed by law does not vitiate it. *Reynolds v. Chicago & A. R. Co.*, 85 Mo. 90.

In an action to recover the penalties for overcharges for transportation, where there was a special contract between the shipper and the company for legal rates, the plaintiff is not remitted to an action for breach of the contract, and such contract constitutes no defense. *Reynolds v. Chicago & A. R. Co.*, 85 Mo. 90.

A petition in an action on Rev. St. 1889, § 2643, to recover penalties for charging plaintiff unreasonable rates on coal shipped over defendant's line, is fatally defective

which fails to allege that the rates charged were in excess of those fixed by defendant and filed with the state board of railroad commissioners and posted in defendant's depots, or that the charges were in excess of the maximum rate fixed by the commissioners or by the statute. *McGrew v. Missouri Pac. R. Co.*, 114 Mo. 210, 21 S. W. Rep. 463.—REVIEWING *Sorrell v. Central R. Co.*, 75 Ga. 509; *Chicago, B. & Q. R. Co. v. People*, 77 Ill. 443.

Where a new right, or the means of acquiring it, is conferred, and an adequate remedy for its invasion is given by the same statute, parties injured are confined to the statutory redress, but the right secured by Rev. St. ch. 21, art. 3, is not a new right, as the carrier has always been obliged to carry freight for a reasonable charge, and it has always been the right of the shipper, at common law, to recover back any excess beyond a reasonable charge. *Young v. Kansas City, St. J. & C. B. R. Co.*, 33 Mo. App. 509.

Upon allegations, under Mo. Rev. St. 1879, § 844, of a charge by a railroad company for freight in excess of rates fixed by the railroad commissioners, no recovery can be had, under § 835, for a charge exceeding the statutory rate, where there is a failure to prove that a rate has been fixed by the commissioners. *Scammon v. Kansas City, St. J. & C. B. R. Co.*, 41 Mo. App. 194.

55. — Texas statutes, generally.—The statutory remedy for overcharge in freight afforded by Rev. St. art. 4258 is not exclusive, but cumulative, and he who would recover the penalty provided by it must bring himself clearly within its terms. *Murray v. Gulf, C. & S. F. R. Co.*, 22 Am. & Eng. R. Cas. 464, 63 Tex. 407.—NOT FOLLOWED IN *State v. Kansas City, Ft. S. & G. R. Co.*, 32 Fed. Rep. 722.

The expense account attending a carriage of goods by railway is a bill of particulars of services rendered and expenses paid under the contract made by the railway company alone. *Schloss v. Atchison, T. & S. F. R. Co.*, 85 Tex. 601, 22 S. W. Rep. 1014.

In order to recover the penalty provided by Tex. Rev. St. art. 4257, for an overcharge on freights, the facts to show such violation must be alleged; that is, that the company demanded and received more than fifty cents for one hundred pounds per one hundred miles. *Dwyer v. Gulf, C. & S. F. R. Co.*, 3 Tex. App. (Civ. Cas.) 104.

Where a party sues a railroad company under the Texas act of May 6, 1882, which merely denounces the charging of a greater rate of freight than is specified in the bill of lading, but which provides no penalty whatever for its violation, he cannot recover under the act of April 10, 1883, § 7, which specially provides the instances in which railroad companies shall become amenable to the penalty, but which does not cover charges in excess of the bill of lading. *Dwyer v. Gulf, C. & S. F. R. Co.*, 3 Tex. App. (Civ. Cas.) 104.

Rev. St. art. 4258, prescribing a penalty against carriers for an overcharge in freights, was not repealed by the act of April 10, 1883. *Missouri Pac. R. Co. v. Rains*, 3 Tex. App. (Civ. Cas.) 90.—FOLLOWED IN *Gulf, C. & S. F. R. Co. v. Lamkin*, 23 Am. & Eng. R. Cas. 652, 3 Tex. App. (Civ. Cas.) 106.

A party may avail himself of the right to sue under either statute, the remedy under the act of 1883 being cumulative. *Missouri Pac. R. Co. v. Parkhurst*, 3 Tex. App. (Civ. Cas.) 198.

Under Tex. Rev. St. art. 4257 there can be no recovery of the penalty prescribed for an overcharge of freights, where it appears that the freight weighed 47 7/8 pounds and was transported 65 miles for \$18, as under the statute the company had a right to charge as much as fifty cents per hundred for carrying the freight any distance less than 100 miles. *Missouri Pac. R. Co. v. Lybrand*, 3 Tex. App. (Civ. Cas.) 405.

In a suit for the statutory penalty for exacting five dollars overcharge for carrying a cow and calf less than fifty miles, the estimated weight stated in the bill of lading was 600 pounds. The way-bill reserved the right to correct errors. There was no testimony as to the weight of the animal from which it could be ascertained whether an overcharge in fact had been made. *Held*, that the penalty should not have been imposed. *Sabine & E. T. K. Co. v. Cruse*, 83 Tex. 460, 18 S. W. Rep. 755.

Where a bill of lading contained the clause, "Weight and classification subject to correction," to entitle plaintiff to recover the penalty for overcharge he should have alleged and proved that the weight, etc., in the bill of lading were correct, so as to negative the correctness of the demand for freight in excess of that named in the bill of lading. *Gulf, C. & S. F. R. Co. v. Loonie*, 84 Tex. 259, 19 S. W. Rep. 385.—DISTIN-

GUISHING Gulf, C. & S. F. R. Co. v. Dwyer, 75 Tex. 572. QUOTING Sabine & E. T. R. Co. v. Cruse, 83 Tex. 460.

56. — notice of claim.—The statute requires that notice be given to "the railway company or to the agent demanding or receiving the same;" and when notice is given to a station agent at the place where the overcharge is claimed to have been demanded or received, then if not given to the agent who demanded or received it the necessity for identifying the transaction would be more apparent. It seems when it is claimed that notice, in cases based on the statute, was given to an agent who is not to be deemed the agent of the railway company generally, that it should be shown that the notice was given to the agent who demanded or received the overcharge. *Sabine & E. T. R. Co. v. Cruse*, 83 Tex. 460, 18 S. W. Rep. 755.—QUOTED IN Gulf, C. & S. F. R. Co. v. Loonie, 84 Tex. 259.

Proof that the notice was served upon a freight agent who had succeeded the one in charge of the office at the time the goods were shipped is a sufficient compliance with the law. *Missouri Pac. R. Co. v. Rains*, 3 Tex. App. (Civ. Cas.) 90.

A party may prove notice of the overcharge by showing that the notice was duly posted, and it will be presumed that the letter was duly carried and delivered; and especially will this be sufficient where there is further evidence showing that the agent afterward returned the notice with an indorsement thereon. *Missouri Pac. R. Co. v. Kuthman*, 2 Tex. App. (Civ. Cas.) 406.

In an action to recover the penalty prescribed by Tex. Rev. St. art. 4258, providing a penalty for an overcharge on freights, it appeared that the expense bill delivered to the shipper contained a provision to the effect that "claims for overcharge, loss, or damage must invariably be accompanied by original bills of lading and expense bill." Held, that such requirement, which compelled plaintiff to surrender to the company his only written evidence of the overcharge, was not reasonable, and it was not necessary in order to recover that the notice of overcharge should be accompanied by the original bill of lading or expense bill. *Missouri Pac. R. Co. v. Rains*, 3 Tex. App. (Civ. Cas.) 90.

Freight was consigned to D. H. The account for overcharge was made out in favor of W. W. C. A new station agent represented the company. The freight was de-

livered August, 1889, the claim for overcharge, May 30, 1890. The agent could find no bill in name of C., and the claim was rejected, the agent not knowing that it was for overcharge in the shipment for D. H. Held, that the facts failed to show such notice to the defendant company as is required by statute prior to recovery of penalty. *Sayles Civ. St. art. 4258d, § 10. Sabine & E. T. R. Co. v. Cruse*, 83 Tex. 460, 18 S. W. Rep. 755.

57. — constitutionality of act of 1882.—The act of congress requires that the schedule of rates be agreed upon and published, and denounces penalties upon any carrier who receives more or less than schedule rates. The state statute of May 6, 1882, provides that any carrier who shall refuse to deliver freight upon tender or payment of the freight charges shown by the bill of lading shall be liable for an amount equal to the freight charges for each day's delay. This state law demands that the carrier should do a thing that is forbidden by a constitutional law of congress, and that law is paramount to any state law when the provisions of the latter are antagonistic to those of the former. *Dillingham v. Fischl*, 1 Tex. Civ. App. 546, 21 S. W. Rep. 554.

58. — Wisconsin statutes.—Laws of 1874, ch. 273, after fixing the maximum tolls chargeable gives certain civil remedies against the companies for violations of the rates so fixed, and also provides penalties against the agents of the companies who may be guilty of such violations; but it does not provide penalties against the companies themselves. Held, that the legal remedies so provided furnish no sufficient ground for denying relief by injunction against the companies. *Attorney-General v. Chicago & N. W. R. Co.*, 35 Wis. 425.—REVIEWED IN *Ditberner v. Chicago, M. & St. P. R. Co.*, 47 Wis. 138.

Rights of action against railroad companies for penalties for overcharges, which had accrued under the acts of 1874 and 1875, went with the repeal of those acts by ch. 57 of 1876. *Smith v. Chicago & N. W. R. Co.*, 43 Wis. 686, 17 Am. Ry. Rep. 145.—FOLLOWING *Dillon v. Linder*, 36 Wis. 344; *Rood v. Chicago, M. & St. P. R. Co.*, 43 Wis. 146.

Section 7 of the act of 1876 does not give private persons injured by violations of the provisions of that act limiting railroad charges an absolute right to bring actions for three times the excess, at their own expense, without authority of the railroad

commissioner, but merely authorizes such an action at the discretion of the commissioner (and at the expense of the state), to enforce a penalty on behalf of the state, but payable to the person injured. *Smith v. Chicago & N. W. R. Co.*, 43 Wis. 686, 17 Am. Ry. Rep. 145.—FOLLOWED IN *Streeter v. Chicago, M. & St. P. R. Co.*, 44 Wis. 383.

Said section 7 cannot be regarded as continuing prior statutory provisions for such actions, or saving rights of action which had accrued under them, because the action there given is essentially different from those of former acts in the respect above described, and others; and is given only for charges in excess of the new rates established by the act itself. *Smith v. Chicago & N. W. R. Co.*, 43 Wis. 686, 17 Am. Ry. Rep. 145.

Since the repeal of the Wis. Law 1874, ch. 273, giving an action for three times the excess above legal rates of the charges made by a railway company for carriage of goods, the plaintiff in such action cannot without amendment of the complaint recover as in a common-law action for the simple excess of such charges above reasonable rates. *Streeter v. Chicago, M. & St. P. R. Co.*, 44 Wis. 383, 18 Am. Ry. Rep. 196.—FOLLOWING *Rood v. Chicago, M. & St. P. R. Co.*, 43 Wis. 146; *Smith v. Chicago & N. W. R. Co.*, 43 Wis. 686.

In an action, originally brought to recover, for an exaction of excessive charges for the carriage of goods, the statutory penalty of three times the excess, it was determined that such an action would not lie, by reason of a repeal of the statute (43 Wis. 686). The prayer of the complaint was then changed so as to demand only the illegal excess. *Held*, that, as the excessive charges are alleged to have been made "wrongfully and fraudulently," the action may be regarded as still one in tort, and the amendment was allowable. *Smith v. Chicago & N. W. R. Co.*, 1 Am. & Eng. R. Cas. 303, 49 Wis. 443, 5 N. W. Rep. 240.—FOLLOWED IN *Graham v. Chicago, M. & St. P. R. Co.*, 49 Wis. 532.

V. LOCAL AND THROUGH RATES.

59. What are local or through freights.*—Grain bought in another state, shipped to and stored for sale at Pittsburgh,

* Local traffic rates must be reasonable, see note, 12 L. R. A. 436.

Construction of statutes fixing rates for local freights, see note, 51 Am. Rep. 653.

by a dealer there, and afterwards reshipped by him to Philadelphia, by the Pennsylvania railroad, is local freight within the meaning of the act of March 7, 1861, for commutation of tonnage duties. *Pennsylvania R. Co. v. Canfield*, 46 Pa. St. 211.

Millers in Philadelphia bought grain west of Pennsylvania, not the product of her soil, shipped it to Pittsburgh, and thence by railroad to Philadelphia. *Held*, that this was not "local freight" within the meaning of the Commutation Act of March 7, 1861. The grain in such case was not a domestic product. *Rowland v. Pennsylvania R. Co.*, 52 Pa. St. 250.—DISTINGUISHING *Shipper v. Pennsylvania R. Co.*, 47 Pa. St. 338; *Sandford v. Catawissa, W. & E. R. Co.*, 24 Pa. St. 378.

Plaintiff shipped goods to a city in a foreign country over two railroads connecting at the border. The through bill of lading provided that if the freight was removed at the connecting point, the shipment should be regarded as a local one to such point, and the full proper rate to such point collected. The plaintiff had knowledge that the local rate was greater than the *pro rata* proportion of the through rate to the connecting point, but intended to withdraw upon payment of the lesser *pro rata* rate. *Held*, that the plaintiff could not withdraw the goods at such point upon payment merely of the *pro rata* which the first road would have received under the through shipment. *Southern Pac. R. Co. v. Haas*, (Tex.) 49 Am. & Eng. R. Cas. 37, 17 S. W. Rep. 600.—FOLLOWING *Gulf, C. & S. F. R. Co. v. Dwyer*, 42 Am. & Eng. R. Cas. 503, 75 Tex. 572.

60. Power of carrier to make through rates.—The constitution of the United States does not prohibit a discrimination between local freight on railroads and that which is extraterritorial when it commences its transit; the distinction is not personal, and therefore not within the prohibition. *Shipper v. Pennsylvania R. Co.*, 47 Pa. St. 338.

The general freight agent of a railroad has no power to fix the rate over other connecting lines of railway; and an agreement between two connecting railroad companies to transport freight will not have the effect to make them joint contractors or parties. *Hill v. Burlington, C. R. & N. R. Co.*, 9 Am. & Eng. R. Cas. 21, 60 Iowa 196, 14 N. W. Rep. 249.

The right of connecting railroads to make contracts for through rates is incident to their powers unless prohibited by their charter. Where such contracts are not unjust, unconscionable, or in restraint of trade they will not be interfered with. *Munhall v. Pennsylvania R. Co.*, 5 *Am. & Eng. R. Cas.* 337, 92 *Pa. St.* 150.—DISTINGUISHING *Morris Run Coal Co. v. Barclay Coal Co.*, 68 *Pa. St.* 173; *Twells v. Pennsylvania R. Co.*, 12 *Am. Law Reg. (N.S.)* 728.

The traffic arrangement made by the managers of defendant railway, to induce traffic from Port Perry to pass over their line via Lindsay to Port Hope, ought not, *per se*, to be treated or characterized as a prohibited arrangement, within the meaning and intention of the 25th section of the Railway Act, as affording an undue advantage or privilege to the Port Perry dealers as against the plaintiff's instestate. *Scott v. Midland R. Co.*, 33 *U. C. Q. B.* 580.

Defendant company, by the 10th section of the amending act, 16 *Vict. c.* 241, are empowered and authorized to enter into arrangements with steamboat proprietors, so as to enable them to make a charge or a general through rate from any point. *Scott v. Midland R. Co.*, 33 *U. C. Q. B.* 580.

61. How local and through rates determined under Alabama statute.

—The rate on freight carried over the whole line of a railroad company, which furnishes the basis for the additional fifty per cent. allowed by the act of the General Assembly of Alabama, approved April 19, 1873, for the transportation of "local freight," is the rate charged on freight taken on at one terminus and discharged at the other, and not the rate for freight brought from or carried to a point beyond either terminus of the road. *Lotspeich v. Central R. & B. Co.*, 18 *Am. & Eng. R. Cas.* 490, 73 *Ala.* 306.—FOLLOWING *Mobile & M. R. Co. v. Steiner*, 61 *Ala.* 559.—*Mobile & M. R. Co. v. Steiner*, 61 *Ala.* 559.—FOLLOWED IN *Lotspeich v. Central R. & B. Co.*, 18 *Am. & Eng. R. Cas.* 490, 73 *Ala.* 306. QUOTED IN *Murray v. Gulf, C. & S. F. R. Co.*, 22 *Am. & Eng. R. Cas.* 464, 63 *Tex.* 407.

The second section of the act of April 19, 1873, does not authorize the addition of fifty per cent. on the charge over the whole road, irrespective of the distance the freight may be carried, but only an additional fifty per cent. more per mile for the distance local freight is carried, than the per-mile

freight charged on goods carried over the whole line. *Mobile & M. R. Co. v. Steiner*, 61 *Ala.* 559.—FOLLOWING *State ex rel. v. Mobile & M. R. Co.*, 59 *Ala.* 321.

62. Power of Iowa commission to establish joint through rates.—The authority of the state to limit or control the rates or charges made by railroad companies for the transportation of freight extends to "joint through rates" between points within the state. *Burlington, C. R. & N. R. Co. v. Dey*, 45 *Am. & Eng. R. Cas.* 391, 82 *Iowa* 312, 48 *N. W. Rep.* 98.

The authority conferred upon the board of railroad commissioners to establish joint through rates for the transportation of freight, after notice to the railroad companies affected thereby, does not operate to deprive such railroad companies of their property without due process of law. *Burlington, C. R. & N. R. Co. v. Dey*, 45 *Am. & Eng. R. Cas.* 391, 82 *Iowa* 312, 48 *N. W. Rep.* 98.

63. False representation as to—Where actionable.—A false representation by a railway company to a shipper that the rate charged him was its joint rate, as fixed by contract with a connecting line, is not actionable, unless he was induced thereby to ship by its line and to pay more than the service would have cost him by some other means of transportation. *Arkansas & L. R. Co. v. Smith*, 42 *Am. & Eng. R. Cas.* 348, 53 *Ark.* 275, 13 *S. W. Rep.* 929.

VI. SPECIAL SERVICES.

64. Services for which extra charge may be made.—Under an agreement by a railroad company to carry freight for the owner thereof at so much per ton, it is not liable to refund to the freighter the amount paid by him for weighing the freight, in the absence of any evidence of an agreement that the defendants were to weigh the same, or cause it to be done, or to pay for the weighing. *Johnson v. Cayuga & S. R. Co.*, 11 *Barb. (N. Y.)* 621.

The limitation of rates to be charged by the Monmouthshire railway company by 24 & 25 *Vict. c.* 223, § 26, to 1d. a ton per mile for coals, did not comprise or include a charge for stoppage which was not incidental to the conveyance of the goods; for such a stoppage a reasonable charge may be legally made by the company under § 105, 8 & 9 *Vict. c.* 169, in addition to the

tolls for conveyance. *Monmouthshire R. & C. Co. v. Williams*, 27 L. T. 134.

Where a railway act authorizes the company to charge not exceeding three farthings per ton per mile for the carriage of coal, but also provides that "nothing in this act contained shall prevent the company from taking any increased charges, over and above the charges by this act limited, for the conveyance of goods of any description, by agreement with the owners of or persons in charge of the goods, either with respect to the conveyance thereof, except small parcels by passenger trains, or by reason of any other special service performed by the company in relation thereto"—the company may agree for the carriage of coals at a higher rate than three farthings, although there are no special services involved. *Wrexham R. Co. v. Little Mountain Colliery Co.*, 38 L. T. 290.

A railway company, although having no express statutory power to make charges for the use of weighing-machines placed in its station yard, may allow coal merchants to weigh out coal to customers by such machine in consideration of a specified reasonable charge and may maintain an action to recover such charges. *London & N. W. R. Co. v. Price*, L. R. 11 Q. B. D. 485, 52 L. J. Q. B. D. 754.

Station accommodation, the use of sidings, weighing, checking, clerkage, watching, and labeling provided and performed by a railway company, in respect of goods carried by it, are *prima-facie* "services incidental to the duty or business of a carrier," within the meaning of § 51 of the London, Brighton & South Coast Railway Act 1869; and such services may be the subject of a separate charge in addition to the rates prescribed by the act. *Hall v. London, B. & S. C. R. Co.*, 22 Am. & Eng. R. Cas. 446, L. R. 15 Q. B. D. 505, 53 L. T. 345.

The cost of working a junction between one part of a railway and another is an item of the cost of conveyance, the remuneration of which is included in the mileage rate which the company is authorized to charge. *Hall v. London, B. & S. C. R. Co.*, 22 Am. & Eng. R. Cas. 446, L. R. 15 Q. B. D. 505, 53 L. T. 345.

The plaintiff, a manufacturing corporation, had been a shipper for several years over the road of the defendant company. It was charged for its traffic to a certain point, where defendant's road connected with an-

other road, fifty cents per ton, or at the rate of ten cents per ton per mile, the distance being, as was supposed, five miles. Plaintiff, subsequently becoming dissatisfied with the rates it was receiving, caused the distance to be measured, and learned that it was but four and nine tenths miles. It also contended that under the act of 1846 the freight rates which the defendant, by the fourteenth section of the act of 1837 was entitled to charge, had been reduced, and that plaintiff could legally charge but eight cents per ton. Suit was brought to recover sums paid in excess above this rate. *Held*, that the act of 1846 did not operate to reduce the rates, and that the defendant was entitled to charge ten cents per ton; that even though the distance was but four and nine tenths miles, yet as there were various terminal services, switching, etc., that were performed by the defendant, for which it was entitled to a reasonable amount, plaintiff was not entitled to recover. *National Tube Works Co. v. Baltimore & O. R. Co.*, (Pa.) 28 Am. & Eng. R. Cas. 13, 8 Atl. Rep. 6.

65. Services for which extra charge may not be made.—A railroad company cannot collect charges for unloading freight which it converts to its own use at the time of such unloading. *Burlington & M. R. R. Co. v. Chicago Lumber Co.*, 15 Neb. 390, 19 N. W. Rep. 451.—DISTINGUISHED IN *Miller v. Georgia R. & B. Co.*, 88 Ga. 563.

The expense of invoicing traffic and clerkage is an expense incidental to conveyance and is not an "extraordinary service" for which a railway company may make an extra charge, under the provisions of its act authorizing extra charges for such services. *Hall v. London, B. & S. C. R. Co.*, 22 Am. & Eng. R. Cas. 446, L. R. 15 Q. B. D. 505, 53 L. T. 345.

Services performed by a railway company in advising a consignee of the arrival of goods, obtaining his signature acknowledging receipt of same, and clerkage, are not extraordinary services for which the company is authorized to make an extra charge under a provision in its act authorizing it to charge a reasonable sum for such services. *Hall v. London, B. & S. C. R. Co.*, 22 Am. & Eng. R. Cas. 446, L. R. 15 Q. B. D. 505, 53 L. T. 345.

A railway company authorized by its act to demand a reasonable sum for "extraordinary services" performed as a carrier can-

not make an extra charge for providing and maintaining siding accommodations at the receiving station for full and empty cars and for taking empty wagons out and placing full ones on the sidings, such services being incidental to conveyance and not extraordinary. *Hall v. London, B. & S. C. R. Co.*, 22 *Am. & Eng. R. Cas.* 446, *L. R.* 15 *Q. B. D.* 505, 53 *L. T.* 345.

A railway company cannot charge for the collection and delivery of goods where they have rendered no such services; such charges, if paid under protest, may be recovered back. *Garton v. Bristol & E. R. Co.*, 1 *B. & S.* 112, 7 *Jur. N. S.* 1234, 30 *L. J. Q. B.* 273, 9 *W. R.* 734, 6 *C. B. N. S.* 639, 5 *Jur. N. S.* 1313, 28 *L. J. C. P.* 306.—CONSIDERED IN *Palmer v. London & S. W. R. Co.*, *L. R.* 1 *C. P.* 588, 35 *L. J. C. P.* 289, 12 *Jur. N. S.* 926, 15 *L. T.* 159, 15 *W. R.* 11.

Under its special act the defendant company was not entitled to charge, in addition to the regular toll, an additional sum for services performed, accommodations afforded, and expenses and risk incurred in and about the receiving, loading, unloading, and the delivery of the goods. *Pegler v. Monmouthshire R. & C. Co.*, 6 *H. & N.* 644, 39 *L. J. Ex.* 249, 9 *W. R.* 597, 4 *L. T.* 331.

Where the statute provides the maximum rates to be charged, but makes an exception in respect of special services to be rendered by the company for loading, unloading, collection, and delivery, the company is not entitled to charge for such services where the customer has not had the offer and option first distinctly given him of either availing himself of such services at the company's rate or of doing them himself. *Lancashire & Y. R. Co. v. Gidlow*, 42 *L. J. Ex.* 129, 21 *W. R.* 649.

Where a railway company is authorized to charge "a reasonable sum for loading, unloading, and covering, and the delivery and collection of goods, and other services incidental to the business of a carrier," the words "a carrier" do not refer to carriage by railway, but the ordinary business of the carrier who collects and delivers goods from door to door; and the word "incidental" does not refer to the terminal services, but to such subsidiary services as, according to the nature of the carrier's employment, ordinarily attach to it. *Kempson v. Great Western R. Co.*, 4 *N. & M.* 426.

A railway company which has carried a

cow has no right to charge the owner, in addition to the charge for carriage, with the cost of cleansing and disinfecting the car as required by statute, since such service is not a service performed for the owner within the meaning of a provision in its act empowering the company to receive a certain maximum rate, inclusive of every incidental expense, except for any extraordinary services performed by the company in respect to which they ought to make a reasonable extra charge. *Cox v. Great Eastern R. Co.*, 38 *L. J. C. P.* 151, *L. R.* 4 *C. P.* 183.

66. — handling coal.—A railway company cannot make a terminal charge for marshaling the cars of a coal train in its station and on its own sidings; such a service is paid for in the mileage rate which the company is authorized to charge. *Hall v. London, B. & S. C. R. Co.*, 22 *Am. & Eng. R. Cas.* 446, *L. R.* 15 *Q. B. D.* 505, 53 *L. T.* 345.

Providing, maintaining, and working signaling and interlocking apparatus at a junction with a branch line to a colliery, such branch line belonging to the company and constructed at its cost and to some extent used for general traffic, is not an "extraordinary service," within the meaning of those words in a railway act authorizing the company to make an extra charge for such services. *Hall v. London, B. & S. C. R. Co.*, 22 *Am. & Eng. R. Cas.* 446, *L. R.* 15 *Q. B. D.* 505, 53 *L. T.* 345.

Services performed by a railway company in taking the wagons of a colliery owner from his own siding and attaching them to the trains or returning them to the siding, are not such special services for which the company is authorized to make an extra charge under its act fixing maximum charges, "except a reasonable sum for loading, covering, and unloading of goods, and delivery and collection, and any other services incidental to the business of a carrier, where such services or any of them are or is to be performed by the company." *Lancashire & Y. R. Co. v. Gidlow* (No. 2), *L. R.* 7 *H. L. Cas.* 517, 32 *L. T.* 573, 24 *W. R.* 144.

The fact that a railway company permits a colliery owner to leave his coals on the ground adjoining its lines does not constitute such a special service as to authorize the company to make a special charge therefor under its act fixing maximum

rates, "except a reasonable sum for loading, covering, and unloading of goods, and delivery and collection, and any other services incidental to the business of a carrier, where such services or any of them are or is to be performed by the company." *Lancashire & Y. R. Co. v. Gidlow* (No. 2), L. R. 7 H. L. Cas. 517, 32 L. T. 573, 24 W. R. 144.

67. Demurrage charge.—A railroad is not entitled to charge demurrage for freight standing in its cars unless by virtue of contract or statutory laws, or possibly by such use and custom as may have acquired the force of law. *Burlington & M. R. R. Co. v. Chicago Lumber Co.*, 15 Neb. 390, 19 N. W. Rep. 451.

A charge by a railway company for demurrage is not affected by any decision of the railway commissioners as to its reasonableness. *North Eastern R. Co. v. Cairns*, 32 W. R. 829.

Where sacks are hired from a railway company for the conveyance of grain, subject to the following regulations—
 2. The charges for the use of sacks will be a halfpenny per sack per journey when discharged at any of the company's stations on the company's line, or at their warehouses, or at warehouses or mills connected by rail with the company's line, and 1d. per sack when sent to foreign stations.
 3. Demurrage of halfpenny per sack per week will be charged after the expiration of fourteen days, the time to commence from the time the sacks leave the station to be filled; the time allowed for filling and returning to the station to be seven days.
 10. None of the company's sacks containing grain will be allowed to leave any station, local or foreign, unless a guaranty is first obtained by the clerk in charge from the consignee that the grain will be immediately discharged and the sacks returned the same day and to the station, a claim for demurrage arises at the expiration of the fourteen days from the hire of the sacks, and the only person with whom there is a contract for such demurrage is the consignor; but by the operation of the tenth regulation his liability ceases when the company permits the sacks to get in the hands of the consignee. *Great Northern R. Co. v. Wyles*, 2 C. B. N. S. 344.

VII. POSTING AND PUBLISHING RATES.

68. Under New Hampshire act.—Under N. H. Laws 1852, ch. 1277, § 1, requiring companies to post their tariff rates

in their stations, the "published tariffs" referred to in N. H. Laws 1861, ch. 2540, § 4, are those posted in the stations, and the fact that a railroad company had charged less rates did not make them the published ones. *Locke v. Concord R. Co.*, 60 N. H. 552.

VIII. REMEDIES FOR COLLECTING.

1. Carrier's Lien.

69. In general.—The carrier need not be paid in advance unless he specially demands it; and he has a lien on the goods carried for his freight. *Wilson v. Grand Trunk R. Co.*, 56 Me. 60.

A carrier who has received goods from a wharfinger, with whom they have been deposited without authority to forward them, has no lien on them for freight against the owner. *Clark v. Lowell & L. R. Co.*, 9 Gray (Mass.) 231. — FOLLOWING *Robinson v. Baker*, 5 Cush. (Mass.) 137.

Carriers obtain no lien on the property of the government for services in transporting it. *Dufolt v. Gorman*, 1 Minn. 301 (Gil. 234).

A carrier acquires no lien on goods carried unless he fulfils his contract for carriage. *Bass v. Upton*, 1 Minn. 408 (Gil. 292).

The owner of a package carried is not entitled to the delivery thereof until freight is paid or tendered; but a demand and tender to a man appearing at the freight office, who refers the plaintiff to others, and whose employment by the company is wholly unproved, is not sufficient. *Langworthy v. New York & H. R. Co.*, 2 E. D. Smith (N. Y.) 195.

70. Lien as affected by delivery or part delivery.—A carrier, by parting with the property, loses its lien for freight. *Geneva, I. & S. R. Co. v. Sage*, 35 Hun (N. Y.) 95.

A carrier having delivered part of a quantity of goods consigned to one person, without collecting the freight, has a lien therefor upon the part undelivered, even as against the consignor's right of stoppage in transit. *Potts v. New York & N. E. R. Co.*, 3 Am. & Eng. R. Cas. 424, 131 Mass. 455, 41 Am. Rep. 247.

A carrier, having a lien for freight upon an entire cargo of coal, delivered a portion of it, on the order of the consignee, to a person who had purchased the whole cargo from the consignee. Subsequently the car-

rier, on the arrival of the remainder of the coal, notified the purchaser that he claimed a lien on the remainder for the freight of the entire cargo, and ordered him not to disturb or unload it. The purchaser, without right, appropriated the remainder of the coal to his own use. *Held*, that the fact of such taking did not of itself, as matter of law, import a promise on the part of the purchaser to pay to the carrier the freight of the entire cargo. *New York & N. E. R. Co. v. Sanders*, 16 *Am. & Eng. R. Cas.* 280, 134 *Mass.* 53.—**DISTINGUISHING** *New Haven & N. Co. v. Campbell*, 128 *Mass.* 104.

The plaintiff railroad, upon the arrival of cattle at their destination, not knowing certainly who the owner was, relied on its lien for the charges and refused to deliver them. The defendant agreed to be responsible for the freight on their delivery, upon which (being a butcher, but not the owner) he sold some of them and received the proceeds, out of which he retained and was to pay, by express agreement with the party in whose name they were shipped, the amount of the freight claimed. The defendant also, subsequent to the delivery of the cattle by the company, promised to pay the charges. *Held*, that the promise of the defendant did not come within the statute of frauds. It was an original undertaking; and there was abundant consideration, both of benefit to the promisor and harm to the promisee, for the promise by the defendant to the plaintiffs. *New York & E. R. Co. v. Gilchrist*, 16 *How. Pr. (N. Y.)* 564.

71. Selling goods to satisfy lien.—In selling freight for charges a carrier is bound to use reasonable diligence to ascertain the character of the packages from the external *indicia*, and to communicate his knowledge to bidders; and if he fails to do so, and sells valuable freight to a favorite having superior knowledge, at a nominal price, he and the purchaser are liable to an action for damages by the injured party. *Nathan v. Shivers*, 16 *Am. & Eng. R. Cas.* 276, 71 *Ala.* 117, 46 *Am. Rep.* 303.

A carrier who has a lien on goods for the freight earned by him in transporting them, and also for sums paid for freight earned by preceding carriers thereof, has no right to sell the goods to enforce the lien. *Briggs v. Boston & L. R. Co.*, 6 *Allen (Mass.)* 246.

If a carrier who has a lien on goods for freight wrongfully sells them, he is liable to

an action for the conversion; and the measure of damages is the market value of the goods, deducting the amount of the lien. *Briggs v. Boston & L. R. Co.*, 6 *Allen (Mass.)* 246.

Under the Pa. act of Dec. 14, 1863, authorizing a carrier to "expose" goods for sale at public auction for non-payment of freight, an express company is not authorized to sell a trunk closed, with the contents as "unknown." *Adams Exp. Co. v. Schlessinger*, 75 *Pa. St.* 246.

Where a common carrier applies to a judge of the court of common pleas for an order of sale of goods in his possession to satisfy his lien, upon the ground that the places of residence of the owner and consignee are unknown, and such order is granted, it is his duty to expose the goods for public sale at auction. If he sells trunks or boxes filled with valuable goods as trunks or boxes the contents of which are unknown, without exhibiting the goods or stating what is in the trunks or boxes, so that the buyers cannot know what they are bidding for or buying, such a sale is contrary to the act of assembly and the order made under it, and is unlawful, and the carrier will be responsible to the owner for the value of the goods. *Schlessinger v. Adams Exp. Co.*, 9 *Phila. (Pa.)* 70.

Where a railway company seizes and sells goods for tolls without complying with the statutory conditions authorizing it to seize and sell goods for tolls, it becomes a trespasser *ab initio*. *North v. London & S. W. R. Co.*, 14 *C. B. N. S.* 132, 9 *Jur. N. S.* 896, 32 *L. J. C. P.* 156, 11 *W. R.* 624, 8 *L. T.* 246.

72. Carrier must care for goods held under lien.—A carrier, in detaining bees to enforce its lien for freight, is bound to take all reasonable measures to prevent injury to them while so detained. Failure to unload the bees within a reasonable time is negligence, making the carrier liable for the damages caused thereby. *St. Louis, A. & T. H. R. Co. v. Flennagan*, 23 *Ill. App.* 489.

2. *When and from Whom Carrier Entitled to Demand Charges.*

73. Right to demand charges, generally.*—The right to take tolls, freight, and fares can only be exercised by corpora-

* Carriers may demand prepayment of freight, see note, 49 *AM. & ENG. R. CAS.* 75.

tions under an express grant in their charters, and can never be raised by implication; the charters conferring this right will always be construed most favorably to the public. *Camden & A. R. & T. Co. v. Briggs*, 22 N. J. L. 623; *affirming* 21 N. J. L. 406.

The amount of freight charges to which the railroad company is entitled is determined by the weight reported by the state weigh-master who weighs it into the elevator. Upon the weight being reported to the elevator company by the weigh-master, the elevator company reports it to the railroad company and to the consignee. Thereupon the railroad company makes out its freight bill, which is then presented to the consignee, and, upon its payment, gives him a receipt, and also gives the elevator company a statement that the freight bill has been paid, whereupon, and not before, the elevator company issues a warehouse receipt to the consignee. *Arthur v. St. Paul & D. R. Co.*, 32 Am. & Eng. R. Cas. 449, 38 Minn. 95, 35 N. W. Rep. 718.

A common carrier received goods in Philadelphia for C. & T. of Lexington, and receipted for the same, to be delivered to H. & L. of Pittsburgh "on presenting this receipt and payment of freight." The goods were delivered, but the freight was not paid, and H. & L. received the amount of the freight from C. & T. and afterwards failed. *Held*, that the carrier was entitled to recover the amount of the freight from C. & T. *Collins v. Union Transp. Co.*, 10 Watts (Pa.) 384.—REVIEWED IN *McEwen v. Jeffersonville, M. & I. R. Co.*, 33 Ind. 368.

When a railroad company carried goods for an individual, which were delivered to him without payment for the freight due to the company, although the company charged the freight to their station agent who delivered the goods, and the agent paid the amount to the company, such transaction does not extinguish the debt due the company for the freight, nor does it transfer the indebtedness due to the agent of the company so that he may maintain a suit in his own name. *Judd v. Littlejohn*, 11 Wis. 176.

The term "manufactured goods," for which a railway company was entitled to charge a certain rate, is considered to mean only those articles which are popularly called manufactures. *Parker v. Western R. Co.*, 6 El. & Bl. 77, 2 Jur. N. S. 325, 25 L. J. Q. B. 209.

Where a railway company carries goods entirely upon land belonging to it, and not upon any highway nor in the enjoyment of any easement or other right reserved by the former owners of the land or those under whom they held, such goods cannot be the subject of a claim to a toll thorough or toll traverse arising either by prescription or by grant. *Brecon Markets Co. v. Neath & B. R. Co.*, L. R. 7 C. P. 555, 27 L. T. 316.

A market company, in which is vested by statute tolls which had immemorially been received by the borough for cattle, goods, and carriages passing to, through, and from the borough, is not entitled to toll in respect to cattle, goods, or carriages passing along a railway constructed under act of parliament on land not a highway, although the rights of the corporation and the market company were expressly reserved by the railway act. *Brecon Markets Co. v. Neath & B. R. Co.*, L. R. 7 C. P. 555, 27 L. T. 316.

74. From shipper or consignee.*—The property in goods usually passes when they are delivered to the carrier for shipment to the consignee; so where a railroad company receives goods, knowing whom they are for, in the absence of any contract that the shipper will be liable for the freight the company cannot charge him, where the goods have been carried and delivered to the consignee, but who has failed to pay the freight charges. *Union Freight R. Co. v. Winkley*, 55 Am. & Eng. R. Cas. 695, 159 Mass. 133, 34 N. E. Rep. 91.

The defendants hired a trolley and agreed with the owner to pay for the carriage both ways. The defendants delivered the trolley to the plaintiffs to be returned to the owner, under a consignment note which stated that the defendants requested the plaintiffs to receive and forward the trolley as per address and particulars on the note, and on the conditions stated therein. The note gave the name of the owner as consignee, and in a column headed "Who pays carriage" was inserted "consignee." The plaintiffs delivered the goods to the consignee, who declined to pay the freight, on the ground that the defendants had agreed to pay it. In an action to recover the freight from the defendants—*held*, that under the circumstances the defendants could not be

* Liability of consignee or his assignee for freight charges generally. Remedy against consignee not exclusive. Liability of consignor, see note, 55 AM. & ENG. R. CAS. 700.

treated merely as agents of the consignee to make the contract for the carriage of the trolley, but were themselves contracting parties, and liable to pay the freight. *Great Western R. Co. v. Bagge*, 23 *Am. & Eng. R. Cas.* 715, *L. R.* 15 *Q. B. D.* 625, 54 *L. J. Q. B.* 599, 53 *L. T.* 225, 5 *Ry. & C. T. Cas.* vii.

75. Complete carriage and delivery necessary.—To entitle a carrier, who has contracted to transport goods and to deliver them to the consignee, to freight a complete delivery must be made; a carriage of the goods in safety to the place of delivery is not sufficient. *Western Transp. Co. v. Hoyt*, 69 *N. Y.* 230.

Where a carrier, in violation of his contract, upon arrival of the goods at the place of delivery stores instead of delivering them, the fact that the consignee obtains possession thereby from the warehouseman does not entitle the carrier to the freight contracted for; nor where the consignee so obtains the goods under claim of right to possession, discharged from all claim for freight, is such a receipt an acceptance which will entitle the carrier to *pro rata* freight. *Western Transp. Co. v. Hoyt*, 69 *N. Y.* 230.

Where a common carrier pays damages for the loss of goods by negligence, etc., it is tantamount to a safe delivery so far as to entitle him to his freight. *Hammond v. M'Clures*, 1 *Bay (So. Car.)* 101.

A railroad company is not entitled to demand or receive either freight charges or demurrage until it is in a condition to tender a delivery of the goods at a convenient, safe, and uninterrupted point at its depot. The legal effect of its undertaking is to deliver the goods at a point and in a manner to enable consignee to receive them without inconvenience, delay, or interruption. After notice it may require prompt action on the part of the consignee, but he may demand of it free, convenient, safe, and undisturbed access to his goods. *East Tenn., V. & G. R. Co. v. Hunt*, 15 *Lea (Tenn.)* 261.

The contract for the conveyance of merchandise is in its nature an entire contract; and unless it be completely performed by the delivery of the goods at the place of destination, the carrier cannot, in general, claim freight. The cases in which a partial payment may be claimed are exceptions founded upon principles of equity and justice as applicable to particular circum-

stances. *Adams v. Haight*, 14 *Tex.* 243.

76. Partial delivery.—Where the carrier, after a delivery of a portion of the goods, stores the residue, he cannot recover freight upon the portion delivered. *Western Transp. Co. v. Hoyt*, 69 *N. Y.* 230.

Coal was shipped for the port of B., consigned to a railroad company which had its terminus there, to be transported by the latter to W. The bill of lading stated the quantity and the freight per ton. The railroad company paid the freight to the master of the vessel, and transported all the coal received to W. On being weighed there after delivery it was found some six tons short of the amount stated in the bill of lading. It was the custom of the railroad company, known to the parties for whom the coal was transported, not to weigh coal thus delivered, but to depend on the bill of lading; but in the present case the agents of the road could, with ordinary care, have observed a deficiency in the quantity. *Held*, that the railroad company had not made itself liable for the deficiency in the coal, and that it was entitled to the full amount of the freight paid to the master of the vessel. *Naugatuck R. Co. v. Beardsley Scythe Co.*, 33 *Conn.* 218.

77. Abandoning carriage.—Where a carrier by boat abandons the boat and refuses to complete the contract upon his part, he has no right to recover any sum whatever for freight. In such a case it is competent for the consignee to complete the transportation, or to hire or pay any one what was necessary for so doing, and as against the original carrier to charge him or his freight the necessary expense thereof. *Bates v. White*, 13 *N. Y. S. R.* 602.

78. When goods are replevied.—A common carrier from whom part of a consignment of goods is replevied by the consignee, after the delivery of another part and before the arrival of a third part, may recover freight on the goods already delivered, and also on those which arrive and are taken by the officer and delivered to the consignee after the beginning of the service of the replevin, but not on the goods replevied and for which judgment is afterwards given in the replevin for the consignee. *Boston & M. R. Co. v. Brown*, 15 *Gray (Mass.)* 223.—REVIEWED IN *Dyer v. Grand Trunk R. Co.*, 42 *Vt.* 441.

3. *Right of Last or Intermediate Carrier to Demand Charges.*

79. *Recovering advanced charges.**

—Common carriers who advance to forwarding agents existing charges on goods for freight, storage, etc., are entitled to be reimbursed by the consignee and owner of the goods the amount so advanced, and this by the usage of trade. *White v. Vann*, 6 *Humph. (Tenn.)* 70. *Bissel v. Price*, 16 *Ill.* 408.

Where a carrier has advanced the charges of an antecedent carrier, who transported the goods under an independent contract, he becomes subrogated to the rights of the latter and may recover such advances although he fails to perform his own contract; and the fact that his bill of lading is for transportation and delivery upon payment of freights and charges does not deprive him of such right. *Western Transp. Co. v. Hoyt*, 69 *N. Y.* 230.

80. Liability of last carrier to preceding ones.—Where goods are shipped to a certain party in care of a railroad company, the company receiving them is liable to the first carrier for the freight thereon; and where the real owner refuses to pay the freight on account of a loss of a portion of the goods, the railroad company cannot adjust the matter of damages, but must pay the freight actually earned on the goods delivered. *Canfield v. Northern R. Co.*, 18 *Barb. (N. Y.)* 586.

In the absence of some regulation by law or custom, a company receiving freight from a connecting line is not bound to advance or assume payment of the charges due thereon from the point of shipment to the point of connection. *Oregon S. L. & U. N. R. Co. v. Northern Pac. R. Co.*, 51 *Am. & Eng. R. Cas.* 145, 51 *Fed. Rep.* 465.

Plaintiff was a member of an association of land-carriers which was engaged with defendant, an ocean-carrier, in transporting cotton from Texas to England on a through bill of lading. The freight charge was by agreement divided between the association and defendant in certain specified proportions, and the share of the former, by agreement between its members, was divided between them in the same manner. Each

member on receiving goods from another paid to the latter its proportion of the freight charges and the amount advanced by it, if any, to the member from which it received them. Plaintiff, the last land-carrier, transported the goods to New York and delivered them upon a pier where defendant's steamers loaded. By the terms of the through bill of lading the entire freight was to be collected by defendant on delivery of the goods to the consignees in Liverpool, and under it, until such delivery, no duty was imposed on defendant to pay the land-carriers their proportion. A consignment of cotton was delivered by plaintiff upon the pier, and while there, without fault of either party, was destroyed by fire. Defendant gave to plaintiff a special bill of lading which expressly stipulated for exemption from losses by fire before loading in its steamer. In an action to recover of defendant the land-carrier's proportion of the freight charges, it appeared that neither by any agreement nor by custom did defendant become liable for the land-charges until goods were laden upon the vessel, at which time it was the custom to make out the bill for the freight and insure the goods, insurance never being effected by defendant while the goods were on the pier. *Held*, that the action was not maintainable; that possession on shipboard was a condition precedent to any liability on the part of defendant for the land-charges. *New York, L. E. & W. R. Co. v. National Steamship Co.*, 137 *N. Y.* 23, 32 *N. E. Rep.* 993, 49 *N. Y. S. R.* 901; *affirming* 62 *Hun* 621, 43 *N. Y. S. R.* 361, 17 *N. Y. Supp.* 28; and *reaffirming* 37 *N. Y. S. R.* 731, 60 *Hun* 577, 14 *N. Y. Supp.* 253.

81. Right of last carrier to demand more than contract rate.—A. shipped goods from New York to St. Louis, the first carrier agreeing to deliver them there for \$50. The last carrier paid the freight charged thereon and transported the goods to St. Louis, and there demanded of A. the sum it had paid, with its own freight added, amounting to \$100. A. tendered \$50. *Held* (there being no arrangement between the companies as to "through carriage"), that the last carrier was entitled to recover the amount demanded. *Wells v. Thomas*, 27 *Mo.* 17.

82. Division of charges between connecting carriers.—Where one of two connecting roads collects the charges at the

* Connecting lines. Prepayment of freight, see note, 40 *AM. & ENG. R. CAS.* 139.

Lien of connecting carriers for freight charges, see notes, 40 *AM. & ENG. R. CAS.* 148; 55 *Id.* 416.

rates allowed by law for the whole distance, the sum so collected should be divided between the two companies upon some equitable principle, to be determined by the courts in case the companies invoke their aid in the premises. *Ackley v. Chicago, M. & St. P. R. Co.*, 36 Wis. 252, 9 Am. Ry. Rep. 112.

4. Pleading in Actions to Recover.

83. Limiting claim to certain dates.—A plaintiff, by limiting his claim to services performed between certain dates, may make those dates material, so that he cannot claim for services before or after. *Manchester & L. R. Co. v. Fisk*, 33 N. H. 297.

84. How tolls described.—It is not necessary to declare for tolls as such. They may be described by suitable terms to express the services, or the like, for which the tolls are allowed. *Manchester & L. R. Co. v. Fisk*, 33 N. H. 297.

It is unnecessary, where a shipper gives a contract note with respect to the carriage of live stock, that the two alternative rates should appear on the face of such note, but it is sufficient that the contract note referred to the defendant's tariff, containing all the rates. *Moore v. Great Northern R. Co.*, L. R. 10 Ir. 95.

5. Defenses to Such Actions.

85. Defenses, generally.—A demand by a carrier, by mistake, of more than is due upon freight is not a waiver of tender of the amount legally due. *Loewenberg v. Arkansas & L. R. Co.*, 56 Ark. 439, 19 S. W. Rep. 1051.

In an action for charges, in the absence of a special contract evidence is admissible that the plaintiffs raised their charges without giving notice thereof to defendant, and without his knowing that they were different from what he had been accustomed to pay. *Fitchburg R. Co. v. Gage*, 12 Gray (Mass.) 393.

Where there is evidence tending to show that defendant, in bargaining for the transportation and in receiving the goods, acted only as agent of a third party, it is not incumbent upon him to show that he notified plaintiff at the time of receiving the goods that he received them as agent, if the jury are satisfied from the evidence that plaintiff must have known that he was acting only as an agent. *Boston & M. R. Co. v. Whitteher*, 1 Allen (Mass.) 497.

L. being indebted to a company for freight, paid the amount to the sheriff, who held an execution against the company. *Held*, an extinguishment of the debt, notwithstanding the company had given notice to their station agent that they would hold him liable for the amount of the freight. *Judd v. Littlejohn*, 11 Wis. 176.

It is no defense to an action by a company to recover charges for the carriage of goods that the charges sued for are unreasonable, so as to give an undue preference to other persons, or to subject the defendant to undue prejudice or disadvantage, within the meaning of the Railway and Canal Traffic Act 1854, § 2; nor can the defendant in such an action set off, or recover by counterclaim, overpayments in respect of previous charges which were unreasonable within that section. *Lancashire & Y. R. Co. v. Greenwood*, 35 Am. & Eng. R. Cas. 537, 21 Q. B. D. 215.—*EXPLAINING* Denaby M. Colliery Co. v. Manchester. S. & L. R. Co., 11 App. Cas. 97.—*REVIEWED IN* Liverpool C. T. Assoc. v. London & N. W. R. Co., [1891] 1 Q. B. D. 120.

Plaintiff shipped cars over a road as freight. No rate was agreed on, and none had been fixed by the directors. The company charged \$23 per car, which was paid under protest. A subsequent shipment was made under the same circumstances. *Held*, that the facts of the first shipment raised no implied contract that plaintiff was to pay the same per car on the second shipment. *Greene v. St. John & M. R. Co.*, 22 New Brun. 252.

86. Right to set-off damages against charges.—In an action by a carrier for freight charges defendant may set up any breach of his contract by plaintiff, and have any damages resulting therefrom applied upon plaintiff's claim. *Gleadell v. Thomson*, 56 N. Y. 194; *affirming* 3 J. & S. 232.

The defendant may set up as a defense negligence, or want of skill in the carrier, by which the goods were deteriorated in value. *Leech v. Baldwin*, 5 Watts (Pa.) 446. *Boys v. Martin*, 13 B. Mon. (Ky.) 239.

Where the action is brought to recover freight over a continuous line of transportation, of which plaintiff's road forms a part, and the freight for such transportation is to be divided among the proprietors of the different parts of the line in certain stipulated proportions, defendant may set off

damages to the goods by the fault of a carrier on any part of the line. *Fitchburg & W. R. Co. v. Hanna*, 6 Gray (Mass.) 539. —DISTINGUISHING *Nutting v. Connecticut River R. Co.*, 1 Gray (Mass.) 502. —APPROVED IN *South & N. Ala. R. Co. v. Wood*, 9 Am. & Eng. R. Cas. 419, 66 Ala. 167. DISTINGUISHED IN *Gass v. New York, P. & B. R. Co.*, 99 Mass. 220. REVIEWED IN *Darling v. Boston & W. R. Co.*, 11 Allen (Mass.) 295.

The value of an article lost by a prior connecting carrier cannot be recouped, in a suit by the last carrier against the consignee, for the freight bill for carrying several articles, including the lost one. *Louenbourg v. Jones*, 56 Miss. 688.

Where two railway companies as joint lessees sue for statutory tolls, the defendant may set up against each company separate counterclaims for damages for delay in the delivery of goods. *Manchester & S. R. Co. v. Brooks*, L. R. 2 Ex. D. 243, 46 L. J. Ex. D. 244, 25 W. R. 413, 36 L. T. 103.

IX. UNDER ENGLISH RAILWAY AND CANAL TRAFFIC ACTS.

1. Reasonable Facilities—Overcharges.

87. Under special acts.—Although a railway company give public notice that they are not common carriers of mineral traffic and that they only undertake to convey such traffic under special rates and provisions, such special rates must not exceed the maximum authorized to be charged for mineral traffic by their act. In the construction of a special act, toll clauses are to be controlled by a general clause limiting maximum charges. *Chatterley Iron Co. v. North Staffordshire R. Co.*, 3 Ry. & C. T. Cas. 238. —FOLLOWING *Aberdeen Commercial Co. v. Great North of Scotland R. Co.*, 3 Ry. & C. T. Cas. 205.

The expression "all sorts of manure," in a toll clause includes all sorts, both of natural and artificial manures, *bona fide* forwarded for the purpose of being used as fertilizers. *Aberdeen Commercial Co. v. Great North of Scotland R. Co.*, 3 Ry. & C. T. Cas. 205.

A company were entitled to charge a certain rate "for all cotton and other wools, drugs, and manufactured goods." *Held*, that this meant, not all goods on which human skill was employed, but those articles made in what are, in popular language, called manufactories. *Parker v. Great Western R.*

Co., 6 El. & Bl. 77, 25 L. J. Q. B. 209, 1 Ry. & C. T. Cas. 23.

The special act of a railway company provided that where goods were carried on the company's railway, or partly on their railway and partly on some other railway of which they were joint owners, or which they had a right to use, for a less distance than six miles, the company should be entitled to take tolls as for six miles. The act also provided that the tolls for goods carried over the company's line, and over portions of other lines of which they were part owners, or which they had a right to use, should be computed as if the company's line and the said portions of the said other lines formed one railway. Goods were passed over the line of which the company were sole owners for a distance of less than six miles; the same goods, on their transit to their ultimate destination, passed over another line of which the company was part owner, for a distance of more than six miles. This latter line was under the sole management of another company. The goods were accompanied by two declaration notes, one made out in the name of the first company and the other in the name of the other company, but the station of ultimate destination mentioned in both notes was the same. *Held*, that the company was not entitled to split the contract; that the two lines must be treated as one; and that the six-mile clause was not applicable. *Lancashire & Y. R. Co. v. Gidlow* (No. 1), 42 L. J. Ex. 129, 3 Ry. & C. T. Cas. xxv.

The special act of a railway company enacted that (§ 52) "they may demand any tolls for the use of their railway not exceeding the following: In respect of the tonnage of all articles conveyed upon the railway or any part thereof, as follows: For all dung, compost, and all sorts of manures, per ton per mile, 2d.; and if conveyed by carriages belonging to the company an additional per ton per mile of 1d.;" that (§ 53) "the toll which the company may demand for the use of engines for propelling carriages shall not exceed 1d. per ton for each passenger or animal, or for each ton of goods or other articles;" that (§ 55) "it shall not be lawful for the company to charge in respect of the several articles and things hereinafter mentioned, conveyed on the railway, or any part thereof, any greater sum, including the charges for the use of carriages, wagons, or trucks, and for locomotive power, and all

other charges incidental to such conveyance, than the several sums hereinafter mentioned; that is to say, for dung, compost, and all sorts of manure, 2d. per ton per mile." The company gave notice that they would not act as carriers of manure and other specified articles, but would, at the request of parties and at agreed rates, provide wagons or locomotive power or both to persons desiring the use of their railway to forward the above-mentioned articles, and claimed to charge under the toll clauses for such articles carried on their railway. *Held*, by the commissioners, affirmed by the court of session in Scotland, that notwithstanding such notice, the company in fact acted as carriers of such articles, and were not entitled to charge under the toll clauses, and § 55 limited tolls as well as rates for manure to 2d. per ton per mile. *Aberdeen Commercial Co. v. Great North of Scotland R. Co.*, 3 Ry. & C. T. Cas. 205.

88. Under act of 1845, sec. 90.—Where a railway company carried coals from a group of collieries situate at different points along their line, and charged all the collieries with one uniform set of rates in respect of such carriage, and the owners of the colliery lying nearest to the point of arrival brought an action for overcharges—*held*, that the railway company had not infringed the provisions of section 90 of the Railways Clauses Consolidation Act 1845. *Denaby M. Colliery Co. v. Manchester, S. & L. R. Co.*, 11 App. Cas. 97, 55 L. J. Q. B. 181, 6 Ry. & C. T. Cas. 133.

A railway company which carried coals for the appellants and also for B. and J. "over the same portion of their line of railway," and made allowances and a rebate to B. and J., proved that they carried for B. and J. at a less cost to the company, but did not show that the allowances and rebate were adequately represented by the saving to the company. *Held*, that the difference in cost constituted a real difference in the "circumstances;" that there being nothing to show any want of good faith, the company were not bound to prove that the allowances and rebate were adequately represented by the saving; that there was no breach of section 90 of the Railways Clauses Consolidation Act 1845; and that the appellants could not maintain an action for overcharges under that section. *Denaby M. Colliery Co. v. Manchester, S. & L. R. Co.*,

11 App. Cas. 97, 55 L. J. Q. B. 181, 6 Ry. & C. T. Cas. 133.

89. Under act of 1854, sec. 2.—Where a railway company makes illegal or excessive charges for the conveyance of traffic, it does not afford all reasonable facilities within the meaning of the Railway and Canal Traffic Act 1854, § 2. *Chatterley Iron Co. v. North Staffordshire R. Co.*, 3 Ry. & C. T. Cas. 238.

Charges which a railway company have no statutory power to make, and which are intended or calculated to prevent, and do in fact prevent, the conveyance of traffic on the railway, are a violation of § 2. *Young v. Gwendraeth Valleys R. Co.*, 4 Ry. & C. T. Cas. 247.

An overcharge, even when it is not alleged that other traders are unduly preferred, or that the persons overcharged are subjected to any prejudice or disadvantage other than the necessity of paying the illegal rates, is, if the legal amount has been tendered and refused, or if the railway has threatened to prevent or obstruct the traffic except upon prepayment, a denial of reasonable facilities, and a violation of § 2. *Distington Iron Co. v. London & N. W. R. Co.*, 6 Ry. & C. T. Cas. 108.—DISTINGUISHING *Brown v. Great Western R. Co.*, 3 Ry. & C. T. Cas. 523, 7 Q. B. D. 182, 50 L. J. Q. B. D. 483. REVIEWING *Ransome v. Eastern Counties R. Co.*, 1 Ry. & C. T. Cas. 63; *Harris v. Cockermouth & W. R. Co.*, 1 Ry. & C. T. Cas. 97.

Upon proof that a railway company had charged more than they were entitled to take under the maximum clause of their special act, the commissioners will make an order under § 2 enjoining the railway company to desist in future from exceeding the limit prescribed by their special act. *Lloyd v. Northampton & B. J. R. Co.*, 3 Ry. & C. T. Cas. 259.

Upon an application for such order it is not necessary to prove actual damage, if damage can be inferred from the circumstances. *Denaby M. Colliery Co. v. Manchester, S. & L. R. Co.*, 3 Ry. & C. T. Cas. 426.

Held, by Huddleston, B., and Manisty, J., that the railway commissioners had no jurisdiction to entertain a complaint of such an overcharge. *Distington Iron Co. v. London & N. W. R. Co.*, 6 Ry. & C. T. Cas. 108.—APPLYING AND QUOTING *Brown v. Great*

Western R. Co., 3 Ry. & C. T. Cas. 533, 7 Q. B. D. 182. *QUOTING* South Eastern R. Co. v. Railway Com'rs, 3 Ry. & C. T. Cas. 464, 6 Q. B. D. 591.

If a customer, to whom credit has been allowed, retains a balance due to a railway company as a set-off against a balance in dispute on another account, the company are justified in refusing such customer a further ledger account, and the privilege of making monthly payments as others do, without contravening § 2. *Skinningrove Iron Co. v. North Eastern R. Co.*, 5 Ry. & C. T. Cas. 244.

90. Charges for carrying goods past station and back.—A railway company in carrying goods took them past C. junction to N. E. station and back, and then on by other lines, and charged a mileage rate, which included the mileage to and fro between these places. Such route was reasonable and usual. *Held*, that they could so charge. *London & S. W. R. Co. v. Myers*, 39 L. J. C. P. 57, 1 Ry. & C. T. Cas. 19.

2. Undue Preference or Advantage.

91. Generally.—A railway company is bound to treat carriers in the same manner as the rest of the public. *Great Western R. Co. v. Sutton*, 38 L. J. Ex. 177, L. R. 4 H. L. Cas. 226. *Parker v. Great Western R. Co.*, 3 Railw. Cas. 563. *Crouch v. Great Northern R. Co.*, 9 Ex. 556, 11 Ex. 742, 1 Ry. & C. T. Cas. 20.

A railway insisting upon the prepayment of rates in excess of those authorized by parliament, and threatening to cease carrying the traffic if they are not prepaid, subjects its customers to an undue disadvantage. *Distington Iron Co. v. London & N. W. R. Co.*, 6 Ry. & C. T. Cas. 108.

Where there is a group rate which is justified on the grounds of commercial convenience, the measure of what amount of preference amounts to an "undue" preference is different from that applicable where no such rate exists. *North Lonsdale I. & S. Co. v. Furness R. Co.*, 7 Ry. & C. T. Cas. 146.

A railway agreed with a firm of colliery owners to carry their coal at lower rates than those charged to other colliery owners, with whom they had no agreement. The company attempted to justify the preference on the ground that the traffic not covered by the agreement was more costly to carry

in consequence of a steep descending incline from the collieries to the main line. The higher rate was imposed whichever direction the coal traffic took, while it passed down the incline in going in one direction only. *Held*, that a charge purporting to be in respect of a special service—such as in respect of the incline—should not have its incidence extended to traffic for which that service was not performed, and that payment in respect of such incline should take the form of a fixed reasonable toll payable only for the traffic using the incline. *Bellsdyke Coal Co. v. North British R. Co.*, 2 Ry. & C. T. Cas. 105.

The S. Steamboat Co. and the R. Steamboat Co. respectively owned passenger steamboats plying between S. and R., and the B. & S. W. Ry. companies carried passengers by their own lines to S.; and having entered into a traffic agreement with the R. Steamboat Co. that their vessels should run between S. and R. in connecting with the lines of the railway companies, issued through tickets to passengers from places on their lines to R., available by the boats of the R. Steamboat Co., to the exclusion of the boats of the S. Steamboat Co. *Held*, that under the circumstances this arrangement did not amount to an undue preference of the R. Steamboat company. *Southsea & I. of W. S. Ferry Co. v. London & S. W. R. Co.*, 2 Ry. & C. T. Cas. 341.

The S. Steamboat Co. alleged that the fares charged by the railway companies in respect of the part of the journey performed on the steamboats of the R. Steamboat Co. were unreasonably high. *Held*, that this was a question which could not be raised by the S. Steamboat Co. against the railway companies. *Southsea & I. of W. S. Ferry Co. v. London & S. W. R. Co.*, 2 Ry. & C. T. Cas. 341.

By agreement, A. was to be charged "rates and charges for his traffic similar to those which may for the time being be charged to and paid by B., under schedules A and B" of a certain agreement between the Ry. Co. and B., "and that in terms of the provisions of the said agreement, or of any amendment or alteration thereof," the agreement between the Ry. Co. and B. was that "B. shall, subject to the exceptions and provisions hereinafter mentioned, pay" to the railway company the charges mentioned in schedules A and B. It further provided that "notwithstanding what is

before written that for and in respect of all limestone, calcined ironstone, hematite, sand, and fireclay, passing along the railways formerly belonging to the Ardrossan Ry. Co.," to and from the B. works, B. should pay the charges specified in schedule D. *Held*, that A.'s traffic in hematite and limestone along the Ardrossan railway was similar traffic to that mentioned in schedules A and B, and was chargeable at the rates of those schedules. *Merry v. Glasgow & S. W. R. Co., 4 Ry. & C. T. Cas. 383.*

The rates to two ironworks, situate respectively 26 and 35 miles from the market to which the traffic of each was sent, were respectively 2s. 8d. and 2s. 9d., so that the railway company carried the extra distance to the further of these at the rate of one tenth of a penny per ton per mile, or a sum insufficient to pay the cost of earning the difference in the two rates. The only reason given for the smaller charge to the further works was that a low rate was necessary to enable these works to compete with the works nearer to the market. *Held*, that that constituted an undue prejudice to the owners of the nearer works and an undue preference to the owners of the further works. *Held* also, that applicants, except those coming within § 13 of the Regulation of Railways Act 1873, must show that they are damaged by the undue preference complained of. *Skinningrove Iron Co. v. North Eastern R. Co., 5 Ry. & C. T. Cas. 244.*

92. Under act of 1854, sec. 2.— A railway company, if it makes illegal or excessive charges for the conveyance of traffic, subjects such traffic to undue prejudice, within the meaning of the Railway and Canal Traffic Act 1854, § 2. *Aberdeen Commercial Co. v. Great North of Scotland R. Co., 3 Ry. & C. T. Cas. 205.*

If a railway company charges the same rates for the same traffic going to the same destination from places differing considerably in distance from that destination, this is *prima-facie* evidence of an undue preference. Where there is evidence of a preference, whether or not it is an unreasonable or undue preference, within the meaning of § 2, is a question of fact. *Denaby M. Colliery Co. v. Manchester, S. & L. R. Co., 3 Ry. & C. T. Cas. 426.*

Where relatively to distance the rates as between traders are fairly adjusted, but the maximum applicable to the line over which the traffic of one of these is carried is

higher than the maximum under other acts of parliament applicable to the line over which the traffic of the other is carried, but in both cases the rates charged are below the maximum, the fact that there is not a ratable reduction of the authorized rates below the maximum does not constitute an undue preference of the trader whose traffic is carried on the line to which the higher statutory maximum is applicable under § 2. *Skinningrove Iron Co. v. North Eastern R. Co., 5 Ry. & C. T. Cas. 244.*

Where a railroad company is owner of two or more lines or channels of communication, it is not an undue preference to conduct the unconsigned traffic by one of them if traders are left free to select the route which is most convenient to them. Therefore, where through rates had been arranged to a larger and fuller extent by one route than by the other, it was held not to be, under the circumstances, proved a contravention of the Railway and Canal Traffic Act 1854. *Londonderry P. & H. Com'rs v. Great Northern R. Co., 5 Ry. & C. T. Cas. 282.*

It is not a contravention of § 2 for a railway company which trades to a port to charge rates from the port with the view of getting as much of the port traffic as it can, although by so doing it may injure a steamboat company trading from that port. *Londonderry P. & H. Com'rs v. Great Northern R. Co., 5 Ry. & C. T. Cas. 282.*

It is no defense to an action by a railway company to recover charges for the carriage of goods that the charges sued for are unreasonable, so as to give an undue preference to other persons, or to subject the defendant to undue prejudice or disadvantage, within the meaning of § 2, nor can the defendant in such an action set off, or recover by counterclaim, overpayments in respect of previous charges which were unreasonable, within that section. *Lancashire & Y. R. Co. v. Greenwood, 21 Q. B. D. 215, 58 L. J. Q. B. 16, 6 Ry. & C. T. Cas. lxxi.*

The provisions of § 2, that railway companies shall provide all reasonable facilities for receiving, forwarding, and delivering traffic, and that "no such company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvan-

tage in any respect whatsoever," are limited to the conveyance and transport of traffic on a railway, and do not give jurisdiction to the railway commissioners, on complaint under the Regulation of Railways Act 1873 (36 & 37 Vict. c. 48), § 6, to restrain a company owning two separate docks twenty miles apart, and a line of railway connected with one of such docks, from charging preferential dock dues to the prejudice of one shipowner using the docks, not connected with the line of railway, in favor of other shipowners. *East & W. I. Dock Co. v. Shaw*, 39 Ch. D. 524.—EXPLAINING *West v. London & N. W. R. Co.*, L. R. 5 C. P. 622.

93. Separate or packed parcels.—

By the terms of their special act a railway company may be justified in charging packed parcels as separate packages. *Parker v. Great Western R. Co.*, 6 El. & Bl. 77, 1 Ry. & C. T. Cas. 20.

A provision in a statute authorizing a railway company to fix such sum for the carriage of small parcels as to them should seem fit, does not repeal the equality clauses, but only the clause limiting the maximum of tolls. *Baxendale v. Great Western R. Co.*, 16 C. B. N. S. 137, 2 Ry. & C. T. Cas. 16.

A railway company, incorporated for the conveyance of passengers and goods from L. to F., under acts of parliament which prohibited them from making unequal charges, obtained another act enabling them to establish a communication by steam vessels with B., which last-mentioned act contained no proviso as to equality of rates for the carriage of goods. The company, by their tariff, charged certain rates for small parcels, with a double charge for "packed parcels." *Held*, that so far as regarded the contract for the carriage of such parcels from B. to L., there was nothing illegal in the increased charge. *Branley v. South Eastern R. Co.*, 12 C. B. N. S. 63, 31 L. J. C. P. 286, 1 Ry. & C. T. Cas. 20.

The special act of the G. N. Ry. Co. empowers the company to charge for the carriage of small parcels any sum which they may think fit. 8 Vict. c. 20 is incorporated with the special act, and § 90, while it empowers a company to vary the tolls upon their railway as they may think fit, provided "that all such tolls be at all times charged equally to all persons, and after the same rate in respect of all * * * goods of the same

description, and conveyed by a like carriage passing only over the same portion of railway under the same circumstances, and no reduction or advance in any such tolls shall be made, either directly or indirectly, in favor of or against any particular company or person using the railway." *Held*, that the company were compelled to charge all persons alike, and that they were not justified in charging a carrier more than the rest of the public. *Crouch v. Great Northern R. Co.*, 9 Ex. 557, 1 Ry. & C. T. Cas. 16.

The plaintiffs were common carriers trading under the name of "P. & Co.," and they were in the habit of collecting parcels in L. and forwarding them to customers in the country. Each parcel was addressed to the person to whom it was ultimately to be delivered, but it was labelled with the name of "P. & Co." and that of the station to which it was to be sent, and all the parcels for the same station were delivered in one consignment, consigned to the plaintiffs at that station. The defendants refused to charge the plaintiffs for the carriage of their parcels at a tonnage rate upon the gross weight, and charged for each parcel separately according to its individual weight. *Held*, that this created an inequality. *Baxendale v. South Western R. Co.*, 35 L. J. Ex. 108, 1 Ry. & C. T. Cas. 20.

The plaintiff, a carrier, was in the habit of collecting small parcels and sending them together in large packages by the defendant's railway. The defendants charged different rates of carriage for different classes of goods, the highest charges being for packed parcels. A declaration was required from the plaintiff as to the description of his parcels. He declared them as "packed parcels," and was charged and paid accordingly. Finding, however, that other firms sent packed parcels, from whom no declaration was required, and who were charged for them at a less rate, he sued the company to recover the alleged excess. On the trial he gave evidence that the practice of the other firms in sending "packed parcels" was notorious. *Held*, by the house of lords, affirming the judgment of the exchequer chamber, that the evidence produced was admissible, and was sufficient to show that the defendants knew of the practice of other firms to pack their parcels, and that with such knowledge they had improperly charged the plaintiff with a higher rate of charge, and had thus in-

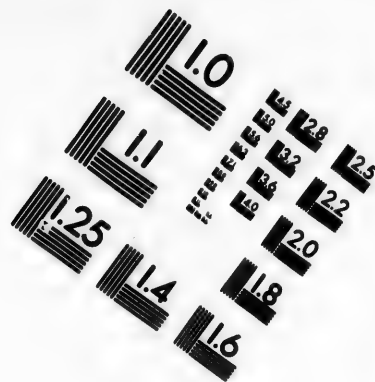
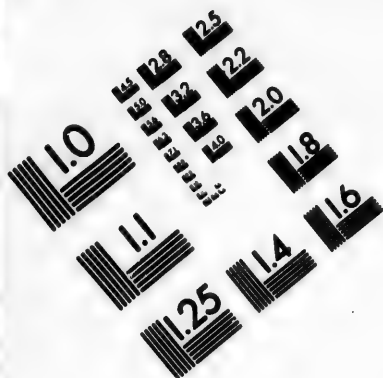
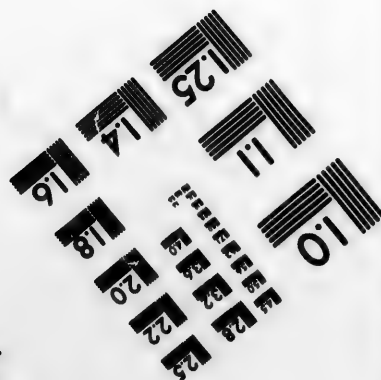
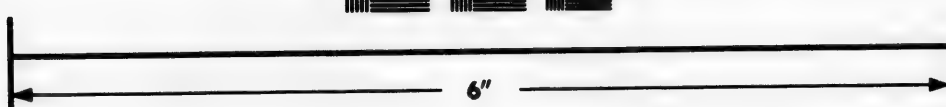
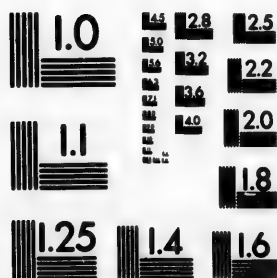


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fringed the equality clause, and that the plaintiff was entitled to recover the amount so charged in excess as for money had and received. *Great Western R. Co. v. Sutton*, 38 L. J. Ex. 177, L. R. 4 H. L. Cas. 226, 1 Ry. & C. T. Cas. 20.

94. Extra charge on switches or branches.—In the case where the railway makes no separate charge for use of sidings, a siding constructed by a trader, to entitle him to a reduction of rates as compared with other traders who have not constructed sidings, must be a benefit to the company, and not merely a means of accommodating traffic which could have been conveniently dealt with at the company's station. *Greenwood v. Lancashire & Yorkshire R. Co.*, 6 Ry. & C. T. Cas. 39.

The G. R. Co. leased a branch line, on which F., a coal owner, resided, and they made two tables of rates for coal—one applicable to the main line and the other to the branch line, the latter being the higher of the two rates. When F. sent his coals along the branch line he was charged at the branch rates, but when his coals got to the main line, then at the main rates; whereas when coal owners, living on the main line, sent their coals from the main line on to the branch line, they were charged for the whole distance (i. e., both on the branch and the main line) at the main-line rates only. The special act applicable to the branch line (which also incorporated the Railways Clauses Act) provided that the rates should "be made equally to all persons in respect of goods passing over the same portion of, and over the same distance along, the railway and under the like circumstances," etc. *Held* (Lord St. Leonards and Lord Cranworth differing in opinion), that the rate charged upon F. was no violation of the equal-rates clause—but *held*, by Lord St. Leonards (who dissented), that it was a gross violation of that clause. *Finnie v. South Western R. Co.*, 26 L. T. 14, 1 Ry. & C. T. Cas. 18.

95. Procedure under different acts.—The railway commissioners' powers under the Railway and Canal Traffic Act 1854, § 3, and the Regulation of Railways Act 1873, § 25, "to direct and prosecute inquiries" will not be exercised so as to make corporations or persons parties to an application made by a trader against a railway company on the ground of undue preference as a preliminary to the hearing. The com-

missioners might exercise such powers if at the hearing the whole case was not sufficiently brought before them. *Wilson v. North Eastern R. Co.*, 5 Ry. & C. T. Cas. 97.

Section 83 of the Railways Clauses Consolidation (Scotland) Act 1845 provided for the alteration or variation of such tolls as a railway company might by special acts be entitled to charge, "provided that all such tolls be at all times charged equally to all persons, and after the same rate * * * in respect of all passengers, and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine passing only over the same portion of the line of railway, under the same circumstances." *Held*, that to justify proceedings under that section by a person complaining of an undue preference in the rates charged to another trader, the goods of the two traders must be carried on precisely the same journey, from the same place and to the same place. *Murray v. Glasgow & S. W. R. Co.*, 11 Court Sess. Cas. (4th ser.) 205, 4 Ry. & C. T. Cas. 456.

3. Through Rates.

96. Generally.—The railway commissioners in apportioning a through rate will take into consideration exceptional expenditure by the terminal company upon works for facilitating the delivery of traffic. *Caledonian R. Co. v. North British R. Co.*, 3 Ry. & C. T. Cas. 403.

The rates charged by railway companies for traffic to ports where such traffic is to be carried from such ports to others, must be, relative to the service, equal. *Ayr Harbour Trustees v. Glasgow & S. W. R. Co.*, 4 Ry. & C. T. Cas. 90.

The term "the railway," is, in the acts applicable to a railway company which had branch lines, considered to mean the whole system belonging to the company; and it was over it that the tolls and charges imposed by the acts were intended to be extended, and not over branch lines only. *Bristol & E. R. Co. v. Garton*, 4 H. & N. 33, 5 Jur. N. S. 1172, 28 L. J. Ex. 169.

An agreed through rate via route A., where there is no corresponding rate via B., may be such, relatively to the local rates of a company owning a material link in both routes, that such company, by agreeing to the rate, gives an undue preference to senders of traffic by route A. So, as to

the facility of granting drovers' tickets or free passes with cattle by one of such routes only. *Londonderry P. & H. Com'rs v. Great Northern R. Co.*, 5 Ry. & C. T. Cas. 282.

The S. J. Co. and the M. & C. Co. agreed to afford various mutual facilities. The first four clauses of the agreement provided that various facilities, including through rates, should be given to all through and interchanged traffic whatever passing between the places mentioned in those clauses. The 5th and 6th clauses were as follows: 5. "All through traffic to or from places on the F., the late W. and F. junction, the late W. J., the W., C. and E., and the late C. and W. Rys., respectively, from or to places on the N. and C. Ry., and from or to C. or places north of C. within the district bounded on the west by the C. Ry., south of K. bridge, and on the north by a line drawn due east from K. bridge, shall, unless otherwise consigned, be sent via the N. & C. Ry., as at present." 6. "The following regulations shall have effect with respect to the through fares and rates and the charges to be taken by the two companies respectively for all through traffic, and all traffic interchanged between the two companies (that is to say): (A.) The tolls, rates, fares, and charges to be taken for all through traffic and for all traffic interchanged between the two companies shall be fixed and determined by mutual agreement, so far as the two companies are concerned, or, in case of difference, shall from time to time be determined by arbitration," etc. Upon complaint by the S. Co. that the M. Co. refused to grant a through rate for through traffic, which was sent between pairs of places which were not mentioned in the first four clauses of the agreement, it was contended on behalf of the M. Co. that clause 6 of the agreement did not, *per se*, confer on either company any right to demand a through rate, but only regulated the manner in which the through rates—the right to which was given by the previous clauses—were to be fixed and divided between the companies. *Held*, that clause 6 of the agreement included all traffic whatever passing off the line of one company onto that of the other. The expression "the N. & C. Ry.," as used in clause 5 of the agreement—*held* to include branches or extensions of that railway north or south

of it. *Solway Junction R. Co. v. Maryport & C. R. Co.*, 3 Ry. & C. T. Cas. 264.

97. When granted.—That through rates exist by an alternative route, and that to maintain competition by the proposed route a similar facility is necessary, are reasons for granting through rates. *Central Wales & C. J. R. Co. v. London & N. W. R. Co.*, 4 Ry. & C. T. Cas. 211.

It is not necessary to establish a claim to through booking that the service should be continuous by the same trains or by a connection between trains. *Innes v. London, B. & S. C. R. Co.*, 2 Ry. & C. T. Cas. 155.

As a general rule, in apportioning through rates it is reasonable that where a railway company has a very short distance, that it should have more in proportion than the company which has a long distance. *Severn & W. & S. B. R. Co. v. Great Western R. Co.*, 5 Ry. & C. T. Cas. 156.

A through coal rate will be a sufficient paying rate to be allowed, if the earnings per truck are not less than the earnings in other trucks of a goods train, and if the company's profit on coal is not less than their profit on their goods traffic generally. *Belfast C. R. Co. v. Great Northern R. Co.*, 4 Ry. & C. T. Cas. 159.

The S. & M. Ry. formed an alternative route between certain stations on the G. W. Ry. and other stations on the S. W. Ry. Upon an application by the S. & M. Ry. Co. for through rates between such stations via their railway, the rates to be the same as the existing rates between such stations by the competitive route, which were agreed through rates, it was proved that the route proposed by the S. & M. Ry. would effect a great saving in time and distance, and that the transfers at junctions were the same by either route. The commissioners allowed the application, on the ground that the interests of the public were, under the circumstances, in favor of the existence of an alternative railway route at equal rates. *Swindon, M. & A. R. Co. v. Great Western R. Co.*, 4 Ry. & C. T. Cas. 349.

The commissioners held that rates that excluded traffic from the shorter of these two through routes, and confined it to the longer, could not but be at the expense of public policy; and though the quantity of traffic might be insignificant, and equal rates might not have much effect in developing through traffic by the route in question.

it was a principle of importance to the public that a route between places offering the best opportunities for railway carriage, as far as distance was concerned, should not be placed at a disadvantage merely because portions of the route belonged to companies which had an alternative route and made lower charges in favor of the latter. *Swindon, M. & A. R. Co. v. Great Western R. Co.*, 4 Ry. & C. T. Cas. 349.

Iron ore was sent from B. to South Wales by alternative routes, one of which was by the N. W. Ry. to Smethwick, and the other by the E. Ry. to Stratford, the continuation in each case being by the G. W. Ry. The G. W. Co. refused to agree to a lower through rate between B. and South Wales by the Stratford route than that charged by the Smethwick route, although the distance by the former was twenty miles shorter, the G. W. mileage being practically equal in both cases. Upon application to the commissioners by the E. Co. to allow the proposed through rates, which gave the G. W. Co. about 1s. 2d. per ton per mile—*held*, that the apprehension of the G. W. Co., that a reduction of rates by the shorter route would entail a similar reduction of the rates by the longer route, and so render the traffic carried by the latter unprofitable, did not justify them in raising the rates by the shorter route above their natural and proper level; and as the G. W. Co. carried the like traffic under similar circumstances for about 1s. 2d. per ton per mile, the court allowed the rates proposed by the E. Co., on condition that the latter company should maintain a traffic by their route averaging 500 tons a week. *East & W. J. R. Co. v. Great Western R. Co.*, 2 Ry. & C. T. Cas. 147.

98. When refused.—Commissioners refuse to fix and apportion through rates where the proposed rates are not in accordance with the terms of a statutory agreement made between the two railway companies over whose railways the rates were sought to be charged. *North Monkland R. Co. v. North British R. Co.*, 3 Ry. & C. T. Cas. 282.

When the validity of an agreement is disputed upon grounds not obviously frivolous, the commissioners will abstain from exercising their power of granting through rates, although the agreement, if valid, is such a one as would have entitled a railway company to require through rates under

the section. *Caledonian R. Co. v. Greenock & W. B. R. Co.*, 4 Ry. & C. T. Cas. 70.

That the distance between the points of arrival and departure of two through routes is the same, is too vague a ground for deciding that the rates charged in respect of these routes should be the same. *Central Wales & C. J. R. Co. v. London & N. W. R. Co.*, 4 Ry. & C. T. Cas. 211.

The commissioners will not grant through rates which will have the effect of raising a long-established rate and unsettling interests which have been founded on its continuing, unless the railway company asking for such through rates can show that an alteration is required to give them a fair return upon the traffic carried. *Great Northern R. Co. v. Belfast C. R. Co.*, 3 Ry. & C. T. Cas. 411.

Where there was an agreement for the season that a certain steamer should connect with one up and one down train of the railway company daily, the application being made within five weeks of the end of the season, the through rates were refused on the ground that they would be too transient to be proper to be allowed. *Caledonian R. Co. v. Greenock & W. B. R. Co.*, 4 Ry. & C. T. Cas. 70.

The railway commissioners refused to entertain an application for through rates and through booking where a similar application was pending in the chancery division, unless the applicants discontinued the proceedings in the chancery division; and upon the applicants electing to proceed with their application to the chancery division the commissioners stayed the proceedings before them. *Metropolitan Dist. R. Co. v. Metropolitan R. Co.*, 5 Ry. & C. T. Cas. 126.

An application by the D. Steam Packet Co. for through rates for passengers between Kingstown and London, via the company's steamers and the N. W. Co.'s railway, was refused on the ground that the D. Steam Packet Co. had agreed (under statutory powers) that the charges for the conveyance of passengers' traffic between London and Kingstown were to be fixed from time to time, as regards the through rates, by the railway. *Dublin S. Packet Co. v. London & N. W. R. Co.*, 4 Ry. & C. T. Cas. 10.

99. Apportioning rates.—An apportionment of rates under a special act diverted traffic from the route by which the

two companies had agreed that such traffic which they exchanged with each other should be forwarded or accounted for, and such diversion was to the advantage of the one and to the disadvantage of the other company. The commissioners, therefore, directed that out of each of the through rates the usual clearing-house terminals should be paid to the companies owning or working the terminal stations from and to which the traffic was carried, and that the residue of such rate should be divided between the companies interested therein by mileage, according to the actual route by which the traffic was carried, save only that in reckoning such mileage each two miles which the traffic passed over one way should be reckoned as three miles, provided that the total sum to be received by such company out of each such through rate for mileage and terminals (exclusive of any sum which might be reasonably added to the rate for any services for which an extra charge was permissible as against the public) was not in any case to exceed their maximum local rate for conveyance for the actual distance which the traffic was carried on their railway. *London & N. W. R. Co. v. Great Western R. Co.*, 5 Ry. & C. T. Cas. 20.

In an act amalgamating three lines of railway companies in the Isle of Wight, a fourth company had a clause inserted that the companies should respectively afford to each other all reasonable facilities, including through booking and invoicing, and the amount of such fares and rates, and the apportionment thereof as between the companies "should be determined by the railway commissioners as arbitrators." On an application by that company against the amalgamated company, asking the commissioners to fix equal rates by either route,—*held*, that the routes were intended to be competing routes and the commissioners fixed equal rates by both routes; but in apportioning the rates they refused in some instances to allow the applicants their full mileage proportion out of the traffic carried by the longer route. *Isle of Wight R. Co. v. Isle of Wight C. R. Co.*, 6 Ry. & C. T. Cas. 35.

The G. Ry. and C. Ry., together with steamboats, formed a continuous communication between the stations on the railways and (by a short sea-voyage) places on the Clyde. The G. Ry. was worked by the C. Ry. and through rates divided between the

two companies (after deducting the steamboat fares); and the rates for the G. Ry. were fixed by a joint committee or, on their differing equally in opinion, by an arbitrator, but the amount of the through rates was fixed, quoted, and (in the first instance) received by the C. Ry. company. The committee having been equally divided in opinion as to the rate for the G. railway, the same was ascertained by an arbitrator, and the company, by his award, were to be paid certain sums in respect of the then existing through rates. These rates afterwards in many instances being made higher by the C. Co. for the land route, and lower by the steamboat companies for the sea route, the G. Co. claimed from the C. Co. a share of the increase, alleging that it ought to be in the same proportion for them as the arbitrator had made their rate when the land rates were lower and the sea rates higher, and, on their refusal, and the committee being equally divided in opinion, applied to the railway commissioners as arbitrators. *the matter*, who *held* that they had no power to give to the G. Co. any share of the existing through rate made by the C. Co., or to take from the C. Co. that portion of the through rate which they had made for themselves, namely, the surplus of the land rate, after deducting the amount fixed by the arbitrator for the G. Co.; but that the amount given up by the steamboat companies, and not made part of the land rate by the C. Co., although received and appropriated by them (the rate to the public remaining the same as before the rebate by the steamboat companies), should be divided between the G. and C. companies. *Greenock & W. B. R. Co. v. Caledonian R. Co.*, 2 Ry. & C. T. Cas. 136.

100. Under act of 1854, sec. 2.—The Railway and Canal Traffic Act 1854, s. 2, gives a customer a right to require any number of railway companies in Great Britain to combine to form a continuous route by which his traffic may be sent at a single booking and for a single payment. *Great Western R. Co. v. Severn & W. & S. B. R. Co.*, 5 Ry. & C. T. Cas. 170.

That act gives every individual customer the absolute right to select what railway company he pleases to deliver his traffic to, to deliver that traffic to that company, and require, without any second booking or any second payment, that the traffic shall be delivered at the station to which he desires it

to be sent; provided always that he tenders the traffic to the company at a station where there are proper facilities for receiving it, and that he names as a delivery station a station where there are proper facilities for delivering it, and there is a continuous route connecting the two stations. In such a case the sum which the customer will have to pay will be ascertained by adding together the local rates of the various companies over whose line it passes. *Great Western R. Co. v. Severn & W. & S. B. R. Co.*, 5 Ry. & C. T. Cas. 170.

A railway company has the right (apart from the question of through rates) to collect what traffic it can, to carry it as far as it can by its own line, and there, at the point which is most convenient to itself, to hand it over to the company which is to forward it. *Great Western R. Co. v. Severn & W. & S. B. R. Co.*, 5 Ry. & C. T. Cas. 170.

A route, for which through rates are proposed, that would be a reasonable and serviceable route if worked throughout by one company, does not lose its serviceableness because two or more companies are concerned in working it; for the Railway and Canal Traffic Act 1854, § 2, is intended to secure that, in the case of a continuous line formed out of the railways of different companies, the companies should co-operate for the transit of through traffic, and send it forward to its destination as though it were their own proper traffic. *Swindon, M. & A. R. Co. v. Great Western R. Co.*, 4 Ry. & C. T. Cas. 349.

On an application by the C. W. Ry. Co. for through rates for traffic carried between H. & C., L., M., Leeds, Burton, B'gham, and W., required to be forwarded via the C. W. route, it appeared that the route was shorter and more direct than the G. W. route via Hereford (on which through rates were in force), the saving of distance by the C. W. route from C., L., M., and Leeds being 57 miles, from Burton 32 miles, from W. 22, and B'gham 7. The G. W. Co. contended that the proposed rates were not in the public interest, because the quantity of traffic to which they could apply was small; because no time would be saved if the traffic were carried by the proposed route; and that the number of exchanges on the portion of the proposed through route worked by other companies was great. *Held*, that these were not reasons for refusing through rates any more than they would be for

withholding facilities under § 2 of the Railway and Canal Traffic Act 1854. *Central Wales & C. J. R. Co. v. London & N. W. R. Co.*, 4 Ry. & C. T. Cas. 211.

The S. E. Ry. Co. carried goods at agreed through rates between London and Paris, as to which the companies undertook, for the fixed amount paid, every kind of service and charge incidental to the transit from point to point. The sum paid included clearing the goods in the custom-house, which was done only by the company's servants, or if done by custom-house agents no rebate was allowed by the company. *Held*, that the plan of delivering goods between London and Paris at one fixed sum for the entire service, and free of any intermediate charges, was a great convenience to the public and did not involve any infringement of the Railway and Canal Traffic Act 1854. *Greenop v. South Eastern R. Co.*, 2 Ry. & C. T. Cas. 319.

101. Under act of 1873, sec. 11, generally.—One of the objects of section 11 of the Regulation of Railways Act 1873 is to prevent rates being raised merely as a consequence of amalgamation, so far as that can be done by regulating the charges on through traffic, and to cause railway companies to adjust their rates with reference, not alone to their own interests, but to the interests of other companies as well. *Great Northern R. Co. v. Belfast C. R. Co.*, 3 Ry. & C. T. Cas. 411.

In application under § 11 of the Regulation of Railways Act 1873, there is no *prima-facie* case in favor of specially low charges, and the *onus* is upon the company applying to show reasons why the forwarding company should carry for less than it would be likely to receive out of agreed through rates. *Belfast C. R. Co. v. Great Northern R. Co.*, 4 Ry. & C. T. Cas. 159.

In a new through rate case it is not the practice of the commissioners to give costs, the defendants having a right, under the Regulation of Railways Act 1873, to the judgment of the commissioners before a through rate is put into operation. *Central Wales & C. J. R. Co. v. Great Western R. Co.*, 10 Q. B. D. 231, 52 L. J. Q. B. D. 211, 4 Ry. & C. T. Cas. 110.

The 11th section of the Regulation of Railways Act 1873 applies not only to mileage tolls and tolls granted as maximum tolls, but also to gross tolls, and any special charges which a company may be entitled

to make. In applying for a through rate it is not necessary to complain of an infringement of the Regulation of Railways Act 1873. *Warwick & B. C. Nav. Co. v. Birmingham C. Nav. Co.*, 3 Ry. & C. T. Cas. 113.

Whether each company collects its own quota of a through toll, or one collects for all, the character of a through toll is the same, and, if made compulsory under the Regulation of Railways Act 1873, is not subject to the equality clause of the special acts of the railway companies, so as to render it necessary to regulate the local tolls thereby. *Warwick & B. C. Nav. Co. v. Birmingham C. Nav. Co.*, 3 Ry. & C. T. Cas. 113.

The commissioners must, unless they are prepared to refuse the rate altogether (which they will not do unless the amount of the proposed through rate is so high as to make the rate useless to the public, or so low as to prevent the commissioners from making an equitable apportionment between the companies, or from complying with the conditions imposed upon them, under certain circumstances, in section 11 of the Regulation of Railways Act 1873), accept the amount proposed to them, although they may be of opinion that some other amount would be more equitable. *Great Western R. Co. v. Severn & W. & S. B. R. Co.*, 5 Ry. & C. T. Cas. 170.

Prima facie it is to the interest of the public that there should be at least two railway routes open between any two given places, provided that those routes are practically independent of one another, fairly alternative, and reasonably calculated to keep one another in check. *Great Western R. Co. v. Severn & W. & S. B. R. Co.*, 5 Ry. & C. T. Cas. 170.

102. — who may apply for.—The right to apply for through rates under § 11 of the Regulation of Railways Act 1873 is not confined to the companies owning lines at the two ends of the through route, but extends to an intermediate company; but an intermediate company whose traffic is worked by one of the terminal companies, and who has agreed that the rate for through traffic shall be fixed by the latter, is not the proper party to apply. *Central Wales & C. J. R. Co. v. Great Western R. Co.*, 2 Ry. & C. T. Cas. 191.

An intermediate railway company which owns no rolling stock nor works its own road, yet maintains and manages its line

and collects, forwards, and delivers its own traffic to and from *termini* of its own line, employing and supervising a staff of employés, may properly apply for through rates under section 11. *Central Wales & C. J. R. Co. v. Great Western R. Co.*, 4 Ry. & C. T. Cas. 110.

To entitle a company to apply for an order for through rates, under section 11, it is enough that it is a company with an interest in the through route, and it is not necessary to measure its interest and to refuse it a *locus standi*, even though its proposals should be more of detriment to the other railway companies than of benefit to itself, the other conditions to which the granting of through rates is subject amply providing for the fair interests of all railway companies, large or small, being considered and allowed for. *Severn & W. & S. B. R. Co. v. Great Western R. Co.*, 5 Ry. & C. T. Cas. 156.

The company requiring traffic to be forwarded at through rates, under section 11, need not themselves be a forwarding company as regards the particular traffic, but it is enough if they are interested in the forwarding. *Greenock & W. B. R. Co. v. Caledonian R. Co.*, 2 Ry. & C. T. Cas. 227.

A railway company applying for through rates had agreed with C. for the carriage of passengers by steamer in connection with their line. *Held*, that such steamer and the traffic carried thereby were within the provisions of the 11th section of the Regulation of Railways Act 1873. *Greenock & W. B. R. Co. v. Caledonian R. Co.*, 2 Ry. & C. T. Cas. 227.

The W. B. Ry. Co. had entered into an agreement with the C. company whereby the latter worked their line, and it was agreed that the rates and fares on the W. B. Ry. should be fixed by a joint committee of the two companies. *Held*, that this agreement did not relate to through rates, and that the W. B. Co. were the proper parties to apply for such rates under section 11. *Greenock & W. B. R. Co. v. Caledonian R. Co.*, 2 Ry. & C. T. Cas. 227.

Where through rates are in existence for traffic conveyed in a company's wagons, a railway company may apply to the commissioners, under section 11, to allow different proposed through rates for similar traffic when conveyed in owner's wagons. The jurisdiction of the commissioners under the above section is simply to decide whether

the proposed through rate shall be allowed or refused. *Newry & A. R. Co. v. Great Northern R. Co.*, 3 Ry. & C. T. Cas. 28.

Section 11 authorizes the commissioners to allot to a company, out of a through rate, an amount less than its maximum charges, but not less per mile "than the mileage rates which such company may, for the time being, legally be charging for like traffic carried by a like mode of transit on any other line of communication between the same points, being the points of departure and arrival of the through route." *Held*, that the "mileage rates" must be mileage rates for a line having the same *termini* as the through route, and must be charged in respect of goods carried over it for its whole length. *Warwick & B. C. Nav. Co. v. Birmingham C. Nav. Co.*, 3 Ry. & C. T. Cas. 113.

103. — "reasonable route." — A route is a reasonable one, within the meaning of the Regulation of Railways Act 1873, § 11, which is capable of maintaining a competition with quicker or cheaper routes, and efficient enough to be likely to be preferred for some portion of the traffic. *Great Western R. Co. v. Severn & W. & S. B. R. Co.*, 5 Ry. & C. T. Cas. 170.

On an application of the Belfast railway company to fix through rates for coal sent from Belfast quay over their railway to stations beyond Armagh on the Great Northern (Ireland) company's railway, the commissioners *held*, that having fixed the through rate to Armagh at 3s. 6d., every member of the public had a vested right to have his coal carried to that point for that sum, and therefore, in the case of places lying beyond Armagh, the question whether any proposed through rates were or were not reasonable in the interests of the public depended upon whether the difference between the proposed rate of 3s. 6d. afforded a reasonable remuneration for the haulage of the extra distance, it being proved that the extra distance involved no expense to the Great Northern company other than haulage. *Belfast C. R. Co. v. Great Northern R. Co.*, 3 Ry. & C. T. Cas. 419.

On an application for through rates for traffic carried from places in England via Carlisle to stations of the N. B. company three or four miles by their railway beyond Whifflet junction, it appeared that from Carlisle to Whifflet there were two railways,

one 93 miles long, part of the C. system, the other 130 miles, part of the N. B. system, and the route for which the through rates were sought was for English traffic via the C. railway, between Carlisle and Whifflet, to the above-mentioned stations on the N. B. railway beyond Whifflet, the portion between Carlisle and Whifflet being the railway of the C. company. The N. B. company objected that such route was not a reasonable one for English competitive traffic, and contended that as the traffic was destined for their stations they were entitled to have the working of it from Carlisle forward. *Held*, that the through rates and route proposed by the C. company combined the more direct route of one company with the more convenient station of the other, and fixed as the rates for traffic sent that way the rates in force for through carriage by the alternative but less convenient route. *Caledonian R. Co. v. North British R. Co.*, 3 Ry. & C. T. Cas. 403.

Upon an application for a through route and rate, it was proved that the proposed route was fifty-six miles shorter than the route over which the traffic was being carried, and was worked not less conveniently as regards the railway companies by whom the traffic was handled before it got to its destination; and that the proposed rate was of less amount, and presumably, therefore, more beneficial to the public, while at the same time, being more in proportion to distance than the rate by the other route, it yielded a larger sum per mile to the companies carrying, and was, therefore, not obviously unreasonable as against them. The commissioners inferred from those facts that the route was a reasonable one, and that the public were interested in the rate being granted; and *held*, that where a good *prima-facie* case of public interest existed on general considerations, it was not necessary to bring evidence to prove a special case as well. *Central Wales & C. J. R. Co. v. Great Western R. Co.*, 10 Q. B. D. 231, 52 L. J. Q. B. D. 211, 4 Ry. & C. T. Cas. 110.

Upon an application against defendant company for through rates for coal traffic, it appeared that part of the proposed through route was over another company's line, and that defendants did not carry over such line, but limited themselves in the exercise of their running powers to the carriage of general goods, and they objected to a traffic being forced upon them which they would

have to work over twenty-six miles of line under running powers and upon the terms of paying all receipts, less only a percentage for working expenses, to the owning company, and which the company who own the line and who work and use it for every sort of traffic would be perfectly able to accommodate. *Held*, that the proposed route, which in point of distance and general facilities had many advantages, was not on the whole a reasonable route, owing to the mode in which the traffic was required to be worked over one portion of it. *Severn & W. & S. B. R. Co. v. Great Western R. Co.*, 5 Ry. & C. T. Cas. 156.

A sending company having two alternative routes for through traffic, one eight miles longer than the other, proposed, for the purpose of a through rate, to carry by the longer one, at a double cost and labor in working and maintaining the junctions, with the object of making their own mileage more and the mileage of the forwarding company less. *Held*, that such longer route was not a reasonable route, within the meaning of § 11, sub-sec. 5, of the Regulation of Railways Act 1873, allowing the railway commissioners to compel a connecting line to make a through rate. *East & W. J. R. Co. v. Great Western R. Co.*, 1 Ry. & C. T. Cas. 331.

A "route," within the meaning of this section, is a route from the station on the sending line, where the traffic arises, to the station on the forwarding line, where such traffic is delivered. *East & W. J. R. Co. v. Great Western R. Co.*, 1 Ry. & C. T. Cas. 331.

A clause in an agreement made between certain railways provided that the M., S. & L. Co. and the L. & N. W. Co. should agree upon through rates for coal and other traffic from and to the collieries, to and from all places on the system of the M., S. & L. Co. and C. L. Committee, and that these through rates should be via a reasonable and convenient junction or junctions, to be agreed upon or to be settled by arbitration. *Held*, that the reasonable and convenient junctions contemplated by this clause were not confined to the particular line with which the agreement was principally conversant, but extended to all convenient junctions, wherever situated, on the M., S. & L. system. *Manchester, S. & L. R. Co. v. London & N. W. R. Co.*, 6 Ry. & C. T. Cas. 1.

104. — jurisdiction of commission.—The railway commissioners have jurisdiction, under the Regulation of Railways Act 1873, § 11, to hear and determine any question of through rates brought before them by any railway company having an interest in a route over which it is proposed that the traffic shall be carried. It is a jurisdiction given in order to prevent railway companies, by agreement or want of agreement amongst themselves, imposing difficulties in the way of traffic being carried from point to point. *Metropolitan Dist. R. Co. v. Metropolitan R. Co.*, 5 Ry. & C. T. Cas. 126.

Whenever a continuous line of railway belonging to two or more companies exists, and any one of the companies interested in the route has given the proper statutory notices, under § 11 of the Regulation of Railways Act 1873, and a difference has arisen between the companies as to whether the proposed rates shall come into operation or not, the jurisdiction of the commissioners to hear and determine that question at once arises, and cannot be ousted in any way by any equities that may exist between the different companies themselves. *Metropolitan Dist. R. Co. v. Metropolitan R. Co.*, 5 Ry. & C. T. Cas. 126.

105. — when the section applies.—Section 11 enacts that "where a railway company use, maintain, or work, or are party to an arrangement for using, maintaining or working steam vessels for the purpose of carrying on a communication between any towns or ports, the provisions of this section (as to through rates) shall extend to such steam vessels and to the traffic carried thereby." Upon objection that this clause only applies where the arrangement as to the steam vessels was made by the company to whom the railway with which the steam vessels directly communicated belonged—*held*, that such clause extended the whole provisions of § 11, and took effect whenever there was an arrangement with the proprietors of steam vessels for the conveyance of passengers or goods to and from any port or town with which there was railway communication, provided the railway company party to the arrangement owned or worked, or was otherwise immediately interested in, some portion or other of the line of railway communication. *Caledonian R. Co. v. Greenock & W. B. R. Co.*, 4 Ry. & C. T. Cas. 135.

Where a railway is not charging rates upon another route between the same points, being the points of departure and arrival of the proposed through route, subsec. 8 of § 11 of the Regulation of Railways Act 1873, does not apply. *Plymouth & D. R. Co. v. Great Western R. Co.*, 6 Ry. & C. T. Cas. 101.

The existence of through bookings between A. & B. for the carrying of traffic by a certain steam vessel for the sea part of the through journey between these places is not such an arrangement for the "use" of these vessels as to make § 11 apply to them, and to enable the owners to require a through rate between A. & C. under that section. *Ayr Harbour Trustees v. Glasgow & S. W. R. Co.*, 4 Ry. & C. T. Cas. 81.—*REVIEWING Napier v. Glasgow & S. W. R. Co.*, 1 Ry. & C. T. Cas. 292, 4 Sess. Cas. (3d ser.) 87.

106. Under special acts.—In dividing the total amount of a through rate between two forwarding companies where the traffic is carried on one of the railways a short distance, the charge which such a company may make for short distances under their special act is to be taken into account in favor of such a company. *Tallylyn R. Co. v. Cambrian R. Co.*, 5 Ry. & C. T. Cas. 122.

The special act of the C. W. railway company of 1883 enacted that the company and two others should respectively afford all proper and sufficient facilities for traffic passing between their railways over the C. W. railway; and that these facilities should include through rates, and that any difference which might arise as to the amount or apportionment of such rates should be determined by arbitration by the railway commissioners. They were unable to agree upon an apportionment—one contending for apportionment by mileage according to the route by which the traffic was actually taken, and another for an apportionment by mileage according to the route which the traffic would take if sent in accordance with a statutory agreement made between these two companies in 1863. *Held*, that through traffic passing by way of the C. W. railway, under the provisions of said special act, between the other two was not traffic exchanged between said companies, within the meaning of statutory agreement of 1863, or subject to the provisions thereof, as respects the apportionment between the

said companies of the receipt for such traffic. *London & N. W. R. Co. v. Great Western R. Co.*, 5 Ry. & C. T. Cas. 20.

A special act provided that seven companies should afford all proper and sufficient facilities, including through rates to traffic passing to, from, or over the railway of the C. W. Co. from or to any railway of the seven companies, or any railway connected with them, and that the terms and conditions, pecuniary or otherwise, on which the traffic facilities should be respectively afforded, and the amount and apportionment of the through rates should, failing agreement, be determined by arbitration in manner provided by the Regulation of Railways Act 1873. *Held*, that such special act requires facilities to be afforded to all traffic passing over the line of the C. W. Co. which either comes from or is destined to some point upon, and which during its whole course passes uninterruptedly over, railways belonging to one or more of the seven companies, or connected for purposes of management or working with one or more of said seven companies. *Great Western R. Co. v. Central Wales & C. J. R. Co.*, 5 Ry. & C. T. Cas. 1.

Said special act does not grant through rates absolutely, and the sufficiency of through rates existing at any time and the propriety of granting others are among the matters which, failing agreement, are required by the special act to be referred to arbitration. *Great Western R. Co. v. Central Wales & C. J. R. Co.*, 5 Ry. & C. T. Cas. 1.

The words "connected with," in said special act, mean connected for the purposes of management of working, and not merely physically connected. *Great Western R. Co. v. Central Wales & C. J. R. Co.*, 5 Ry. & C. T. Cas. 1.

4. Rate Books; Toll Boards.

107. Effect of non-publication on toll boards under act of 1845.—Section 88 of the Railways Clauses Consolidation (Scotland) Act 1845, enacts: "That no tolls should be demanded or taken by the company for the use of the railway during any time at which the boards with lists of tolls were not exhibited and milestones maintained." *Held*, that the section applied only to tolls for the use of the railway, and not to tolls charged by the company as common carriers for the conveyance of

passengers and goods. *Scottish N. E. R. Co. v. Anderson*, 1 Sc. Sess. Cas. (3d ser.) 1056, 2 Ry. & C. T. Cas. 21. *Brown v. Great Western R. Co.*, L. R. 9 Q. B. D. 744, 51 L. J. Q. B. D. 529, 47 L. T. 216, 30 W. R. 671; affirming 51 L. J. Q. B. D. 156, 45 L. T. 471, 30 W. R. 214.

Where a statute requires a railway company to paint on boards the rates and tolls charged, and to affix such boards upon the toll houses, and provides that the company shall not take any rates or tolls except during the time that the board is so affixed, the omission to put up such boards does not prevent the company from recovering such sums as it had a right to charge, and the parties who paid it cannot, as a result of the omission, recover back the sums they were charged. *Garton v. Bristol & E. R. Co.*, 1 B. & S. 112, 7 Jur. N. S. 1234, 130 L. J. Q. B. 273, 9 W. R. 734.

Where a railway company's act authorizes it to charge for articles or persons conveyed a less distance than four miles, "in addition to the prescribed tolls for conveyance, a reasonable charge for the expense of stopping, loading, and unloading," the charge for stopping is not properly a "toll," and the non-publication of it on the toll board in the form required by the Railways Clauses Consolidation Act 1845, §§ 93, 95, does not prevent the company from demanding it. *Pyrce v. Monmouthshire C. & R. Co.*, L. R. 4 App. Cas. 197, 49 L. J. Ex. D. 130, 40 L. T. 630, 27 W. R. 666.

108. Under act of 1873, sec. 14—Who may demand rates.*—The book of rates which a railway company are required by the 14th section of the Regulation of Railways Act 1873, to keep at their stations, should show all rates, local as well as through, which are being charged from the station where the book is kept. *Oxlade v. North Eastern R. Co.*, 3 Ry. & C. T. Cas. 35.

It is the duty of a railway company to inform any person interested, and applying to it for information, how much of each local or through rate in its entirety is for conveyance and how much is for other expenses, specifying the nature and detail of such other expenses; and if the information is withheld it will be ordered by the railway commissioners to be given, and to be made

public by proper entries in the rate book. *Watkinson v. Wrexham, M. & C. Q. R. Co.*, 3 Ry. & C. T. Cas. 446.

A railway company is not required, under section 14, to show how the through rates quoted by it are divided between the railway companies receiving them. *Watkinson v. Wrexham, M. & C. Q. R. Co.*, 3 Ry. & C. T. Cas. 446.

Through rates need not be shown in whole or in part at any other station than the one from which the traffic carried at through rates is forwarded in the first instance. *Oxlade v. North Eastern R. Co.*, 3 Ry. & C. T. Cas. 35.

A company refusing to show their rate books at their stations will have to pay the costs of any proceedings which the parties, in the absence of information which the rate books would have afforded, had "reasonable and probable cause" for taking. *Clonmel Traders v. Waterford & L. R. Co.*, 4 Ry. & C. T. Cas. 92.

The expression "person interested," in section 14, includes any person who makes out by proper evidence that the rates which he seeks to have distinguished are really and substantially competitive rates with those he pays, and it includes "all persons who have a bona-fide interest in knowing how the particular rates which are the subject of their application are made up." *Pelsall C. & I. Co. v. London & N. W. R. Co.*, 7 Ry. & C. T. Cas. 1.

The withdrawal of rates by a railway company, after an application has been made to the railway commissioners, will not disentitle an applicant to an order, under section 14, calling on the company to distinguish how the rate is made up. *Berry v. London, C. & D. R. Co.*, 4 Ry. & C. T. Cas. 310.

An order, under section 14, will be made only as to rates which are being charged by a railway at the time of the application. Even if the difference between the maximum charge which a railway may be entitled to make for conveyance and the amount actually charged is small, the company will be ordered to distinguish how that difference is made up. The amount of each charge which the company claim a right to make in connection with each description of service rendered must be shown. *Hall v. London, B. & S. C. R. Co.*, 4 Ry. & C. T. Cas. 398.

* English Regulation of Railways Act 1873, § 14, requiring rate books to be kept, construed, see 40 AM. & ENG. R. CAS. 69, *abstr.*

100. — at stations — Showing other stations.—

Section 14 requires railways to keep at their stations books of rates charged for the carriage of traffic (other than passengers and their luggage) from such stations to places where they book. The L. & N. W. Ry. Co. carried coal in owner's wagons from certain collieries; the wagons were loaded and made into trains by the colliery owners and placed by them on coal-sidings, whence they were taken by the company's engines, and the company contended that they were not bound to keep books of rates in respect of such traffic. *Held*, that for the purpose of coal traffic the said coal-sidings were "stations," within the meaning of the above section, and that the companies were bound to keep books of rates for the conveyance of coals therefrom, such books to be kept either at the sidings (if accessible to the public) or, for the greater convenience of the company and the public, at the station where the general merchandise traffic of the district was conducted. *Harborne R. Co. v. London & N. W. R. Co.*, 2 Ry. & C. T. Cas. 169.

The court has power, under § 14, to require a railway company to distinguish rates in its rate books in cases in which the company books traffic to stations which are not upon its own line, where the booking company has the information necessary for such division. *Pelsall C. & I. Co. v. London & N. W. R. Co.*, 23 Q. B. D. 536, 7 Ry. & C. T. Cas. 1.

A railway company arranged their mineral traffic into three districts, and in each district had a principal or central station at which the mineral rate books were kept. No books of mineral rates were kept at any other stations, and the mineral traffic from the local stations was charged and booked at the central stations only. *Held*, that this arrangement was a contravention of section 14, and that the obligation to keep books of rates at a station from which the rates are charged attaches equally whether the booking is done there or elsewhere. *Jones v. North Eastern R. Co.*, 2 Ry. & C. T. Cas. 208.

110. — when order for dissecting rates will be made.—Regulation of Railways Act 1873, § 14, providing that the commissioners may make orders with respect to any particular description of traffic, requiring a railway to distinguish in rate book how much of each rate is for the con-

veyance of the traffic on the railway, including therein tolls for the use of the railway, for the use of carriages or vessels, or for locomotive power, and how much is for other expenses, specifying the nature and detail of such other expenses, requires a railway to state in their rate book, to which the order made applies, what terminal services they undertake to perform with regard to the particular traffic, and how much they charge for each of such terminal services; and a railway does not sufficiently comply with the section by giving a list of the various terminal services which they perform and stating what their total charge is for the whole of these services. *Colman v. Great Eastern R. Co.*, 4 Ry. & C. T. Cas. 108.

Considering the obligation imposed upon railway companies by section 14, as to all rates which they charge for traffic received and booked by them, they are bound before they adopt a through rate to insist upon other companies enabling them to separate it if required by a person interested. *Pelsall C. & I. Co. v. London & N. W. R. Co.*, 7 Ry. & C. T. Cas. 1.

The details to be given, under § 14, must be such as to enable the person paying the rates and the commissioners, should application under § 15 be made to them, to say whether an expense charged for in the rate is an expense for which the railway company can properly charge and whether the amount charged for that expense is a reasonable amount or not. *Birchgrove Steel Co. v. Midland R. Co.*, 5 Ry. & C. T. Cas. 229.

On application of plaintiff under section 14, the defendant railway was ordered to distinguish in the book of rates and distances how much of the rate charged him is for the conveyance of the sand and how much for terminal expenses, specifying the nature and detail of such expenses. *Bailey v. London, C. & D. R. Co.*, 2 Ry. & C. T. Cas. 99.

When a complaint is made that a railway company do not allow a sufficient rebate from a cartage rate, including the charge for collection and delivery of goods conveyed upon their line, to those who cart to or from the company's stations for themselves, the application should, as a general rule, in the first instance be for an order requiring the company to distinguish in the books kept at each of their stations, and open to the inspection of the public, how much of the rate is for the conveyance of the traffic

on the railway and how much is for other expenses, specifying the nature and details thereof, under § 15 of the Regulation of Railways Act 1873. *Goddard v. London & S. W. R. Co.*, 1 Ry. & C. T. Cas. 308.

After such separation of the cartage rate from the gross rate, if the company do not allow to carriers performing the cartage the same amount as they charge to the public for such service when performed by the company, or if the charge be made too low, for the purpose of preventing competition, any person injured by the insufficient allowance may apply to the commissioners for an injunction under § 2 of the Railway and Canal Traffic Act 1854, or for an order under § 15 of the Regulation of Railways Act 1873. *Goddard v. London & S. W. R. Co.*, 1 Ry. & C. T. Cas. 308.

Upon the application of a carrier, under § 14, who collected and carted parcels to the terminus of a railway for conveyance, for an order requiring the company to distinguish in their book of rates how much of their parcel rates was for conveyance on the railway and how much for collection or cartage—*held*, that, as the company's parcel rates included charges for other services besides conveyance, they must distinguish in the book of rates at the terminus where the applicant's parcels were received for conveyance, how much of the parcel rates was for conveyance on the railway and how much for other expenses, and must specify the nature and detail of such other expenses. *Robertson v. Great Southern & W. R. Co.*, 2 Ry. & C. T. Cas. 374.

To an application, under § 14, for an order requiring a railway company to distinguish in the rate books kept at each of their stations how much of the rate was for the conveyance of the traffic on the railway and how much for other expenses, the railway company answered that the rates charged were mileage rates within their parliamentary powers, and were not made up of separate sums. *Held*, that an order to distinguish such rates should be made, as it did not follow that the whole of each rate was for conveyance only, and that part was not for other expenses. *Jones v. North Eastern R. Co.*, 2 Ry. & C. T. Cas. 208.

Upon an application, under § 14, to have the rates divided on all the traffic which was either taken in or given out by the applicant at the junction between the railway company's line and the applicant's branch

railway—*held*, that the applicant was entitled to an order in respect of the traffic inward and in respect of all the traffic outward, the rates for which are paid to the railway company by the consignor or consignee thereof, the railway company availing themselves of the applicant's services and allowing for them 9d. per ton and the cartage rate. *Tomlinson v. London & N. W. R. Co.*, 7 Ry. & C. T. Cas. 22.

111. — when refused.—If a rate book be a book of rates for traffic received or delivered at a place on a railway other than a station within the meaning of § 14, it is not subject to an order for division of rates. It is a book kept in accordance with the provisions of § 34 of the Railway and Canal Traffic Act 1888, and no power is contained in that section to order a dissection into their component parts of the rates in such book. *Tomlinson v. London & N. W. R. Co.*, 7 Ry. & C. T. Cas. 22.

Upon application by a carrier for an order under section 14, requiring a railway company to distinguish in their book of rates how much of a parcels rate was for conveyance on the line and how much for other expenses—*held*, that as it was proved that nothing was included in the rate except the carriage on the railway, no order would be made. *Robertson v. Midland G. W. R. Co.*, 2 Ry. & C. T. Cas. 409.

Upon a summons taken out under § 14 and § 34, Railway and Canal Traffic Act 1888, for an order directing the railway company to dissect certain rates charged to colliery owners from their own sidings or junctions with their own collieries, it appeared that the railway company kept books of the rates charged from such sidings or junctions at the nearest stations, in accordance with the provisions of § 34 of the Railway and Canal Traffic Act 1888. *Held*, that the powers of dissection contained in § 14 of the Regulations of Railways Act 1873 did not apply to such sidings or junctions and that the court had no jurisdiction, under § 34 of the Railway and Canal Traffic Act 1888, to order dissection of rates in books kept in accordance with the provisions of that section. *Pelsall C. & I. Co. v. London & N. W. R. Co.*, 7 Ry. & C. T. Cas. 36.

112. — permitting inspection of books.—By § 14 of the Regulation of Railways Act 1873, every railway company is bound to keep at each of its stations books showing every rate for the time be-

ing charged for the carriage of traffic (other than passengers and their luggage) from that station to any place to which they book, and every such rate book shall, during all reasonable hours, be open to the inspection of any person without payment of any fee; and any company failing to comply with those provisions shall for each offense, and, in a case of continuing offense, for every day during which it continues, be liable to a penalty of £5, to be recovered before two justices. *Held*, that the commissioners had jurisdiction to order an inspection, although justices also had the power to inflict a penalty for refusal to allow such inspection; that the right of inspection given by § 14 was general, and it was immaterial what motive or object a person had in desiring inspection; that inspection, under the statute, included the right of taking extracts or copies; and that at all events the court had power to order that extracts and copies might be taken as ancillary to the right of inspection, and in order to make such right effectual. *Perkins v. London & N. W. R. Co.*, 1 Ry. & C. T. Cas. 327.

113. Awarding costs.—It being the duty of a railway company to inform any person interested, and applying to it for information, how much of each local and through rate in its entirety is for conveyance, and how much is for other expenses, specifying the nature and detail of such other expenses, if the information is withheld the railway commissioners will, on an application under § 14 of the Regulation of Railways Act 1873, order it to be given and to be made public by proper entries in the rate book, and will order the railway company to pay the costs of the proceedings which become necessary for the purpose of obtaining such information. *Cairns v. North Eastern R. Co.*, 4 Ry. & C. T. Cas. 221.

A company will be compelled to pay half the cost where it makes exorbitant claims and puts forth tables of figures full of fallacies and inaccuracies, which unduly protract the inquiry. *Taff Vale R. Co. v. Barry D. & R. Co.*, 7 Ry. & C. T. Cas. 41.

An applicant, under § 15 of the Regulation of Railways Act 1873, is required by order 10 of the commissioners' general orders to state in his application the actual amount of the terminal charges complained of, and the amount which he contends that they

ought to be, for the purpose partly of enabling the commissioners to determine the reasonable incidence of the costs in a case where the decision is intermediate between the contentions of the parties. *Coxon v. North Eastern R. Co.*, 4 Ry. & C. T. Cas. 284.

In a case where the sums decided by the commissioners to be reasonable to be charged for terminal services were much in excess of the offer of the applicant, and far below the contention of the railway company, the commissioners made no order as to costs. *Coxon v. North Eastern R. Co.*, 4 Ry. & C. T. Cas. 284.

Where it appeared, upon an application under § 15 of the Regulation of Railways Act 1873, that the charges made by the railway company exceeded their maximum for conveyance by sums largely greater than the charges which, having regard to their statutory powers, the commissioners determined to be reasonable, the railway company were ordered to pay the costs of the application. *Berry v. London, C. & D. R. Co.*, 4 Ry. & C. T. Cas. 310.

5. Special Services.

114. Special services not rendered, or not required.—A company have no right to impose a charge for the conveyance of goods to or from their station, where the customer does not require such services to be performed by them. *Garton v. Bristol & E. R. Co.*, 6 C. B. N. S. 639, 28 L. J. C. P. 306, 1 Ry. & C. T. Cas. 218.

A railway company cannot, in addition to the charges for the carriage of goods between the place where the goods are handed to them and the place where they are ordered to be delivered, charge for collection and delivery, where they have not in fact collected or delivered them. *Garton v. Bristol & E. R. Co.*, 30 L. J. Q. B. 273, 1 Ry. & C. T. Cas. 218.

Where the total charge made by a company for conveyance does not exceed their maximum mileage rate, and there is nothing on the face of it to show that part of it consists of a separate charge for station services, the company is, as between itself and the public, entitled to attribute the whole charge to conveyance, notwithstanding that they may perform in addition station services for all customers who require them, for which they might have made a separate charge; and therefore a customer

who does not require such services is not entitled on that account to any rebate. *Howard v. Midland R. Co.*, 3 Ry. & C. T. Cas. 253.

A railway company acted themselves as carriers, charging the public at the rates specified in their printed bills for carriage, including the collection, weighing, loading, unloading, and delivery of the goods. They also carried goods for other carriers, allowing them a certain reduction for the trouble of collection, etc., which was performed by the carriers. In their dealings with a particular carrier they refused to make such allowance, but were willing to perform for him all the things which formed the consideration for that allowance, and which, in fact, he performed for himself. *Held*, that the company were not justified in withholding the allowance from such carrier, and that therefore the charges to him were not equal or reasonable. *Parker v. Great Western R. Co.*, 3 *Railw. Cas.* 563, 1 Ry. & C. T. Cas. 15.

A railway company conveyed goods on the L. and B. line, and published a list of charges for their carriage from M. to L., among which "Manchester packs" were charged 65s. per ton. At foot of the list was a notice that "goods were brought to C. T. station without extra charge, and no charge was made for booking or delivery in L." The company made arrangements with Messrs. C. & H., that the latter should carry from C. T. station and deliver in L. all such goods, and receive 10s. per ton for so doing. *Held*, that a charge of 65s. per ton to other persons willing to receive their own goods at the station was unequal and unreasonable. *Pickford v. Grand Junction R. Co.*, 10 M. & W. 399, 1 Ry. & C. T. Cas. 17.

A railway company were authorized by statute to enter into such arrangements as they might think fit with reference (*inter alia*) to the collection and delivery of goods; also to charge for small parcels, i. e., not exceeding 500 pounds weight, any sum they liked. *Held*, that the company were still bound to charge equally, and could not lawfully demand for carriage of parcels from station to station a sum including the cost of collection and delivery, and so impose an unequal burden on those who do not require the performance of the service. *Baxendale v. Great Western R. Co.*, 14 C. B. N. S. 1; *affirmed in* 16 C. B. N. S. 137, 1 Ry. & C. T. Cas. 17.

115. When reasonable charge for, allowable.—A railway company, in addition to the maximum rates for conveyance allowed by statute, is entitled to make a reasonable charge for a share of expenses of providing and maintaining station accommodation for dealing with merchandise traffic as carriers; for share of general expenses of station attributable to carriers' services; for share of expenses of supervision and clerkage, attributable as aforesaid; for shunting, attributable as aforesaid; for cartage (when performed by the railway company). *Sowerby v. Great Northern R. Co.*, 7 Ry. & C. T. Cas. 156.—*FOLLOWING* *Hall v. London, B. & S. C. R. Co.*, 5 Ry. & C. T. Cas. 28, 15 Q. B. D. 505.

As advising applicants of the receipt of each consignment at a sending station to the applicants' order, and asking their instructions, with incidental clerkage, stationery, and stamps, are proved to be a service only occasionally required to be rendered—*held*, that it ought not to be taken into account in fixing the amount of a general rate, and that only those for whom things have to be done out of the usual course should bear the reasonable charges that may be made for doing them. *Kempson v. Great Western R. Co.*, 4 Ry. & C. T. Cas. 426.

As regards the applicants' traffic, 6d. a sheet was a reasonable sum for the use of a sheet for covering applicants' traffic, it being proved that a sheet used in that traffic would make two journeys a week; a reasonable charge for the labor of covering the loaded truck was 3d. if one sheet only was used, and 2d. each sheet if more than one. *Hall v. London, B. & S. C. R. Co.*, 4 Ry. & C. T. Cas. 398.

Ninepence a sheet—*held*, reasonable for providing covering for a load of hay, assuming that a sheet used in that traffic would not make more than one journey a week; that a reasonable charge for labor of covering the loaded wagon was 2d. a ton; for assistance in loading, 2d. a ton; for uncovering and recovering the load at the receiving station, 2d. per ton. *Coxon v. North Eastern R. Co.*, 4 Ry. & C. T. Cas. 284.

The M. Ry. Co. were authorized by their act to charge for coal carried in owner's wagons a rate not exceeding 1d. per ton per mile for conveyance, and for everything incidental to conveyance, and also reason-

able sums for certain terminal and extraordinary services. *Held*, that haulage and shunting in marshaling the traffic from collieries were services incidental to conveyance, and that back haulage of empty wagons was not a service for which a charge could be made under the above clause; but that providing, maintaining, and working signaling and interlocking apparatus at a junction with a colliery siding was an extraordinary service within that clause, because a service from which the general public using the railway derived no benefit, but was performed for the benefit of the colliery proprietors alone, and that 3d. per ton was a reasonable charge in respect of such service. *Dunkirk Colliery Co. v. Manchester, S. & L. R. Co.*, 2 Ry. & C. T. Cas. 402.—FOLLOWING *Lancashire & Y. R. Co. v. Gidlow, L. R. 7 E. & I. App. 517, 45 L. J. Ex. 625.*

Providing coal-chutes for unloading coal wagons was a service within the above-mentioned clause for which 2d. per ton was a reasonable charge. *Dunkirk Colliery Co. v. Manchester, S. & L. R. Co.*, 2 Ry. & C. T. Cas. 402.

116. When not allowable for loading, unloading, etc.—A carrier is not entitled to any allowance in respect of assistance in the loading, unloading, or weighing of goods given by his men to a railway company voluntarily, or for the carrier's own convenience. *Edwards v. Great Western R. Co.*, 11 C. B. 588, 1 Ry. & C. T. Cas. 22.

"Weighing, clerkage, watching, and labeling" are services incidental to conveyance and covered by the maximum rate, because a railway company that carries goods contracted to take proper care of them in their passage and to make a right delivery of them, and being thus liable, and having also to calculate the price of carriage according to class and tonnage, it finds it necessary, in its own interests, to check, weigh, label, and watch, and to write out way-bills, invoices, and amounts. *Hall v. London, B. & S. C. R. Co.*, 4 Ry. & C. T. Cas. 398.

A railway company's act, after providing the maximum rate of tolls to be charged, made an exception in respect of special services to be rendered by the company for loading, unloading, collection, and delivery of goods. *Held*, that the company was not entitled to charge for special services,

though found by a jury to have been actually rendered by them; the customer was charged for such services, not having had the offer and option first distinctly given him of either availing himself of such services at the company's rate of charge or of doing them himself, such services being incidental to the ordinary business of a carrier and such as the customer, without notice, might have supposed were covered by the company's charges for toll. *Lancashire & Y. R. Co. v. Gidlow (No. 1)*, 42 L. J. Ex. 129, 3 Ry. & C. T. Cas. xxvi.

A railway company were required by their special act to carry as common carriers for hire, and to afford to all persons conveying or sending goods upon their railway every reasonable convenience and facility for loading and unloading goods. The act also authorized the company, for carriage of goods, to demand a toll not exceeding threepence per mile. *Held*, that the company were not entitled to charge an additional sum for services performed, accommodation afforded, and expense and risk incurred in and about the receiving, loading, unloading, and delivering the goods. *Pegler v. Monmouthshire R. & C. Co.*, 6 H. & N. 644, 1 Ry. & C. T. Cas. 23.

Upon an application to the railway commissioners, under § 15 of the Regulation of Railways Act 1873, to decide what were reasonable sums, if any, to be charged for terminal services performed by the railway in respect of the applicant's hops, the commissioners fixed the sums to be paid respectively for cartage and delivery of the hops and for loading and unloading, but held that the terms loading and unloading did not comprehend more than the labor of packing and unpacking a goods train or a goods truck, whether done by hand or by machinery; and that weighing, checking, clerkage, and watching, sheeting, and use of siding and station accommodation were services incidental to conveyance, and were not services for which a charge could be made under the clause above set out. *Berry v. London, C. & D. R. Co.*, 4 Ry. & C. T. Cas. 310.

The special act of a railway company enacted that it should be lawful for them to demand, in addition to the maximum mileage rates, a "reasonable sum for loading, unloading, collecting, receiving, or delivering, and for providing covers for minerals, goods, articles, or animals." *Held*,

that the words "providing covers" included not only the supply of sheets, but also the labor of covering wagons with them. *Coxon v. North Eastern R. Co.*, 4 Ry. & C. T. Cas. 284.

A railway company were authorized by their special act to charge a sum for the conveyance of coal along the line, "including the tolls for the use of the railways and wagons, or trucks and locomotive power, and every expense incidental to such conveyance," which sum was to be a maximum sum except in certain cases, the exception being thus expressed: "Except a reasonable sum for loading, covering, and unloading of goods, and delivery and collection, and any other services incidental to the business of a carrier where such services, or any of them, are or is to be performed by the company." *Held*, that taking the wagons of a colliery owner from his own sidings and attaching them to the trains, or returning them from the line of the railway to the sidings of the colliery owner, were not services which came within the meaning of the exception. At some of the stations the colliery owner had been allowed to leave his coals on the ground adjoining the lines. *Held*, that this might have been made the subject of an agreement for payment of any advantage, but did not come within the description of a "service" contained in the exception. *Lancashire & Y. R. Co. v. Gidlow* (No. 2), L. R. 7 H. L. Cas. 517, 45 L. J. Ex. 625, 3 Ry. & C. T. Cas. xiii.

117. — for maintaining sidings, marshalling, shunting, etc.—The ordinary station services are, as between the company and their customers, a part of the services *prima facie* included in the contract for conveyance; and no charge can be made for such services in excess of the maximum mileage rate authorized by the company's act, except where the act gives special power to make such extra charge; and this notwithstanding that, as between two or more railway companies, a deduction of terminal charges in respect of such services would be made at the clearing-house in the division of a through rate. *Howard v. Midland R. Co.*, 3 Ry. & C. T. Cas. 253.

Providing, maintaining, and working signaling and interlocking apparatus at a junction with a branch line to a colliery is not an extraordinary service for which an extra charge may be made, where such

branch line is not a private one, but a line or siding belonging to the railway company, and constructed and maintained at their cost, and to some extent used for general traffic as well as for coal from the colliery. *Neston Colliery Co. v. London & N. W. R. Co.*, 4 Ry. & C. T. Cas. 257.—**DISTINGUISHING** *Dunkirk Colliery Co. v. Manchester, S. & L. R. Co.*, 2 Ry. & C. T. Cas. 402.

The use of the signals afterwards in working the trains out of that siding onto the main line of the railway, and so forward to their destination, was only part of the ordinary course of working their line which the railway company had to take in respect of all traffic using their station, whether coming off this branch or not, and therefore not a service for which any terminal charge could be made. *Neston Colliery Co. v. London & N. W. R. Co.*, 4 Ry. & C. T. Cas. 257.

A customer who pays for the use of a railway acquires a right to use a junction between one part of it and another, and the cost of working the junction is an item of the cost of conveyance, the remuneration for which is included in the mileage rate. *Neston Colliery Co. v. London & N. W. R. Co.*, 4 Ry. & C. T. Cas. 257.

Marshalling the trucks of a coal train by a railway company in their railway station and on their own siding is not a service for which they can make a terminal charge, because such a service is incidental to conveyance and paid for in the mileage rate. *Neston Colliery Co. v. London & N. W. R. Co.*, 4 Ry. & C. T. Cas. 257.

Providing and maintaining siding accommodation at the receiving station for full and empty wagons, taking empty wagons out of and placing full ones in the sidings, were services incidental to conveyance and not extraordinary ones, the undertaking to carry involving the duty of delivering safely, and providing sidings and depositing wagons in them being essential acts by which such duty is to be performed. *Neston Colliery Co. v. London & N. W. R. Co.*, 4 Ry. & C. T. Cas. 257. *Isle of Wight R. Co. (Newport Junction) v. Isle of Wight R. Co.*, 4 Ry. & C. T. Cas. 128.—**FOLLOWING** *Lancashire & Y. R. Co. v. Gidlow*, L. R. 7 E. & I. App. 517.

Where a company's act fixed the maximum rates of charge to be made by the company, including tolls for the use of the railway and of wagons or trucks and loco-

motive power, and every expense incidental to such conveyance except loading and unloading—*held*, that no extra charge could properly be made under a section giving the company power "to charge for terminal services" for mere use of sidings in shunting or unloading, so long as there was no delay in unloading. *Chatterley Iron Co. v. North Staffordshire R. Co.*, 3 Ry. & C. T. Cas. 238.

Upon application to the commissioners, under § 15 of the Regulation of Railways Act 1873, to decide what were reasonable sums to be charged for terminal services—*held*, that station accommodations, shifting and placing wagons in position for loading and unloading, weighing, checking, clerage, watching, and labeling at sending station, advising consignees at their request of the arrival of their goods, and clerage, checking, and watching at receiving station, were services incidental to conveyance, for which a charge cannot be made. *Kempson v. Great Western R. Co.*, 4 Ry. & C. T. Cas. 426.

A railway company worked a line for the carriage of minerals, which was connected with collieries by junctions to private sidings. The company had no power to make a terminal charge for services at the junctions of their line with the siding. The company's trains called for trucks standing in the different sidings. At each junction the engine was detached and ran off the main line into the siding beyond the company's lands, from which it drew out any trucks ready to start and attached them to the train. The engine had, besides, frequently to perform shunting and marshaling, so as to pick out of a number of trucks, full and empty, such as were to be added to the train. The railway company charged for the work done on the sidings a fixed sum of 3d. per ton in addition to the mileage rate for conveyance on the railway company's own line. *Held*, that the company were not entitled to make such charge, and that as the plan of each siding, as well as its junction, had received the approval of the engineer of the railway company, the owners of the sidings did all that was necessary to entitle them to have their traffic taken by the railway company at the mileage rate, and free of any charge for terminal services, if they placed their trucks as near to the junctions as they could be brought with safety to the main line, arranged in proper

order, and clear of any obstacles to their being moved away. *Watkinson v. Wrexham, M. & C. Q. R. Co.*, 3 Ry. & C. T. Cas. 5.

118.—for use of wagons, or warehouse.—A charge for warehousing is not a proper ingredient in a railway rate. *Greenwood v. Lancashire & Y. R. Co.*, 6 Ry. & C. T. Cas. 39.

The delay in unloading wagons at a particular station is not a cost which ought to make the through rate to that station higher. *Belfast C. R. Co. v. Great Northern R. Co.*, 4 Ry. & C. T. Cas. 159.

Unless a company is put to some special expense in supplying wagons, the rate ought not to be increased on account of it; for the use of wagons for which a rate is payment involves a delivery of them for use in an ordinary way. *Hall v. London, B. & S. C. R. Co.*, 4 Ry. & C. T. Cas. 398.

Charges made in respect of the time that wagons, loaded or unloaded, on private sidings are necessarily out of the railway company's possession and control, quite apart from any such undue detention as might give rise to claims for demurrage, are charges which ought not to be allowed, unless the way a company's wagons were dealt with in private sidings caused such wagons to earn less than when they did not go out of the company's sidings. *Hall v. London, B. & S. C. R. Co.*, 4 Ry. & C. T. Cas. 398.

A company were authorized by their special act to charge a sum for the conveyance of coal along the line, "including the tolls for the use of the railways and wagons, or trucks and locomotive power, and every expense incidental to such conveyance," which sum was to be a maximum sum, except in certain cases, the exception being thus expressed: "Except a reasonable sum for loading, covering, and unloading of goods, and delivery and collection, and any other services incidental to the business of a carrier, where such services, or any of them, are or is to be performed by the company." *Held*, that taking the wagons of a colliery owner from his own sidings and attaching them to the trains, or returning them from the line of the railway to the sidings of the colliery owner, were not services which came within the meaning of the exception. At some of the stations the colliery owner had been allowed to leave his coals on the ground adjoining the lines. *Held*, that this

might have been made the subject of an agreement for payment of any advantage, but did not come within the description of a "service" contained in the exception. *Lancashire & Y. R. Co. v. Gidlow*, L. R. 8 E. & I. App. 517, 45 L. J. Ex. 625, 2 Ry. & C. T. Cas. xv.

A railway company provided wagons to traders who loaded and unloaded on their own premises, and who hauled the wagons to and from the stations for that purpose at their own expense. *Held*, that some remuneration was due to the railway company for their wagons being used elsewhere than upon their premises, and that a reasonable sum to be paid to them would be an amount not exceeding 1d. per ton. *Aberdeen Commercial Co. v. Great North of Scotland R. Co.*, 3 Ry. & C. T. Cas. 205.

119. — for invoicing, clerkage, etc.—The expense of invoicing the traffic and clerkage is one which a railway company must necessarily incur for the purpose of conducting their own business, and is an expense incidental to conveyance, and not an extraordinary service for which a charge could be made. *Neston Colliery Co. v. London & N. W. R. Co.*, 4 Ry. & C. T. Cas. 257. *Isle of Wight R. Co. (Newport Junction) v. Isle of Wight R. Co.*, 4 Ry. & C. T. Cas. 128.

The word "conveyance," in a clause in the special act of a railway limiting the maximum amount to be charged for the conveyance of goods, etc., must be understood as taking the whole course of the company's work as a railway carrier, from its acceptance of goods brought to it for the purpose of being forwarded to the moment of delivery at the termination of the journey, and the words "everything incidental to conveyance" comprise station accommodation and services, and those are, therefore, expenses, the payment for which is included in the rate unless expressly excepted, and are not expenses for which the maximum rate can be exceeded. *Hall v. London, B. & S. C. R. Co.*, 4 Ry. & C. T. Cas. 398.

120. Construction of special acts.—Under the provisions of the Barry Dock and Railways Act of 1888, the Barry Company should pay to the Taff Vale Company a bonus of $\frac{1}{8}$ of a penny on all mineral traffic carried on the Taff Vale railway for a greater distance than four miles, and extending between the companies at Har-

ford junction. *Taff Vale R. Co. v. Barry D. & R. Co.*, 7 Ry. & C. T. Cas. 41.

Construction of special act as to special services and tolls and the six-mile clause. *Lancashire & Y. R. Co. v. Gidlow*, 42 L. J. Ex. 129, 1 Ry. & C. T. Cas. 22.

Construction of special act, giving a right to charge for "stopping," as well as loading and unloading. *Monmouthshire R. Co. v. Williams*, 27 L. T. 134, 1 Ry. & C. T. Cas. 22.

6. Procedure.

a. In General.

121. What are "superior courts" —Adopting court procedure.—By § 3 of the Regulation of Railways Act 1873, "the term 'superior court' means in England any of Her Majesty's superior courts at Westminster; in Ireland, any of Her Majesty's superior courts in Dublin; and in Scotland, the court of session." *Macfarlane v. North British R. Co.*, 4 Ry. & C. T. Cas. 206.

By order 54 of the general orders made under that act, it is provided that "in any case not expressly provided for by this act or by these orders, the general principles of practice in the superior courts may be adopted and applied at the discretion of the commissioners to proceedings before them." *Held*, by the commissioners, that this order gave them the power to adopt, if they thought fit, the procedure of any other superior court than that of the court of the country where the cause of action originated; but that without special circumstances they would follow the procedure of the court whose jurisdiction would have existed but for the Regulation of Railways Act 1873. *Macfarlane v. North British R. Co.*, 4 Ry. & C. T. Cas. 206.

In a case where both parties resided in Scotland and the cause of action arose there, the commissioners ordered that the procedure on summonses for inspection and interrogatories should be similar to what it is in an action in the court of session. *Macfarlane v. North British R. Co.*, 4 Ry. & C. T. Cas. 206.

122. Dividing traffic between independent routes.—Certain traffic had the choice between two alternative and independent routes, viz., the G. route and the S. W. route. A special act vested part of the G. route in the company which had the S. W. route. In order to protect the interests

of the G. route statutory provision was made that the traffic should be distributed between the two routes, that part should go one way and part the other, and that the G. route should have assigned to it such of the traffic as an arbitrator might consider ought fairly to be considered as G. traffic, having regard to the shortness of the route. The railway commissioners were appointed to carry that provision into effect, and they divided all the traffic between the two routes with due regard to the position of localities and their vicinity to each route, and also to the interests of the public as well as those of the companies. *Girvan & P. J. R. Co. v. Glasgow & S. W. R. R. Co.*, 5 Ry. & C. T. Cas. 215.

123. When the commissioners will not state a case.—The commissioners refused to state a case for the opinion of the high court upon the question whether the condition as to the proposed rate being in the interest of the public had been duly considered by them before allowing the rate, on the ground that such a point was not a question of law at all, but a mere question of fact on which they had no authority to state a case. *Great Western R. Co. v. Severn & W. & S. B. R. Co.*, 5 Ry. & C. T. Cas. 170.

b. Enforcing Orders of Commission.

124. By attachment and fine.—The railway commissioners have power, under § 6 of the Regulation of Railways Act 1873, to issue a writ of attachment, or impose a penalty not exceeding £200 for disobedience to their orders. *Chatterley Iron Co. v. North Staffordshire R. Co.*, 3 Ry. & C. T. Cas. 238.

125. By suit.—An action does not lie for a breach of the provisions of the Railway and Canal Traffic Act. *Manchester, S. & L. R. Co. v. Denaby M. Colliery Co.*, 4 Ry. & C. T. Cas. 437.

7. What are Included in Tolls, Rates, and Duties.

126. Construction of statutes giving tolls.—In railway and canal acts, where there is an ambiguity in a clause imposing rates, tolls, or duties, that construction is to be adopted which is more favorable to the interests of the public and against that of the company. *Barrett v. Stockton & D. R. Co.*, 1 Railw. Cas. 443, 7 M. & G. 870; *affirmed* in 11 C. & F. 590, 1 Ry. & C. T. Cas. 22.

127. What are "tolls."—In 8 & 9 Vict. c. 20, § 90, and in 17 & 18 Vict. c. 31, § 2, the word "tolls" applies to traffic generally, and is not limited to tolls strictly so called. *Evershed v. London & N. W. R. Co.*, L. R. 2 Q. B. D. 254, 46 L. J. Q. B. D. 289, 36 L. T. 12, 26 W. R. 102.—FOLLOWED IN *Budd v. London & N. W. R. Co.*, 36 L. T. 802, 25 W. R. 752.—*Evershed v. London & N. W. R. Co.*, 3 App. Cas. 1029, 48 L. J. Q. B. (H. L.) 22, 3 Ry. & C. T. Cas. xvi.

The word "tolls," in § 95 of the Railways Clauses Consolidation Act 1845, relates to tolls properly so called, and not to charges for carrying passengers in the company's own carriages. *Brown v. Great Western R. Co.*, 9 Q. B. D. 744, 51 L. J. Q. B. D. 529, 4 Ry. & C. T. Cas. ix.

The word "tolls," in the 97th section of the Railways Clauses Act 1845, does not mean charges for the conveyance of goods by the railway company in their carriages, but only charges for the use of the company's line by persons conveying their own goods over the line in their own carriages. *Wallis v. London & S. W. R. Co.*, 39 L. J. Ex. 57, 1 Ry. & C. T. Cas. 24.

A sum claimed for sending back empty carriages is not "toll," within the meaning of the 97th section of the Railways Clauses Act 1845. *Field v. Newport, A. & H. R. Co.*, 3 H. & N. 409, 27 L. J. Ex. 396. *Grantham C. Nav. v. Hall*, 13 M. & W. 114; *affirmed* in 14 M. & W. 880, 1 Ry. & C. T. Cas. 23.

What determines whether a charge is a rate or a toll is not who provides the carriage or who provides the engine, but who are the carriers. *Watkinson v. Buxham, M. & C. Q. R. Co.*, 3 Ry. & C. T. Cas. 5.

128. Right of embankment company to tolls.—A railway, although made and opened to the public by act of parliament, is a "way," within the meaning of a previous act empowering an embankment company to make a road and to erect turnpikes upon or across any lanes or ways leading, or that may after lead out of the same, and to take tolls at such turnpikes. *Rowe v. Shilson*, 4 B. & Ad. 726, 1 N. & M. 734.

A clause in a railway act authorizing all persons to use the railway upon payment of proper tolls does not take away the vested right to its tolls, of an embankment company previously organized; and consequently such embankment company may take tolls from persons crossing its road upon a rail-

way. *Rowe v. Shilson*, 4 B. & Ad. 726, 1 N. & M. 734.

CHARTERS.

Amendment of, effect on municipal subscription to railways, see MUNICIPAL AND LOCAL AID, 200.

Authority in, to bridge navigable streams, see BRIDGES, ETC., 64.

Authorizing municipal aid, construction of, see MUNICIPAL AND LOCAL AID, 66.

Change of route under provisions of, see LOCATION OF ROUTE, 18.

Changes in, when a defense to action on subscriptions, see SUBSCRIPTIONS TO STOCK, III.

Consolidation pursuant to power given in, see CONSOLIDATION, 5.

Construction of elevated railways under special, see ELEVATED RAILWAYS, 4, 5.

Contracts beyond authority given in, see CONTRACTS, 5.

Custom not valid if inconsistent with, see CARRIAGE OF MERCHANDISE, 426.

Duty to keep crossings in repair under provisions of, see CROSSING OF STREETS AND HIGHWAYS, 31.

Effect of consolidation on special privileges granted by, see CONSOLIDATION, 32.

— on right to cross tracks of another road, see CROSSING OF RAILROADS, 1.

Entry on land before making compensation, under power given in, see EMINENT DOMAIN, 416.

Equity confines company within strict limits of, see EQUITY, 10.

Expiration of, as ground of abatement, see ABATEMENT, 9.

— — — for dissolution, see DISSOLUTION, 2.

Forfeiture of, when not prevented by lease, see LEASES, ETC., 5.

May restrain corporation from making contracts of through carriage, see CARRIAGE OF MERCHANDISE, 595.

New location, where charter power has been exhausted, see LOCATION OF ROUTE, 21.

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— same corporation in two or more states, see also FOREIGN CORPORATIONS, 3.

Power of commissioners to regulate charges as affected by provisions in, see RAILWAY COMMISSIONERS, 16.

— congress to amend, see CENTRAL PACIFIC R. Co., 3, 4.

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— to issue bonds under provisions of, see BONDS, 3.

Provisions in limiting time to sue, see LIMITATIONS OF ACTIONS, 2.

Regulation of charges by, see CHARGES, 4—13.

Restrictions in, as to poles and wires in streets, see ELECTRIC RAILWAYS, 10.

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I. HOW GRANTED.

1. In General.

1. Proceedings in legislature—Opposition.—Where opposition to a charter of a railroad, or the modification of one already granted, is made in the legislature merely to protect a private interest, and the party is induced to withdraw that opposition in consideration of indemnity secured to him, the courts will enforce such indemnity, unless from the peculiar circumstances of the case the legislature was liable to be misled, and to do what it would not have done had not the transaction been concealed from its knowledge. *Low v. Connecticut & P. R. R. Co.*, 46 N. H. 284.

2. Constitutionality, generally.—The New York constitutional provision (art. 8, § 1) in reference to the formation of corporations does not render a special charter, or a special addition to a charter taken under a general law, unconstitutional. *In re Prospect Park & C. I. R. Co.*, 67 N. Y. 371, 15 Am. Ry. Rep. 102; *affirming* 8 Hun 30.

3. Subject to be expressed in title.*—An act incorporating a railroad company need not express in its title any of the powers, rights, privileges, or immunities which the charter is intended to confer. The charter of a private corporation is a contract as between the state and the corporation; and the stipulations, terms, and conditions of a contract are to be looked for in the body of the instrument, not in the title or caption. *Goldsmith v. Rome R. Co.*, 62 Ga. 473.

The fact that the limit on the taxing power of the state over the Georgia Railroad and Banking Company is not expressed or indicated in the title of the act of incorporation, does not render that provision of the charter unconstitutional. *Goldsmith v. Georgia R. Co.*, 62 Ga. 485.

An act incorporating a railroad, with power to construct a branch or extension, to purchase land, to make coal-beds thereon, and to purchase or lease a ferry, none of which are referred to in the title of the act, is not in conflict with a constitutional provision providing that no law shall embrace more than one subject, which must be expressed in its title. *Belleville & I. R. Co. v. Gregory*, 15 Ill. 20.—REVIEWED IN *Abington v. Cabeen*, 12 Am. & Eng. R. Cas. 581, 106 Ill. 200.

The charter of a railway company will not be subject to the constitutional objection of embracing more than one subject, from the fact that it authorizes the construction of one or more extensions of the principal line in different directions. The charter of the Peoria and Hannibal railway company is not obnoxious to this objection, as the extensions authorized are not regarded as independent and distinct lines from the main road. *Ross v. Chicago, B. & Q. R. Co.*, 77 Ill. 127.

The right to build branch roads, and to expropriate for the purpose, conferred by a

charter to a railroad company, is embraced within the title of its charter, which reads: "An act to incorporate the Mississippi, Terre-aux-Bœufs and Lake Borgue railroad company, and to define its powers and authority." *Mississippi, T. & L. B. R. Co. v. Wooten*, 36 La. Ann. 441.

It is not necessary that a railroad charter should refer in its title to a clause limiting the time for bringing suits against the company to conform to a constitutional provision to the effect that a law shall embrace but one subject, and that shall be expressed in the title. *Vail v. Easton & A. R. Co.*, 44 N. J. L. 237.

It is not necessary that an act incorporating a railroad company shall set forth in the title all the powers of the company, in order to conform to New York Constitution, art. 3, § 16, providing that no private or local bill passed by the legislature shall embrace more than one subject, and that shall be expressed in the title. So long as the objects of the corporation are limited by the act to one corporate body, they constitute, in mass, the single subject which the act must contain. *Freeman v. Panama R. Co.*, 7 Hun (N. Y.) 122.

It is sufficient if the title of an act fairly give notice of its subject so as reasonably to lead to an inquiry into the body of the bill. An original act was, "To incorporate the State Line, &c., railroad;" another was, "A supplement to an act to incorporate the State Line, &c., railroad;" another, "A further supplement to an act to incorporate the State Line, &c., railroad." All the provisions in both supplements related to the State Line, etc., road. The object of the supplements was sufficiently expressed in their titles, the object being germane to the original act. *State Line & J. R. Co.'s Appeal*, 77 Pa. St. 429.—FOLLOWING Allegheny County Home's Appeal, 77 Pa. St. 77.

4. Amendatory act—New charter.—An act enabling a railway company to take a new name and to extend its road is not an act renewing or extending its charter or creating a new corporation. *Attorney-General v. Joy*, 16 Am. & Eng. R. Cas. 643, 55 Mich. 94, 20 N. W. Rep. 806.

The original act incorporating a railroad company declared that the act "shall be deemed and taken as a public act, and shall at all times be recognized as such, in all courts and places whatsoever." *Held*, that a supplementary act amending the charter

* Sufficiency of title of legislative acts concerning railroads, see note, 51 AM. & ENG. R. CAS. 30.

must also be considered as a public act. *Stephens & C. Transp. Co. v. Central R. Co.*, 33 N. J. L. 229.

After a company has been incorporated under the general railroad law, the legislature passed an act, entitled "An act to incorporate the A. & H. R. Co.; to confer certain powers, privileges, etc.; and for other purposes." The corporators named in the act were not the same as the corporators in the original corporation. The act declared that "they are hereby created a body politic and corporate," and gave them all the powers necessary for a railroad company. Subsequently an amendatory act was passed, which changed the name of the company and authorized the extension of the railroad. *Held*, that these acts were not amendments to the charter granted under the general railroad law, but were a separate and distinct charter granted by the legislature. *Snook v. Georgia Imp. Co.*, 38 Am. & Eng. R. Cas. 492, 83 Ga. 61, 9 S. E. Rep. 1104.—CRITICISING *Johnston v. Crawley*, 25 Ga. 316.

2. Acceptance; Filing; Registration.

5. Necessity of acceptance.—An act or charter of incorporation is nothing more than an offer until consummated by acceptance. *State v. Baltimore & O. R. Co.*, 12 Gill & J. (Md.) 399.

So where a special act is passed for the purpose of incorporating a railroad company, and before any acceptance or organization under it a new constitution is adopted, providing that such companies shall not be chartered by special act, it acts as a repeal or withdrawal of the charter. *State v. Dawson*, 16 Ind. 40.

Where an act is passed, conferring upon an existing corporation additional powers and privileges, upon certain terms and conditions, such powers and privileges are inoperative, and have no binding effect until accepted. *Lyons v. Orange, A. & M. R. Co.*, 32 Md. 18.

Both original charters and amendments thereto must be accepted by the corporation or individuals composing it. *Troy & R. R. Co. v. Kerr*, 17 Barb. (N. Y.) 581.—REVIEWING *London & B. R. Co. v. Wilson*, 6 Bing. N. C. 135; *London & B. R. Co. v. Fairclough*, 6 Bing. N. C. 135; *Graham v. Birkenhead, L. & C. J. R. Co.*, 12 Beav. 460.—REVIEWED IN *New Haven & D. R. Co. v. Chapman*, 38 Conn. 56.

Where it is clearly the purpose of the legislature to give a company time within which they would have an opportunity to accept certain conditions imposed by that body, it cannot be contended that official negligence in promulgating the law should make it impossible for such time to transpire, and thus deprive the company of the right and opportunity to accept it; it would enable such official negligence to defeat the legislator's will. *State v. North La. & T. R. Co.*, 25 La. Ann. 65.

6. What amounts to acceptance, and when presumed.—Where the charter of a railway company prescribes no mode or time or acceptance, proof that the act creating it was passed at the request of the directors designated therein would show a sufficient acceptance; or acceptance could be inferred from the use of corporate powers under the charter or by proof that the company had constructed and operated a part of its road. *St. Joseph & I. R. Co. v. Shambaugh*, 106 Mo. 557, 17 S. W. Rep. 581.

Where individuals apply for a charter beneficial to themselves, acceptance may be presumed; or where a charter names the incorporators and declares them a corporation, without further steps, acceptance may be established by slight acts; but these rules do not apply to charters merely prescribing conditions upon which persons not named may become incorporated. *Attorney-General v. Chicago & N. W. R. Co.*, 35 Wis. 425.

Acceptance of an act of assembly by a corporation may be inferred from the exercise of corporate powers or other unequivocal acts on its part; but this presumption cannot prevail against direct proof. *Lyons v. Orange, A. & M. R. Co.*, 32 Md. 18.

The acceptance of a charter and the organization of a corporate body under such charter may be proved by a witness who saw the alleged corporators in the use and exercise of the franchises and powers conferred by the act of incorporation. *Wilmington & M. R. Co. v. Saunders*, 3 Jones (N. Car.) 126.

A railroad charter may be considered as presumptively accepted at its date without any record evidence of the fact, when it appears that the grantees afterwards asked for and obtained amendments to their charter and have fully constructed the road. *Farnsworth v. Lime Rock R. Co.*, 47 Am. & Eng. R. Cas. 64, 83 Me. 440, 22 Atl. Rep. 373.

Under Wisconsin act of Feb. 11, 1847, incorporating the Milwaukee and Waukesha railroad, and appointing commissioners to receive subscriptions to stock, and declaring it a corporation when so much stock was subscribed and paid in, said commissioners could do no act tending to prove acceptance of the charter because they had no right to accept; and the stock subscribers could do no act tending to prove acceptance before subscription of the whole capital stock, because until then they had no right to accept. *Attorney-General v. Chicago & N. W. R. Co.*, 35 Wis. 425.

As to what acts on the part of the corporators constitute an acceptance of a special charter, see *State v. Dawson*, 22 Ind. 272.

7. Acceptance must be unconditional.—As a general rule, when a charter is granted, whether it be one of creation or an amendment to a pre-existing corporation, it must either be accepted or rejected as offered, without condition; and in accepting the privileges conferred, the grantees will be required to perform the conditions imposed. But this rule, while applicable to subsequent conditions to be performed after the organization of the company, does not apply to conditions precedent, upon the strict performance of which the very existence and exercise of powers on the part of the corporation depend. *Lyons v. Orange, A. & M. R. Co.*, 32 Md. 18.

8. Effect of acceptance, generally.—Where an act of incorporation is accepted, and the company organized provisionally thereunder, no subsequent withdrawal of any of the corporators will affect its vitality. *Busey v. Hooper*, 35 Md. 15.

A city railway company may accept the provisions of a city charter which went into effect after the incorporation of the company, and such acceptance is as binding on the company as if it had acquired its own charter subsequently to the adoption of the city charter. *Union Depot R. Co. v. Southern R. Co.*, 50 Am. & Eng. R. Cas. 324, 105 Mo. 562, 16 S. W. Rep. 920.—FOLLOWED IN *St. Louis R. Co. v. Southern R. Co.*, 105 Mo. 577; *Union R. Co. v. Southern R. Co.*, 105 Mo. 602.

The act of January 22, 1857, incorporating the St. Joseph and Iowa railroad company (Acts 1856-7, p. 107), designating the persons who should constitute the first board of directors and prescribing no conditions precedent, was a present grant of corporate

powers which came into being upon the acceptance of the charter. *St. Joseph & I. R. Co. v. Shambaugh*, 106 Mo. 557, 17 S. W. Rep. 581.

A railway corporation which accepts a charter, finding a previous railway corporation in possession of the streets, cannot, in equity, plead want of notice of the charter of its predecessor and the extent of its franchise. *Appeal of the Union Pass. R. Co.*, 2 Pennyp. (Pa.) 434.

The state may grant a charter to a corporation upon such terms as she pleases, and the conditions so imposed become binding on the corporation upon an acceptance of the charter. The state may grant a franchise conferring vested rights beyond future legislative control, but to have such effect it must be clear, explicit, and unconditional. *Columbia & G. R. Co. v. Gibbs*, 24 So. Car. 60.—QUOTED IN *Kaminitsky v. Northeastern R. Co.*, 35 So. Car. 53.

An exaction of a yearly contribution made by the legislature upon a railroad corporation is not unconstitutional where the corporation accepted its charter subject to such an exaction. *Columbia & G. R. Co. v. Gibbs*, 24 So. Car. 60.—DISTINGUISHING *Atchison, T. & S. F. R. Co. v. Howe*, 32 Kan. 737.

9. — to prove corporate existence.—Where a charter confers corporate capacity without any conditions precedent, acceptance of the charter is all that need be shown to prove corporate existence. *St. Joseph & I. R. Co. v. Shambaugh*, 106 Mo. 557, 17 S. W. Rep. 581.

An act was passed by the legislature in 1849 granting a charter for a railroad to persons who had not applied for it. In 1851 a new constitution was adopted providing that corporations, other than banking companies, could not be created thereafter by special act. There was no acceptance of the charter until 1852. *Held*, that the acceptance was not evidence of corporate existence. *State v. Dawson*, 16 Ind. 40.

10. Filing.—A corporation has no existence until the date of the filing of its charter; and persons named therein as directors for the first year assume or incur no obligations until it is filed. *St. Louis, Ft. S. & W. R. Co. v. Tiernan*, 40 Am. & Eng. R. Cas. 525, 37 Kan. 606, 15 Pac. Rep. 544.

11. Registration.—The "principal office" of a corporation is located in that

county where the incorporators elect to have their charter first registered and perfected, within the meaning of the requirement of the act of 1875, that the charter "is to be registered in the county where the principal office of the company is situated." *Anderson v. Middle & E. T. C. R. Co.*, 52 *Am. & Eng. R. Cas.* 149, 91 *Tenn.* 44, 17 *S. W. Rep.* 803.

An amended charter is void in like manner as an original charter, if it has not been registered as required by act of 1875 in the office of the secretary of state. *Anderson v. Middle & E. T. C. R. Co.*, 52 *Am. & Eng. R. Cas.* 149, 91 *Tenn.* 44, 17 *S. W. Rep.* 803.

3. Charters Granted by Two or More States.

12. In general.*—A state may make a corporation of another state, as there organized and conducted, a corporation of its own, *quoad* any property within its territorial jurisdiction. *Graham v. Boston, H. & E. R. Co.*, 25 *Am. & Eng. R. Cas.* 53, 118 *U. S.* 161, 6 *Sup. Ct. Rep.* 1009.—FOLLOWING *Clark v. Barnard*, 108 *U. S.* 436; *Baltimore & O. R. Co. v. Harris*, 12 *Wall.* (U. S.) 65.

It is the right of each state in which a corporation transacts business to require it to become a corporation of the state under and by virtue of its own laws. *Stout v. Sioux City & P. R. Co.*, 3 *McCrary (U. S.)* 1, 8 *Fed. Rep.* 794.

A corporation cannot transfer its allegiance from the state of its creation by accepting a charter from another state. Its measure of duty toward the former is regulated by the original charter. *Commonwealth ex rel. v. Pittsburg & C. R. Co.*, 58 *Pa. St.* 26.

A railroad company chartered in one state bought the corporate property and franchises of a road created in an adjoining state, and subsequently the legislature of the adjoining state ratified the sale and authorized the purchasing company "to exercise the rights, privileges, and powers" of the selling company. *Held*, that the purchasing company became the successor of the company purchased and a corporation existing under the laws of the adjoining state. *Clark v. Barnard*, 108 *U. S.* 436, 2 *Sup. Ct. Rep.* 878.—FOLLOWED IN *Graham v. Boston, H. & E. R. Co.*, 118 *U. S.* 161.

* Corporations created by concurrent action of several states, see note, 25 *AM. & ENG. R. CAS.* 67.

13. Joint action of the two states.

—Several states may, by competent legislation, unite in creating the same corporation, or in combining several pre-existing corporations into a single one. *Baltimore & O. R. Co. v. Harris*, 12 *Wall.* (U. S.) 65, 1 *Am. Ry. Rep.* 559. *Wilmer v. Atlanta & R. A. L. R. Co.*, 2 *Woods (U. S.)* 409.—QUOTING *Baltimore & O. R. Co. v. Harris*, 12 *Wall.* (U. S.) 82.—*Wilmer v. Atlanta & R. A. L. R. Co.*, 2 *Woods (U. S.)* 447.—FOLLOWING *Philadelphia & W. R. Co. v. Maryland*, 10 *How.* (U. S.) 376; *Baltimore & O. R. Co. v. Harris*, 12 *Wall.* (U. S.) 82. RECONCILING *Ohio & M. R. Co. v. Wheeler*, 1 *Black (U. S.)* 286; *Marshall v. Baltimore & O. R. Co.*, 16 *How.* 325; *Chicago & N. W. R. Co. v. Whitton*, 13 *Wall.* 270; *Tomlinson v. Branch*, 15 *Wall.* 460; *Northern C. R. Co. v. Jackson*, 7 *Wall.* 262; *Delaware Railroad Tax Case*, 18 *Wall.* 206.

And one state may, without thereby creating a new corporation, authorize a corporation of another state to carry on business within its territory. *Copeland v. Memphis & C. R. Co.*, 3 *Woods (U. S.)* 651.—NOT FOLLOWING *Ohio & M. R. Co. v. Wheeler*, 1 *Black (U. S.)* 286.

14. How construed, generally.—A charter granted by two states to a company to construct a railroad is not only a contract with the company, but a contract between the states. It is to be liberally construed with reference to its objects. Like a treaty, it is the law of the contracting states, not being subject to the interpretation by the local usages of either. The same construction must be had in both. *Cleveland & P. R. Co. v. Speer*, 56 *Pa. St.* 325.—FOLLOWING *Brocket v. Ohio & F. R. Co.*, 14 *Pa. St.* 244.

15. Such road a separate corporation in each state.—A corporation chartered in two or more states composed of the same individuals, and bearing the same name and style, and clothed with the same capacities and powers, and intended to accomplish the same objects, has no legal existence in either state except by the law of that state. *Ohio & M. R. Co. v. Wheeler*, 1 *Black (U. S.)* 286.—APPROVED IN *Copeland v. Memphis & C. R. Co.*, 3 *Woods (U. S.)* 651. DISTINGUISHED IN *Williams v. Missouri, K. & T. R. Co.*, 3 *Dill.* (U. S.) 267; *Martin v. Mobile & O. R. Co.*, 7 *Bush (Ky.)* 116. QUOTED IN *Burger v. Grand Rapids & I. R. Co.*, 20 *Am. & Eng.*

R. Cas. 607, 22 Fed. Rep. 561; Washington, A. & G. R. Co. v. Martin, 7 D. C. 120. RECONCILED IN Wilmer v. Atlanta & R. A. L. R. Co., 2 Woods (U. S.) 447. REVIEWED IN Blackburn v. Selma, M. & M. R. Co., 2 Flipp. (U. S.) 525; Kranshaar v. New Haven Steamboat Co., 7 Robt. (N. Y.) 356.

A railroad forming a continuous line through different states and chartered in each is, for the purposes of state regulation, a domestic corporation in each state, and is subject to state regulation, except as to matters belonging exclusively to the United States. *Stone v. Farmers' L. & T. Co.*, 23 Am. & Eng. R. Cas. 577, 116 U. S. 307, 6 Sup. Ct. Rep. 334, 388, 1191.—FOLLOWED IN *Stone v. Illinois C. R. Co.*, 116 U. S. 347; *Mobile & O. R. Co. v. Sessions*, 28 Fed. Rep. 592.—*Atwood v. Shenandoah Valley R. Co.*, 38 Am. & Eng. R. Cas. 534, 85 Va. 966, 9 S. E. Rep. 748. *Rece v. Newport News & M. V. Co.*, 32 W. Va. 164, 9 S. E. Rep. 212. *Allegheny County v. Cleveland & P. R. Co.*, 51 Pa. St. 228. *Quincy R. Bridge Co. v. Adams County*, 88 Ill. 615, 21 Am. Ry. Rep. 378.—QUOTED IN *Ohio & M. R. Co. v. People*, 123 Ill. 467.

The legislatures of two or more states may, by duplicate charters, consolidate corporations existing under the laws of each state; but for the purposes of jurisdiction each remains a separate corporation in the state creating it; and for this purpose separate organization in the states is not necessary. *Blackburn v. Selma, M. & M. R. Co.*, 2 Flipp. (U. S.) 525.—REVIEWING *Baltimore & O. R. Co. v. Harris*, 12 Wall. (U. S.) 65; *Ohio & M. R. Co. v. Wheeler*, 1 Black (U. S.) 286; *Chicago & N. W. R. Co. v. Whitton*, 13 Wall. 270; *Williams v. Missouri, K. & T. R. Co.*, 3 Dill. (U. S.) 267.

10. Adopting provisions of foreign charter.—Where a charter granted by the state of Alabama provides that the company "shall have and enjoy all the rights, powers, and privileges granted" by the statutes of another state incorporating the company, and the latter statutes contain a provision exempting the employes of the company from military duty, service on juries, and road labor, the language employed by the Alabama statutes confers, by necessary construction, upon the employes of the company exemption from military duty, etc., within the state. *Johnson v. State*, 41 Am. & Eng. R. Cas. 275, 88 Ala. 176, 7 So. Rep. 253.

A law of Texas, merely recognizing a railroad corporation existing under the laws of another state, and conferring upon it the same rights and powers that it has in the state of its creation, is but an enabling act, and does not create a new Texas corporation, so as to make it a citizen of that state. *Missouri, K. & T. R. Co. v. Texas & St. L. R. Co.*, 4 Woods (U. S.) 360, 10 Fed. Rep. 497.—REVIEWING *Baltimore & O. R. Co. v. Harris*, 12 Wall. (U. S.) 65.

II. INVIOABILITY.

1. Charter a Contract.

17. General rule of inviolability.—

A charter is a contract, within the meaning of that provision of the U. S. constitution declaring that no state shall make any law impairing the obligation of contracts. *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518.—FOLLOWED IN *Citizens' St. R. Co. v. City R. Co.*, 56 Fed. Rep. 746; *Lejee v. Continental R. Co.*, 10 Phila. (Pa.) 362; *Second & T. St. Pass. R. Co. v. Green & C. St. Pass. R. Co.*, 3 Phila. (Pa.) 430; *People v. O'Brien*, 36 Am. & Eng. R. Cas. 78, 111 N. Y. 1, 18 N. E. Rep. 692, 19 N. Y. S. R. 173. QUOTED IN *Richmond, F. & P. R. Co. v. Richmond*, 26 Gratt. (Va.) 83; *Branin v. Connecticut & P. R. R. Co.*, 31 Vt. 214. REVIEWED IN *Lewis v. Germantown, N. & P. R. Co.*, 16 Phila. (Pa.) 621.—*Attorney-General v. Chicago & N. W. R. Co.*, 35 Wis. 425.—FOLLOWING *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518.—*Zabriskie v. Hackensack & N. Y. R. Co.*, 18 N. J. Eq. 178. *Alabama & F. R. Co. v. Burkett*, 46 Ala. 569. *Davis v. East Tenn. & G. R. Co.*, 1 Sneed (Tenn.) 94.

A charter, being a grant, is an implied contract with the corporation not to reassert the rights granted. *Chesapeake & O. Canal Co. v. Baltimore & O. R. Co.*, 4 Gill & J. (Md.) 1.

The charter of a private corporation is an executed contract between the government and the corporators, and the legislature cannot repeal, impair, or alter it in a matter materially affecting the interest of the corporators against their consent, or without the default of the corporation judicially ascertained. *Mississippi, O. & R. R. Co. v. Gaster*, 24 Ark. 96.

The charter of a corporation designed for the accomplishment of a particular object through the investment of the funds of private individuals, at all events if fairly

obtained, is a contract, at least after interests have become vested under it, which the legislature cannot substantially impair without violating the constitution of the United States. *Smead v. Indianapolis, P. & C. R. Co.*, 11 *Ind.* 104.

A state cannot impair the obligation and privileges secured by such a charter, either by its constitution or its laws. The prohibition is on the state by whatever means it acts. *Alabama & F. R. Co. v. Burkett*, 46 *Ala.* 569. *Scotland County v. Missouri, I. & N. R. Co.*, 65 *Mo.* 123. *State v. Dawson*, 22 *Ind.* 272.

The charter of a passenger railway company is a contract, and a subsequent charter granting rights inconsistent with the former is invalid. *Second & T. St. Pass. R. Co. v. Green & C. St. Pass. R. Co.*, 3 *Phila. (Pa.)* 430.—FOLLOWING Dartmouth College *v. Woodward*, 4 *Wheat.* (U. S.) 518.

Over public corporations the legislature have an unlimited control to create, modify, or destroy at pleasure; but the grant and acceptance of a private charter is a compact which the legislature cannot violate. *Tinsman v. Belvidere Delaware R. Co.*, 26 *N. J. L.* 148.

The charter of a corporation, if irrevocable, is protected by the same constitutional provisions which render inviolable contracts between individuals—that the legislature shall not pass any law impairing the obligation of contracts, or depriving a party of any remedy for enforcing a contract which existed when the contract was made; and the rules for the construction of these constitutional provisions, as applicable to contracts between individuals, apply as well to contracts by the state with corporations having irrevocable charters. *State (United R. & C. Co., pros.) v. Weldon*, 23 *Am. & Eng. R. Cas.* 134, 47 *N. J. L.* 59. *People v. Albany & V. R. Co.*, 37 *Barb. (N. Y.)* 216; *affirming* 11 *Abb. Pr.* 136, 19 *How. Pr.* 523.

Where a charter is granted with certain conditions imposed, when those conditions have been complied with the charter becomes a contract and cannot be impaired. *Slack v. Maysville & L. R. Co.*, 13 *B. Mon. (Ky.)* 1.

18. Illustrations of the rule.—The charter of a railroad corporation created by a state is a contract protected by art. 1, § 10, of the United States constitution, prohibiting the states from passing laws impairing the obligation of contracts; and therefore a

corporation of another state which has become peculiarly interested in or equitably the beneficial owner of the property of such a corporation may maintain a suit for the determination as to whether the contract rights created by the charter were violated by subsequent acts of the state in limitation of the right to collect tolls. *Keagan v. Farmers' L. & T. Co.*, 58 *Am. & Eng. R. Cas.* 670, 154 *U. S.* 362, 14 *Sup. Ct. Rep.* 1047.

A grant by the legislature, in consideration of expenses to be incurred by the grantees, and in contemplation of a public benefit, of the exclusive right of erecting a bridge, and taking tolls, to reimburse such expenses, within certain limits for a limited time, is not a monopoly, in the true sense of that term. Such a grant is in the nature of a contract, which may not be impaired. *Enfield Toll Bridge Co. v. Hartford & N. H. R. Co.*, 17 *Conn.* 40.—CRITICISED IN *Prop'rs of Bridges v. Hoboken L. & I. Co.*, 1 *Wall. (U. S.)* 116; *Com'rs on Inland Fisheries v. Holyoke Water Power Co.*, 104 *Mass.* 446. DISAPPROVED IN Mayor, etc., of N. Y. *v. New England Transfer Co.*, 14 *Blatchf. (U. S.)* 159; *Lake v. Virginia & T. R. Co.*, 7 *Nev.* 294. REVIEWED IN *Prop'rs of Bridges v. Hoboken L. & I. Co.*, 13 *N. J. Eq.* 503.

A charter granted by the common council to a street-railway company to construct and operate a street railway within the corporate limits of a city constitutes a contract between such railway company and the city. *Western P. & S. Co. v. Citizens' St. R. Co.*, 46 *Am. & Eng. R. Cas.* 176, 128 *Ind.* 525, 26 *N. E. Rep.* 188, 28 *N. E. Rep.* 88.—FOLLOWED IN *Citizens' St. R. Co. v. City R. Co.*, 56 *Fed. Rep.* 746.

Such charter is to be strictly construed against the railway company, and it has no doubtful rights under such charter, for where there are doubts they are construed against the grantee and in favor of the city. *Western P. & S. Co. v. Citizens' St. R. Co.*, 46 *Am. & Eng. R. Cas.* 176, 128 *Ind.* 525, 26 *N. E. Rep.* 188, 28 *N. E. Rep.* 88.

A charter to construct a railroad was granted by the legislature to a company styled the Canton, K., A. & T. Co., and after the passage of said charter the legislature of Mississippi passed an act which authorized and empowered said company to assign, transfer, and set over to the New Orleans, J. & G. N. R. Co. all the rights,

powers, privileges, franchises, immunities, and exemptions (then) owned and possessed by said company, by virtue of their charter, and of any other act passed by the legislatures of Mississippi and Alabama, as well as the stock subscribed to said first-named company, upon such terms and conditions as should be agreed on by the boards of directors of said companies; and by a proviso to said act it was not to take effect unless accepted and approved by the stockholders representing a majority of the stock subscribed to said company, at a meeting of the stockholders called specially for that purpose, which meeting was called, and the act accepted and approved accordingly. *Held*, that a charter is a contract, within the meaning of the constitution of the United States, between the state granting the charter and the corporation itself, the obligation of which it is not within the power of the legislature to impair. *New Orleans, J. & G. N. R. Co. v. Harris*, 27 Miss. 517.

The charter of the Memphis, El Paso & Pac. R. Co., granted by the Texas act of Feb. 4, 1854, in which lands were granted and the reserve created, and upon which the company acted and invested its capital, is a contract, within the meaning of the federal constitution, art. 10, § 5, prohibiting the passage of any law impairing the obligation of contracts. *Houston & T. C. R. Co. v. Texas & P. R. Co.*, 70 Tex. 649, 8 S. W. Rep. 498.—FOLLOWING *Davis v. Gray*, 16 Wall. (U. S.) 216.

19. What charter provisions are deemed contracts with the state.—A railroad corporation is a private corporation, though its uses are public, and a contract embodied in terms in the provision of its charter, or necessarily implied by them, is within the constitutional clause prohibiting legislation impairing the obligation of contracts. *Georgia R. & B. Co. v. Smith*, 35 Am. & Eng. R. Cas. 511, 128 U. S. 174, 9 Sup. Ct. Rep. 47.

The legislature of a state may contract in a corporate charter for exemption of the corporate property from taxation, unless there be some constitutional prohibition. No such prohibition is contained in the Tennessee constitution of 1834. *Louisville & N. R. Co. v. Gaines*, 2 Flipp. (U. S.) 621, 3 Fed. Rep. 266.—REVIEWING *Knoxville & O. R. Co. v. Hicks*, 1 Legal Rep. 343.

Where a charter has been granted without the reserved right to amend or repeal,

an amendment passed without the consent of the corporation, which abridges or restricts vested powers under the original charter which are beneficial to the exercise of the franchise, is invalid, as an attempt to impair the obligation of the contract within the meaning of the constitution of the United States. *Philadelphia W. & B. R. Co. v. Bowers*, 4 Houst. (Del.) 506, 6 Am. Ry. Rep. 105.—REVIEWING *Bailey v. Philadelphia, W. & B. R. Co.*, 4 Harr. (Del.) 389.

The power of a railroad company to charge for the transportation of passengers and freight is one essential to the enjoyment of the franchise, and must be presumed to have been the consideration for which the corporators accepted the charter, invested their money, and assumed the obligations imposed upon them; and the power to adjust its tariff of charges by its own officers, according to their views of the necessities of business and of justice to the public, being a part of the franchise as granted, an act of the legislature which assumes for the state the right to regulate what under the charter was granted as an absolute discretion to the corporation, undoubtedly impairs the obligation of the contract in the sense of the constitutional prohibition, and is inoperative and void. *Philadelphia, W. & B. R. Co. v. Bowers*, 4 Houst. (Del.) 506, 6 Am. Ry. Rep. 105. *Attorney-General v. Chicago & N. W. R. Co.*, 35 Wis. 425.—FOLLOWED IN *Stone v. Wisconsin*, 94 U. S. 181. QUOTED IN *Curry v. Chicago & N. W. R. Co.*, 43 Wis. 665; *Laurel Fork & S. H. R. Co. v. West Virginia Transp. Co.*, 25 W. Va. 324.

The regulation of tolls or other charges made by a corporation or an individual for the use of property by the public is a governmental power, and when such a power is contracted away by the sovereign it must be done by positive grant, or the use of such language in the charter or grant as carries with it necessarily an abandonment of legislative control. *Commonwealth v. Covington & C. Bridge Co.*, (Ky.) 54 Am. & Eng. R. Cas. 461, 21 S. W. Rep. 1042.

The purpose of the legislature to part with the right to require a corporation to make its charges for transportation equal and uniform must appear in the charter by express terms or from necessary implication, and will not be presumed from mere inference. *Hines v. Wilmington & W. R. Co.*, 95 N. Car. 434.

Private corporations, although established for public uses, are still entitled to the rights bestowed by their charters, unless inconsistent with that sovereign power with which the state cannot part. In the latter case the renunciation by the legislature would be of no avail, and would not bind its successors. But the legislature may part with its right of taxation and *a fortiori* with its right to regulate rates upon a railroad. *Sloan v. Pacific R. Co.*, 61 Mo. 24.

A contract with the commonwealth arising out of the passage and acceptance of a charter must, by virtue of the act, invest the corporation with an absolute right of property, or confer an authority which, when exercised, vests the corporation with such interests as are of appreciable value. *Chattahoochee R. Co. v. Kinner*, 14 Am. & Eng. R. Cas. 30, 81 Ky. 221.

20. What charter provisions are not inviolable.—A provision in the charter of a railroad company that the directors of the corporation should have power to make needful rules, regulations, and by-laws touching "the rates of toll and the manner of collecting the same," does not constitute such a contract on the part of the state as precludes it from regulating, at any time in the future, the rates of toll to be collected by the company. *Chicago, M. & St. P. R. Co. v. Minnesota*, 42 Am. & Eng. R. Cas. 285, 134 U. S. 418, 10 Sup. Ct. Rep. 702.—DISTINGUISHED IN *St. Louis & S. F. R. Co. v. Ryan*, 56 Ark. 245. EXPLAINED IN *Wellman v. Chicago & G. T. R. Co.*, 83 Mich. 592. FOLLOWED IN *Minneapolis Eastern R. Co. v. Minnesota*, 42 Am. & Eng. R. Cas. 316, 134 U. S. 467, 10 Sup. Ct. Rep. 702; *Interstate Commerce Com. v. Baltimore & O. R. Co.*, 43 Fed. Rep. 37; *Richmond & D. R. Co. v. Trammel*, 53 Fed. Rep. 196; *Clyde v. Richmond & D. R. Co.*, 57 Fed. Rep. 436.—*State v. Southern Pac. R. Co.*, 55 Am. & Eng. R. Cas. 539, 23 Oreg. 424, 31 Pac. Rep. 960.—FOLLOWING *Wells v. Oregon R. & N. Co.*, 8 Sawy. (U. S.) 600, 15 Fed. Rep. 561; *Ex parte Koehler*, 11 Sawy. 37, 23 Fed. Rep. 529.

A provision in a railroad charter that passenger fares shall not exceed five cents per mile is not a contract on the part of the state that fares shall never be reduced below that amount. *Dow v. Beidleman*, 49 Ark. 325, 5 S. W. Rep. 297.

Quare, whether the provision in the charter of a railroad, fixing a maximum

rate for freights and fares, must be treated as such a contract with it on the part of the state as to prevent the legislature from passing a law regulating such freights and fares. *Hines v. Wilmington & W. R. Co.*, 95 N. Car. 434.

The provision in a charter providing for the payment of a specified tax and exempting the company from taxation under the general laws of the state does not constitute an irrepealable contract. *State v. Clark*, 53 N. J. L. 332, 21 Atl. Rep. 302.

Provisions in the charter of a railroad company regulating the manner of taking land for the use of the road are not in the nature of a contract, but may be altered by subsequent legislation. *Mississippi R. Co. v. McDonald*, 12 Heisk. (Tenn.) 54.

An act incorporating a railroad provided that the company should have power to construct its road from a designated point on the Delaware river to certain streets in the city of Philadelphia, "in such direction as they shall deem best to connect with the termination of the city railroad." Held, that this was but a privilege or license granted as to the connection with the city road, and did not prevent the city from removing a portion of the track of its road so as to prevent a connection. *Southwark R. Co. v. Philadelphia*, 47 Pa. St. 314.—FOLLOWED IN *Branson v. Philadelphia*, 47 Pa. St. 329; *Philadelphia v. Philadelphia & R. R. Co.*, 58 Pa. St. 253.

21. Protection of contract between corporation and its members.—After shareholders in a joint stock company have entered into a contract among themselves, under legislative sanction, and expended their money in the execution of the plan mutually agreed upon, the scheme cannot be radically changed by the majority by virtue of legislative enactment, and a dissentient stockholder compelled to engage in a new and totally different undertaking, without impairing his contract with his associates and with the state. *Black v. Delaware & R. Canal Co.*, 24 N. J. Eq. 455.—APPROVING *Zabriskie v. Hackensack & N. Y. R. Co.*, 18 N. J. Eq. 183; *Lauman v. Lebanon Valley R. Co.*, 30 Pa. St. 46.

The contract subsisting between the members of a corporate body and the corporation is equally within the protection of the constitution; and the legislature has no right or power to confer the authority upon the stockholders of a corporation owning

more than half the stock of the company to accept of amendments to the charter under which they act. *Held*, in this case, that the act of the legislature in question did not invest the stockholders representing a majority of the stock subscribed with authority to accept the amendment proposed to the charter. *New Orleans, J. & G. N. R. Co. v. Harris*, 27 Miss. 517.

22. What legislation impairs the obligation of the contract.—An abridgment of the right of choice in selecting the route impairs the obligation of the contract with a company. *Chesapeake & O. Canal Co. v. Baltimore & O. R. Co.*, 4 Gill & J. (Md.) 1.

A statute which only requires uniformity in the charges to be made for transportation does not provide a maximum for such charges, and therefore does not profess to interfere with the power conferred by the charter on a railroad corporation to fix the freights it will charge, inside of a certain maximum charge allowed by the charter. *Hines v. Wilmington & W. R. Co.*, 95 N. Car. 434.

A railroad company—purchaser of another railroad—having received a charter from the state through which the latter ran, conditionally upon its payment to the state of the debts of the purchased road, became thus a party to a contract to which the state was the other party; and any law of the state subsequently made restraining the company in its rights under the charter is "a law impairing the obligation of contracts," and therefore void. *Illinois C. R. Co. v. Stone*, 18 Am. & Eng. R. Cas. 416, 20 Fed. Rep. 468.

23. Change in remedy not an impairment of the contract.—A subsequent statute, providing that process shall be served upon railroad companies differently from that provided in an original charter, is not unconstitutional as impairing the obligation of contracts, though the original charter provides that process "shall" be served in a specified manner. In such cases, as against the government, the word "shall" should be construed as "may." *Cairo & F. R. Co. v. Hecht*, 95 U. S. 168.—REVIEWED IN *State (United R. & C. Co., pros.) v. Weldon*, 23 Am. & Eng. R. Cas. 134, 47 N. J. L. 59.

The rule that the legislature does not impair the obligation of a contract by limiting or altering the modes of proceeding for en-

forcing it, provided the remedy be not withheld or embarrassed with conditions or restrictions which impair the value of the right, applies as well to irrevocable charters as to contracts between individuals. *State (United R. & C. Co., pros.) v. Weldon*, 23 Am. & Eng. R. Cas. 134, 47 N. J. L. 59.

A clause in the charter of a railroad corporation which confers upon its officers the power to fix its charges for the transportation of freight is not infringed by a statute which imposes a penalty for a failure for five days to forward freight delivered for shipment, and which does not, in terms or by implication, attempt to regulate the amount to be charged for such transportation. *McGowan v. Wilmington & W. R. Co.*, 27 Am. & Eng. R. Cas. 64, 95 N. Car. 417.

24. One legislature cannot limit the power of its successors.—Under the New York Constitution, art. 8, § 1, retaining the right to alter or repeal charters, the legislature has no power to make with any corporation a contract, either in its charter or in the act incorporating it, or by any other form of legislation, which can prevent a subsequent legislature from altering, modifying, or wholly abrogating its charter. *New York Cable R. Co. v. Chambers St. & G. S. F. R. Co.*, 40 Hun (N. Y.) 29.

A state statute providing that thereafter all charters granted should be subject to amendment or repeal does not prevent a subsequent legislature from granting a charter which is not subject to amendment or repeal. *New Jersey v. Yard*, 95 U. S. 104.

25. Police power paramount to contracts in charters.—A charter granted to a railroad corporation by the territorial legislature does not confer nor secure rights beyond the reach of the police power of the state. The chartered rights of a corporation are not more sacred than the individual's rights of person and property, and all must give way to any legitimate exercise of the police power of the state. *Kansas Pac. R. Co. v. Mower*, 16 Kan. 573, 9 Am. Ry. Rep. 400.—QUOTING *Nelson v. Vermont & C. R. Co.*, 26 Vt. 717; *Thorpe v. Rutland & B. R. Co.*, 27 Vt. 140; *Lyman v. Boston & W. R. Corp.*, 4 Cush. (Mass.) 288; *Pratt v. Atlantic & St. L. R. Co.*, 42 Me. 577; *Norris v. Androscoggin R. Co.*, 39 Me. 273; *Bulkley v. New York & N. H. R. Co.*, 27 Conn. 479.

2. *Alteration, Amendment, and Repeal.*

a. Generally.

26. The power to amend, alter, or repeal.*—The grant of an act of incorporation by the state is professedly for the public good generally, and there is an inherent right in the legislature to amend, alter, and change it with the assent of the corporation, and those who become corporators in it do so with that contingency, and their engagements are therefore subject to it. *Delaware R. Co. v. Tharp*, 1 *Houst. (Del.)* 149.

The charter of a private corporation may vest rights in the corporators and stockholders which no subsequent legislation can impair or diminish, but may be amended in so far as is necessary to carry into effect or accomplish the purposes for which it was obtained. *Covington v. Covington & C. Bridge Co.*, 10 *Bush (Ky.)* 69.

In ordinary cases a state may at pleasure repeal or modify any act of incorporation granted by it before it is accepted and before rights have been acquired under it. Until accepted it is not a grant, and the public faith is not pledged not to impair it; but it is otherwise after it has been accepted. *Chesapeake & O. Canal Co. v. Baltimore & O. R. Co.*, 4 *Gill & J. (Md.)* 1. *Cincinnati, H. & I. R. Co. v. Clifford*, 33 *Am. & Eng. R. Cas.* 81, 113 *Ind.* 460, 15 *N. E. Rep.* 524, 13 *West. Rep.* 384.

The South Carolina constitutional convention of 1868 had no power to pass an ordinance repealing acts of the state legislature, passed during the existence of the confederacy, under which private rights have become vested. *Gibbes v. Greenville & C. R. Co.*, 4 *Am. & Eng. R. Cas.* 459, 13 *So. Car.* 228.

The right of the legislature to amend the charter of a corporation cannot be construed as placing them beyond the pale of those constitutional provisions which guard the rights and property of natural persons against the encroachment of legislative power. *Gulf, C. & S. F. R. Co. v. Rowland*, 35 *Am. & Eng. R. Cas.* 286, 70 *Tex.* 298, 7 *S. W. Rep.* 718.—QUOTING *Commonwealth v. Essex County*, 7 *Gray* 253.

27. What amendments are within the power.†—The power to alter or mod-

* Alteration or repeal of corporate grants, see note, 14 *AM. & ENG. R. CAS.* 33.

† Limitations of the legislative power to repeal charters; rights of third persons, see note, 23 *AM. & ENG. R. CAS.* 757.

ify a charter is restrained to the powers and franchises granted by the charter. It does not authorize the legislature to change the object of the incorporation, or to substitute another for it. An alteration or modification is necessarily of the grant or thing to be altered or modified, and cannot be done by substituting a different thing; that would be a change.—*Zabriskie v. Hackensack & N. Y. R. Co.*, 18 *N. J. Eg.* 178.—NOT FOLLOWING *North R. Co. v. Miller*, 10 *Barb. (N. Y.)* 260; *White v. Syracuse & U. R. Co.*, 14 *Barb. (N. Y.)* 560; *Schenectady & S. Plankroad Co. v. Thatcher*, 11 *N. Y.* 102; *Buffalo & N. Y. C. R. Co. v. Dudley*, 14 *N. Y.* 336; *Durfee v. Old Colony & F. R. R. Co.*, 5 *Allen (Mass.)* 230. REVIEWING *Oldtown & L. R. Co. v. Veasie*, 39 *Me.* 571.

A legislature cannot impose new burdens upon existing corporations which are clearly and exclusively of private interest and concern, and which have nothing to do with the general security, quiet, and good order; but it may by general laws require them to conform to such regulations of a police character as may be deemed for the security of the rights of citizens generally, and most conducive to quiet and good order, and the security of property. So a railroad company required by its charter to fence its track may, by a subsequent act, be required to maintain cattle-guards. *Nelson v. Vermont & C. R. Co.*, 26 *Vt.* 717.—FOLLOWED IN *Thorpe v. Rutland & B. R. Co.*, 27 *Vt.* 140. QUOTED IN *Kansas Pac. R. Co. v. Mower*, 16 *Kan.* 573.

The modification of a railroad charter, in enlarging the time for commencing and completing the work, is one of those incidents to all charters which come within the constitutional power of the state to exercise, and with due notice of which all its citizens must be presumed to contract. *Taggart v. Western Md. R. Co.*, 24 *Md.* 563.

A railroad had a special exemption from the provisions of a general statute requiring all railroads to ring a bell or blow a whistle at certain designated places. *Held*, that this special exemption act might be repealed by another act. *Galena & C. U. R. Co. v. Appleby*, 28 *Ill.* 283.

28. No implied exemption from future legislation.—Grants to corporations of immunity from legitimate governmental control are never to be presumed, and unless an exemption is clearly established the legislature is free to act on all subjects

within its general jurisdiction as the public interests may seem to require. *Ruggles v. Illinois*, 108 U. S. 526, 2 Sup. Ct. Rep. 832.

Where a railroad charter contains no provision exempting the company from future liability growing out of a change of laws, the charter is taken subject to future changes in the constitution and general laws of the state. Such exemption never arises by implication. *Pennsylvania R. Co. v. Miller*, 132 U. S. 75, 10 Sup. Ct. Rep. 34.

In order to exempt a railroad corporation from legislative control, the exemption must appear by such clear and unmistakable language that it cannot reasonably be construed consistently with the reservation of the power with the state. *Georgia R. & B. Co. v. Smith*, 35 Am. & Eng. R. Cas. 511, 128 U. S. 174, 9 Sup. Ct. Rep. 47.

29. Amendment by special acts.—The constitution of the state does not require that amendments to the charters of corporations created under the general corporation laws of the state should be made by general laws operating alike on all corporations. The legislature has the unquestioned power to amend such charters by special act. *Hodges v. Baltimore U. Pass. R. Co.*, 10 Am. & Eng. R. Cas. 270, 58 Md. 603. *Ames v. Lake Superior & M. R. Co.*, 21 Minn. 241. *St. Joseph & I. R. Co. v. Shambaugh*, 106 Mo. 557, 17 S. W. Rep. 581. —FOLLOWING *State v. Cape Girardeau & S. L. R. Co.*, 48 Mo. 468.

A statute amending a railroad charter is as much a part of it as if incorporated in the original grant. *Louisville & P. R. Co. v. Louisville C. R. Co.*, 2 Duv. (Ky.) 175.

30. General statute, when operates as an amendment.—Where an act created a railroad commission and provided that the expenses thereof should be borne by the several railroads of the state according to their gross incomes, this statute became a part of the charter of every railroad company thereafter incorporated, and assessments for this purpose annually included in the several tax acts were not successive amendments of these charters, but merely a provision to carry into execution a law already enacted. *Columbia & G. R. Co. v. Gibbs*, 24 So. Car. 60.

The Connecticut act of 1889 relating to grade crossings (Session Laws of 1889, ch. 220) provides in effect that the directors of every company which operates a railroad

in this state shall apply for the removal of at least one grade-crossing each year for every sixty miles of road; * * * and if the directors of any company fail to do so the commissioners shall order such crossing or crossings removed, etc. Held, that the statute operates as an amendment of the charter of each corporation affected by it. *New York & N. E. R. Co.'s Appeal*, 62 Conn. 527, 26 Atl. Rep. 122.

31. Laws protecting life and property.—A railroad company takes its charter upon the implied condition that its franchises shall be exercised subject to the power of the state to impose such reasonable regulations upon it as the comfort, safety, or welfare of society may require. *Chicago & A. R. Co. v. People*, 13 Am. & Eng. R. Cas. 42, 105 Ill. 657.

Railroad corporations hold their property and exercise their functions for the public benefit, and they are therefore subject to legislative control. The legislature which has created them may regulate the mode in which they shall transact their business, the price which they shall charge for the transportation of freight and passengers, the speed at which they may run their trains, and the way in which they may cross or run upon highways and turnpikes used for public travel. It may make all such regulations as are appropriate to protect the lives of persons carried upon railroads or passing upon highways crossed by railroads. All this is within the domain of legislative power, although the power to alter and amend the charters of such corporations has not been reserved. *People ex rel. v. Boston & A. R. Co.*, 70 N. Y. 569.—APPROVED IN *Kaminitsky v. Northeastern R. Co.*, 25 So. Car. 53. QUOTED IN *State v. East Orange*, 41 N. J. L. 127; *People v. O'Brien*, 36 Am. & Eng. R. Cas. 78, 111 N. Y. 1, 18 N. E. Rep. 692, 19 N. Y. S. R. 173. REVIEWED IN *Montclair v. New York & G. L. R. Co.*, 45 N. J. Eq. 436; *People v. New York C. & H. R. Co.*, 9 Am. & Eng. R. Cas. 1, 28 Hun (N. Y.) 543, 3 Civ. Pro. 11, 2 McCar. 345.

The regulations contained in the New York general railroad act of March, 1848, being designed for the public safety as well as for the protection of property, are not inconsistent with then existing charters, and are such as the legislature had a right to make. *Waldron v. Rensselaer & S. R. Co.*, 8 Barb. (N. Y.) 390.

32. Laws conferring new rights or franchises.

The acts of creating a corporation by conferring upon an association of individuals certain strictly corporate powers, embracing only powers and privileges not possessed by individuals and partnerships, and then granting to it other privileges, enlarging or restricting its right to the enjoyment of other franchises that may be possessed in common with natural persons, and regulating its external relations, are distinct and independent; and there is nothing in the constitution of California prohibiting the latter power to the legislature. *Southern Pac. R. Co. v. Orton*, 32 Fed. Rep. 457.

A grant of an additional franchise to a corporation not affecting or impairing those before granted does not alter or modify the charter if it does not compel the corporation to exercise such franchise. Such grant can be made whether the right to alter and modify be reserved or not. But in neither case can the corporation be compelled to accept them, nor can part of the incorporators accept them, without the consent of all. *Zabriskie v. Hackensack & N. Y. R. Co.*, 18 N. J. Eq. 178.—DISAPPROVING *Banet v. Alton & S. R. Co.*, 13 Ill. 504; *Pacific R. Co. v. Renshaw*, 18 Mo. 210; *Pacific R. Co. v. Hughes*, 22 Mo. 291.

A supplement to a charter which merely confers upon the corporation a new right or enlarges an old one, without imposing any new or additional burden upon it, is a mere license or promise by the state, and may be revoked at pleasure. It is without consideration to support it, and is not binding on a subsequent legislature. *Philadelphia & G. F. Pass. R. Co.'s Appeal*, 20 Am. & Eng. R. Cas. 1, 102 Pa. St. 123.

33. Laws providing new remedies.

—Where a charter is granted with a provision that "no other or further duties, liabilities, and obligations than those contained in the charter" shall be imposed, it is still competent for the state to provide the mode, the time when, and the courts in which such duties, liabilities, and obligations shall be enforced. *Gowen v. Penobscot R. Co.*, 44 Me. 140.

The provision of a charter of incorporation, regulating the manner of serving process on the corporation, relates only to the remedy, and a subsequent general enactment, prescribing the manner of serving process in such cases, operates as a repeal

of the charter provision. *Cairo & F. R. Co. v. Hecht*, 29 Ark. 661.

A charter gave landowners a right of action against the railroad for a failure to construct necessary causeways at crossings. A supplement to the charter authorized the company to change the location of the road and provided for the assessment of damages occasioned thereby by a jury of inquest. *Held*, that the right of action under the original charter was taken away, and the remedy for an obstruction caused by an embankment on the original location must be under the amended charter. *Knorr v. Philadelphia, G. & N. R. Co.*, 5 Whart. (Pa.) 256.

34. Notice of intention to alter.

A provision of the Florida constitution of 1839, art. 13, § 2, providing that no law shall be passed altering a charter unless notice has been published for three months prior to the session of the legislature, does not apply to railroads assisted by the state under another provision of the constitution making it the duty of the legislature to encourage a system of internal improvements, and "to ascertain proper objects of improvement." *Palmes v. Louisville & N. R. Co.*, 19 Fla. 231.

35. Acceptance of amendments, generally.

—Probably the most satisfactory way of accepting an amendment to a charter is by a majority vote in a meeting of the stockholders, but it may be done by the directors, or by user. *Illinois River R. Co. v. Zimmer*, 20 Ill. 654.—DISAPPROVING *Commonwealth ex rel. v. Cullen*, 13 Pa. St. 133.

Where an act amending a charter is accepted by the directors, the stockholders will be liable, unless otherwise stated; and in determining upon whether the amendment should be accepted, the only question is whether the value of stock as an investment will be benefited thereby. *Illinois River R. Co. v. Zimmer*, 20 Ill. 654.—DISTINGUISHED IN *Sup'ts of Fulton County v. Mississippi & W. R. Co.*, 21 Ill. 338. FOLLOWED IN *Rice v. Rock Island & A. R. Co.*, 21 Ill. 93; *Terre Haute & A. R. Co. v. Earp*, 21 Ill. 290.

The acceptance of an amendment to its charter is a power incident to a corporation, and its exercise belongs to the board of directors, if there be no other active governing body in whom it is vested. The acceptance may be either by express act or implied

from other acts or circumstances. The subsequent use of the privilege, or exercise of the power conferred by the amendment, may well be deemed an assent to the grant; and that whether contained in a special law, applicable to the particular corporation alone, or in a general law, applicable to it and others; unless some special mode of acceptance is required by the terms of the grant. *Dayton & C. R. Co. v. Hatch*, 1 *Disney (Ohio)* 84.—QUOTING *Ffooks v. London & S. W. R. Co.*, 19 Eng. L. & Eq. 11.

A charter being a contract, where the original charter of a railroad provided that no amendment should be made except on the unanimous petition of the president and directors, and any amendment so recommended to be unanimously accepted by the president and directors, an amendment accepted and adopted by the president and directors unanimously will be valid as a substantial compliance with the condition, although not recommended by the unanimous petition of the president and directors, that provision being merely directory. *Deaderick v. Wilson*, 8 *Baxt. (Tenn.)* 108.

A statute requiring a railroad company to reopen a station and stop its trains there is but a regulation of the operation of the road, and not an amendment of its charter, and therefore does not require it to be accepted by the corporation before it is binding. *State v. New Haven & N. Co.*, 43 *Conn.* 351.

A railroad company, by acting under § 3 of the general railroad act of 1853, accepted the same as an amendment to their charter. *Smead v. Indianapolis, P. & C. R. Co.*, 11 *Ind.* 104.

Where a railroad corporation by its conduct accepts the benefits of an act amending its charter it must take it as a whole, with its burdens also. *Kenton County Court v. Bank L. Turnpike Co.*, 10 *Bush (Ky.)* 529.

Railroad companies incorporated prior to the adoption of the Ohio constitution of 1851, and which avail themselves of the twenty-fourth section of the general corporation act of 1852 (S. & C. Stat. 281), either by taking leases of the roads of other companies, or by leasing their own roads to other companies, are to be regarded as thereby accepting a "provision" of said act within the meaning of its seventy-first section, and relinquishing all rights under their charters inconsistent with its provisions,

one of which is the right to demand and take specified rates of fare, free from legislative control or alteration, and they, therefore, become subject to legislative control, in that regard, equally with companies formed under said act of 1852. *Cincinnati, H. & D. R. Co. v. Cole*, 29 *Ohio St.* 126.

The general Ohio railroad act of 1852 provides that existing roads wishing to signify their acceptance of certain benefits contained therein, and certain liabilities imposed, must file a certain certificate with the secretary of state. *Held*, that a company cannot profit by its failure to file the certificate if it has in fact accepted the provisions of the act. *Cincinnati, H. & D. R. Co. v. Cole*, 29 *Ohio St.* 126.

36. Acceptance or assent of stockholders.—Under the provisions of the national constitution, prohibiting the states from making any law impairing the obligation of contracts, no fundamental change, even though authorized by subsequent legislation, can be made in the charter of a private pecuniary corporation without the consent of all the stockholders, unless the legislature has provided otherwise in the charter. *Mowrey v. Indianapolis & C. R. Co.*, 4 *Biss. (U. S.)* 78.—APPROVING *Stevens v. Rutland & B. R. Co.*, 29 *Vt.* 545. CRITICISING *Lauman v. Lebanon Valley R. Co.*, 30 *Pa. St.* 42; *State v. Bailey*, 16 *Ind.* 46.

Although alterations may be made in the charter of an incorporated company by the procurement of the company, in furtherance of the designs and objects of the company, yet in all such cases due regard must always be had to the inviolability of private contracts. The original contract of the parties cannot be materially or essentially altered by an amended charter so as to bind the subscribers thereto without their assent. *Winter v. Muscogee R. Co.*, 11 *Ga.* 438.

Whether an amendment to a charter be material or not is a question of law for the court, and should not be left to the jury; but when its evident purpose is to legalize previous illegal proceedings, and its effect is to reduce the capital stock at the option of the corporation, a verdict in favor of the party asserting its materiality will not be disturbed. *Memphis Branch R. Co. v. Sullivan*, 57 *Ga.* 240.

The legislature may alter a charter with the assent of all the corporators; and that assent may be manifested in at least three

ways: (1) by asking the legislature to make the amendment; (2) by expressly accepting an amendment enacted without request; (3) and by acting upon and acquiescing in an amendment enacted without request. *Smead v. Indianapolis, P. & C. R. Co.*, 11 Ind. 104.

An act of the general assembly altering the charter, to be binding on all stockholders, must be accepted by a vote of the majority of the stock, exclusive of that taken by the state, at a meeting of the stockholders regularly convened for that purpose, as provided by the 21st section of the original charter of the company. *Mississippi, O. & R. R. Co. v. Gaster*, 24 Ark. 96.

In the absence of fraud, or an amendment such as to change the original purposes of a railroad corporation, a majority of the stockholders should govern in the adoption of an amendment, such as providing for a consolidation of the road with another. *Sprague v. Illinois River R. Co.*, 19 Ill. 174. —FOLLOWED IN *Rice v. Rock Island & A. R. Co.*, 21 Ill. 93.

The charter being silent as to the method in which amendments thereto may be accepted by the stockholders, it will not be questioned that the power to accept of alterations and amendments to the charter, proposed by the legislature, and which may by the members be deemed necessary or beneficial, exists, whether such power be regarded as incident to their corporate character or as belonging to them as members of the community. *New Orleans, J. & G. N. R. Co. v. Harris*, 27 Miss. 517.

The acceptance of the amendatory act was not a matter connected with the business, or designed to promote or carry into effect the objects for which the company was chartered. Consequently the general rule in regard to acts performed within the scope of the charter powers does not apply. *New Orleans, J. & G. N. R. Co. v. Harris*, 27 Miss. 517.

37. Repeal by implication.—If the prior clauses of a general law apply in express terms to a special corporation, a general repealing clause therein necessarily repeals inconsistent provisions in the special charter; but if there is an absence of such express prior reference, there must be a special repealing clause to make a general law applicable to such particular corporation. *State (Morris & E. R. Co., pros.) v.*

Com'r of Railroad Taxation, 38 N. J. L. 472; *affirming* 37 N. J. L. 228.

A special charter may be repealed by a general law, without express words declarative of the intent to repeal. Repeals by implication are not favored; but the question is one of legislative intent, and the intent to abrogate the particular enactment in an earlier statute by a general enactment in a later statute is sufficiently manifested where the provisions of the two statutes are so inconsistent that they cannot stand together. *State (Morris & E. R. Co., pros.) v. Com'r of Railroad Taxation*, 37 N. J. L. 228; *affirmed in* 38 N. J. L. 472.

A general power given to a municipal corporation will not be held to conflict with the charter of a railroad company, unless the charter of the company is repealed or altered in express terms. *State v. Mayor of Jersey City*, 29 N. J. L. 170.

38. Effect of repeal.—No repeal of the charter of a corporation can take away or impair the remedy of a creditor against it for previously incurred liability, or affect a pending suit against it. *Blake v. Portsmouth & C. R. Co.*, 39 N. H. 435.

By the repeal of a charter of a railroad company the lands taken for the use of the road do not revert to the original owners, nor is the road itself thereby vacated, but it remains, as before, a public highway, subject to the management and control of the state. *Erie & N. E. R. Co. v. Casey*, 26 Pa. St. 287.

39. Assent to repeal—Estoppel.—If, after the repeal of a charter, the legislature pass an act restoring the charter to the company, conferring upon it new privileges, and imposing new duties and restrictions, and continuing its railway in the custody of the agents of the state until the company accepts the new act, which is formally done, and the road restored to it, the original charter is thereby repealed with the consent and acquiescence of the company, and it is estopped to deny the validity of a law to which it has thus assented. *Erie & N. E. R. Co. v. Casey*, 26 Pa. St. 287.—FOLLOWED IN *State v. Miller*, 30 N. J. L. 368.

b. Under Reserved Power to "Alter, Amend, or Repeal."

40. Necessity of a reserved power.—The legislature cannot make compulsory amendments materially affecting rights under a charter, unless by virtue of some

reserved power. *Smead v. Indianapolis, P. & C. R. Co.*, 11 *Ind.* 104.

41. Its effect.—(1) *Generally.*—Under the reserved power to amend, alter, or repeal the laws under which private corporations are formed, the state cannot exercise any control over the property of a corporation, except such as may be exercised through control over its franchise, and over like property of natural persons engaged in similar business. It cannot divest property or rights which have become vested. *San Mateo County v. Southern Pac. R. Co.*, 8 *Am. & Eng. R. Cas.* 1, 13 *Fed. Rep.* 145, 7 *Sawy. (U. S.)* 517.

Where the right to alter or amend a charter whenever the public good may require is reserved, the legislature is the proper tribunal to determine when the right shall be exercised. *State v. Miller*, 30 *N. J. L.* 368; *affirmed in* 31 *N. J. L.* 521.—**FOLLOWING** *Erie & N. E. R. Co. v. Casey*, 26 *Pa. St.* 287.

The reservation of the right of alteration and repeal in the charter of a corporation has none of the characteristics of a mere power, which, when once exercised, is exhausted. Its effect is on the legislative grant itself, to prevent its becoming, what it otherwise might become, a contract with the state. An act containing such provision confers a mere privilege, subject at any time to be withdrawn or modified at the will of the legislature. *State v. Com'r of Railroad Taxation*, 37 *N. J. L.* 228; *affirmed in* 38 *N. J. L.* 472.

Where a legislature reserves the right to alter, amend, or withdraw a charter, whether the right be reserved in the charter itself, or in the constitution or laws of the state, the grant must be taken and held subject to the right, and a subsequent law exercising the right is not in violation of the guarantee of the federal constitution that no law shall be passed impairing the obligation of contracts. *West Wisconsin R. Co. v. Sup'rs of Trempealeau County*, 35 *Wis.* 257.

Under the reserved power to amend, alter, or repeal a corporate charter, the legislature cannot disturb, affect, or impair vested rights either of the corporation or of its shareholders. *Hill v. Glasgow R. Co. (Ky.)* 41 *Fed. Rep.* 610.

(2) *Alteration or amendment.*—The provisions in the charter of a railroad company by which the legislature limits its taxation is not binding upon the state as

an irrevocable contract, when both the act, the incorporation, and its supplements expressly provide that its provisions shall be subject to the will of the legislature to repeal, modify, or amend. *State Board of Assessors v. Paterson & R. R. Co.*, 33 *Am. & Eng. R. Cas.* 468, 50 *N. J. L.* 446, 14 *Atl. Rep.* 610. *Little v. Bowers*, 17 *Am. & Eng. R. Cas.* 405, 46 *N. J. L.* 300.—**DISTINGUISHING** *New Jersey v. Yard*, 95 *U. S.* 104.—*State v. Person*, 32 *N. J. L.* 566.

Under the New Hampshire statutes reserving the right of amendment or repeal, the legislature may amend or repeal a charter. *Ashuelot R. Co. v. Elliot*, 58 *N. H.* 451.

(3) *Repeal.*—No "irrepealable contract" can result from provisions in a charter which is made in terms subject to alteration, amendment, or repeal by the power granting it. *State v. Miller*, 30 *N. J. L.* 368; *affirmed in* 31 *N. J. L.* 521.—**RECONCILED IN STATE** (*Morris & E. R. Co., pros.*) *v. Com'r of Railroad Taxation*, 38 *N. J. L.* 472.—*State Board of Assessors v. Central R. Co.*, 24 *Am. & Eng. R. Cas.* 546, 48 *N. J. L.* 146, 4 *Atl. Rep.* 578; *reversing* 48 *N. J. L.* 1.

The effect of the repeal of an act of incorporation under such a clause is that the statute no longer exists, and whatever force the law may give to transactions entered into, and which were authorized by the charter while in force, the corporation can originate no new transactions dependent on the power conferred by the charter. Whatever power is dependent solely on the grant of the charter, and which could not be exercised by unincorporated private persons under the general laws of the state, is abrogated by the repeal of the law which granted these special rights. *Greenwood v. Union Freight R. Co.*, 9 *Am. & Eng. R. Cas.* 526, 105 *U. S.* 13.—**FOLLOWING** *Pennsylvania College Cases*, 13 *Wall. (U. S.)* 190; *Tomlinson v. Jessup*, 15 *Wall.* 454; *Maine C. R. Co. v. Maine*, 96 *U. S.* 499; *Sinking-Fund Cases*, 99 *U. S.* 700; *Atlantic & G. R. Co. v. Georgia*, 98 *U. S.* 359; *McLaren v. Pennington*, 1 *Paige (N. Y.)* 102; *Erie & N. E. R. Co. v. Casey*, 26 *Pa. St.* 287; *Miners' Bank v. United States*, 1 *Greene (Iowa)* 553.

The rights of the shareholders to the real and personal property acquired by the corporation, and rights of contract and choses in action, are not destroyed by such repeal; and if the legislature has provided no specific mode of enforcing and protect-

ing such rights, the courts will do so. *Greenwood v. Union Freight R. Co.*, 9 *Am. & Eng. R. Cas.* 526, 105 *U. S.* 13.

If the repeal of the charter of the old corporation was within the power of the Massachusetts legislature it could charter a new one and confer the same powers on it as the former had possessed, and, so far as the property or franchises of the old company were necessary to the public use, it could authorize the new corporation to take them on making due compensation therefor. *Greenwood v. Union Freight R. Co.*, 9 *Am. & Eng. R. Cas.* 526, 105 *U. S.* 13. —FOLLOWING *West River Bridge Co. v. Dix*, 6 *How. (U. S.)* 507; *Central Bridge Corp. v. Lowell*, 4 *Gray (Mass.)* 474; *Boston Water-Power Co. v. Boston & W. R. Corp.*, 23 *Pick. (Mass.)* 360; *Richmond, F. & P. R. Co. v. Louisa R. Co.*, 13 *How. (U. S.)* 71.—EXPLAINED IN *People v. O'Brien*, 36 *Am. & Eng. R. Cas.* 78, 111 *N. Y.* 1, 18 *N. E. Rep.* 692, 19 *N. Y. S. R.* 173. QUOTED IN *Worth v. Wilmington & W. R. Co.*, 13 *Am. & Eng. R. Cas.* 286, 89 *N. Car.* 291, 45 *Am. Rep.* 679; *Hill v. Glasgow R. Co.*, 41 *Fed. Rep.* 610. REVIEWED IN *Henderson v. Central Pass. R. Co.*, 20 *Am. & Eng. R. Cas.* 542, 21 *Fed. Rep.* 358.

A statute which, under this power, repeals an act of incorporation, and at the same time creates a new one with similar powers, the use of which requires the exercise of the right of eminent domain, is not in conflict with the constitution of the United States if it provides for compensation for the property of the extinct corporation so taken by the new one. *Greenwood v. Union Freight R. Co.*, 9 *Am. & Eng. R. Cas.* 526, 105 *U. S.* 13.

42. Constitutional reservation of the power.—Where a state constitution provides that charters may be altered or repealed at any time after their passage, both the stockholders and the bondholders of a railroad company take and hold their rights and securities subject to the power of the state to alter or amend, and they cannot object to an exercise of the right. *Pick v. Chicago & N. W. R. Co.*, 6 *Biss. (U. S.)* 177.

Where a corporation takes a charter, with the reserved right to the state to alter or amend, the same right exists as against the creditors of the corporation. The corporation cannot clothe its creditors or bondholders with greater rights than it has itself. Neither is the right changed or

affected by authority to consolidate with another road. *Pick v. Chicago & N. W. R. Co.*, 6 *Biss. (U. S.)* 177.

Congressional grants of land to the state to aid railroads cannot change the rights of the corporation or its creditors, so far as the power of the state to alter or repeal a charter is concerned. *Pick v. Chicago & N. W. R. Co.*, 6 *Biss. (U. S.)* 177.

Ala. Const. art. 1, § 25, and art. 13, § 5, do not operate upon railroad charters granted by the state before the adoption of the present constitution, unless such charters were made repealable when granted. *Alabama & F. R. Co. v. Burkett*, 46 *Ala.* 569.

The power of the legislature to revoke corporate charters is reserved by the constitution, and need not be contained in the charter. It is not an arbitrary power, but only for cause, of which the legislature is to be the judge, and therefore a reservation of the power of revocation, "on conviction of misuse or abuse of privileges," is a constitutional reservation. *Delaware R. Co. v. Tharp*, 5 *Harr. (Del.)* 454.

As the power to alter or repeal the charter of the Northern Central railway company was reserved to the state, under the Maryland constitution of 1850, as fully as if such reservation had been set forth in express terms in the act of incorporation, the right to exercise this power could not in any manner be affected by the adoption of the constitutions of 1864 and 1867. Said charter must be construed as if the right to alter, amend, or repeal it had been reserved to the legislature by the express language of the charter itself. It was not within the power of the legislature, under the constitution of the state, to grant to the company immunity from taxation, or any other corporate privilege, beyond the power of repeal or revocation by a subsequent legislature. *State v. Northern C. R. Co.*, 44 *Md.* 131.—DISTINGUISHED IN *Jackson v. Walsh*, 75 *Md.* 304.

The Texas constitutional provision that "two thirds of the legislature shall have power to revoke and repeal all private corporations, by making compensation for the franchise," is not a limitation upon the power of the state, confining it to that mode of revocation alone. *State v. Southern Pac. R. Co.*, 24 *Tex.* 80.

Where a charter is granted subject to Wis. Const. art. 11, § 1, providing that "all general laws or special acts enacted under

the provisions of this section may be altered or repealed by the legislature at any time after their passage," it is held subject to the right of the state to alter or repeal; and a subsequent act exercising the right is not in conflict with the United States constitution providing that no law shall be passed impairing the obligation of contracts. *Attorney-General v. Chicago & N. W. R. Co.*, 35 Wis. 425.

Under the reservation contained in the above constitutional provision, a state may change the details of the charter, but cannot change the corporation to one of an entirely different kind. So a charter authorizing the company to collect tolls at its discretion may be changed so as to fix a maximum rate that may be charged. *Attorney-General v. Chicago & N. W. R. Co.*, 35 Wis. 425.

A constitutional provision reserving to the state a right to alter, amend, or repeal a charter only extends to the corporate franchises, and does not affect the rights of the company in its property. *Attorney-General v. Chicago & N. W. R. Co.*, 35 Wis. 425.

It seems that a railroad charter, granted without any reservation to the state of the right to amend or repeal, either in the charter or in a general law, is not affected by a subsequently adopted constitution containing a provision reserving to the state the right to amend or repeal charters. *Attorney-General v. Chicago & N. W. R. Co.*, 35 Wis. 425.

Where a state constitution reserves to the state the right to alter or repeal railroad charters at any time after their passage, it is competent for the legislature to repeal an act exempting the unsold lands of a railroad company from taxation for a period of years. *West Wisconsin R. Co. v. Sup'rs of Trempealeau County*, 35 Wis. 257.

Where a state has reserved to itself the right to alter or repeal railroad charters, it is competent for the legislature to repeal a provision exempting the company's unsold lands from taxation for a period of years; and neither the stockholders nor the company's mortgage bondholders can object, as they acquired their rights with knowledge of, and subject to, the power of the state to alter or repeal. *West Wisconsin R. Co. v. Sup'rs of Trempealeau County*, 35 Wis. 257.

43. Reservation of the power in general laws.*—A state may by general law reserve the power to alter, modify, or repeal charters, in which case the power may be exercised as to any charter granted after the passage of the general law. Such reservation may be embodied in the constitution of the state, and is equally valid. *Miller v. New York*, 15 Wall. (U. S.) 478, 4 Am. Ry. Rep. 23.—REVIEWED IN *Hewitt v. New York & O. M. R. Co.*, 12 Blatchf. (U. S.) 452.—*State v. Person*, 32 N. J. L. 134. *State v. Com'r of Railroad Taxation*, 37 N. J. L. 228; affirmed in 38 N. J. L. 472. *Snydam v. Moore*, 8 Barb. (N. Y.) 358.

The general law of 1831, ch. 503, by which the state of Maine reserves to itself the right to amend, alter, or repeal all acts of incorporation subsequent to its passage has been retained in all the revisions of the statutes, is in full force, and applies to all subsequent corporations, whether organized under general or special laws. *State v. Maine C. R. Co.*, 66 Me. 488, 19 Am. Ry. Rep. 323.

In the state of Massachusetts such a reservation becomes part of every act of incorporation, by virtue of the following language in the general statutes (ch. 68, § 41), to wit: "Every act of incorporation passed after the eleventh day of March, in the year one thousand eight hundred and thirty-one, shall be subject to amendment, alteration, or repeal at the pleasure of the legislature." *Greenwood v. Union Freight R. Co.*, 9 Am. & Eng. R. Cas. 526, 105 U. S. 13.

The right of the legislature to amend, alter, or repeal the charter of a railroad corporation under Gen. St. ch. 68, § 41, includes authority both to withdraw powers granted to the corporation and to confer new powers on it and require their exercise, and is independent of the assent of the corporation. *Mayor, etc., of Worcester v. Norwich & W. R. Co.*, 109 Mass. 103.

The sixth section of the New Jersey general corporation act of 1846 (Nix. Dig. 168) is not limited to grants of corporate franchises and privileges made to corporations created after the passage of that act. It extends to every grant of franchise and privileges thereafter made to corporations which were created before the act was

* Act altering or repealing charter by virtue of general act containing reserved power, see note, 20 AM. & ENG. R. CAS. 554.

passed. *State v. Com'r of Railroad Taxation*, 37 N. J. L. 228; affirmed in 38 N. J. L. 472.—NOT FOLLOWED IN *State Board v. Morris & E. R. Co.*, 49 N. J. L. 193.

The sixth section of the general corporation act (Rev. p. 178), which provides that the charter of every corporation thereafter granted shall be subject to alteration, suspension, or repeal, in the discretion of the legislature, does not incorporate the act of 1880 in defendant's charter so as to affect injuriously the vested rights of stockholders. *Mills v. Central R. Co.*, 24 Am. & Eng. R. Cas. 47, 41 N. J. Eq. 1, 2 Atl. Rep. 453.

The provision of the sixth section of the New Jersey act concerning corporations, approved February 14, 1846 (Nix. Dig. 139), which was incorporated in the revision of 1875 (Rev. p. 178, § 6), which declares that the charter of every corporation which should be thereafter granted by the legislature should be subject to alteration, suspension, and repeal, reserves to the legislature the authority, in its discretion, for proper ends, to make any alteration or amendment of a charter granted subject to it which will not defeat or substantially impair the object of the grant, or any rights vested under it. *Montclair Tp. v. New York & G. L. R. Co.*, 40 Am. & Eng. R. Cas. 342, 45 N. J. Eq. 436, 18 Atl. Rep. 242.—QUOTED IN *Stockton v. Central R. Co.*, 50 N. J. Eq. 52.

Such alteration or amendment may be made by supplement to the act entitled "An act to authorize the formation of railroad corporations and regulate the same." *Montclair Tp. v. New York & G. L. R. Co.*, 40 Am. & Eng. R. Cas. 342, 45 N. J. Eq. 436, 18 Atl. Rep. 242.

A state legislature passed a statute providing that thereafter charters should be held subject to amendment or repeal at the will of the legislature. A street-railway company was then in existence under a perpetual charter. After the passage of the law a second company was organized, limited to 30 years, with power to lease or purchase the franchise and property of the first company, and under this power it purchased the franchises and property of the first road, and subsequently it sold to a third company all "its roads, property, and franchises." *Held*, that by the first sale the duration of the second company was not extended beyond 30 years, as the corporate existence of the first company and its right to operate a road did not pass by either

sale; that the original road was operated after the sales by the other two companies under their own charters, and such charters having been obtained under the above reservation of the right to alter or repeal, it is not unconstitutional to pass a law either amending or repealing them. *Henderson v. Central Pass. R. Co.*, 20 Am. & Eng. R. Cas. 542, 21 Fed. Rep. 358.—REVIEWING *Maine C. R. Co. v. Maine*, 96 U. S. 499; *Atlantic & G. R. Co. v. Georgia*, 98 U. S. 359; *Tomlinson v. Branch*, 15 Wall. (U. S.) 462; *Central R. & B. Co. v. Georgia*, 92 U. S. 665; *Greenwood v. Union Freight R. Co.*, 105 U. S. 13.

An act of the legislature declared that it should be a part of every charter of a corporation thereafter incorporated, or whose charter should be renewed, amended, or modified (unless expressly excepted in such charter, renewal, amendment, or modification), that such charter should be at all times subject to amendment, alteration, or repeal by the legislative authority. A charter was granted to a railroad corporation with this provision of law expressly excepted. The charter was then amended without such exception, and afterwards this corporation was consolidated with another by legislative enactment, without mention of this provision of law. *Held*, that a statute, subsequently passed, making all railroad companies in this state responsible to others for fires caused by sparks from their engines, became, by amendment, a part of the charter of this corporation. *McCandless v. Richmond & D. R. Co.*, 38 So. Car. 103, 16 S. E. Rep. 429.—QUOTING *Hoge v. Richmond & D. R. Co.*, 99 U. S. 348.

44. Reservation of the power in original charter.—Defendant's charter containing an express reservation of the right to alter, amend, or repeal it, whatever might be true if the charter was a close one, the general assembly could impose upon the defendants any additional condition or burthen connected with the grant which they might deem necessary for the protection and welfare of the public, and which they might originally and with justice have imposed. *English v. New Haven & N. R. Co.*, 32 Conn. 240.—APPLIED IN *New York & N. E. R. Co.'s Appeal*, 62 Conn. 527.

The question whether the legislative power can impose a new public burthen on a private corporation, without violating the fundamental principles of the social com-

pact, where the burthen is in no way connected with the grant as a consideration for it, or a condition annexed to it for the protection of individual or public rights which would otherwise be injuriously affected by the exercise of the franchise conferred, is not raised where the burthen imposed is clearly connected with the grant, and necessary to protect the public from injurious consequences resulting from an exercise of the power conferred by the charter. *English v. New Haven & N. R. Co.*, 32 Conn. 240.

Where, in the original charter of a railroad company, the legislature expressly reserved the power to alter, repeal, or annul the charter at pleasure, the question whether a proposed amendment of the charter is wise or consistent with the public interests and with the prosperity of the company, is one which, by the charter, is made to depend upon the wisdom and discretion of the legislature, and is not a question to be determined by the courts. *American Coal Co. v. Consolidation Coal Co.*, 46 Md. 15.

This construction of the terms of the charter is part of the contract, and all parties dealing with the company acquire and hold their rights subject to the reserved power of the legislature to alter, repeal, or annul the charter at its pleasure. *American Coal Co. v. Consolidation Coal Co.*, 46 Md. 15.

The reservation in a charter that the state may at any time alter, amend, or repeal it, is a reservation made by the state for its own benefit, and is not intended to affect or change the rights of corporators as between each other; nor does it authorize the state to authorize one part of the stockholders, for their own benefit, at their mere option, to change their contract with the other part. *Zabriskie v. Hackensack & N. Y. R. Co.*, 18 N. J. Eq. 178.

Where a charter was granted by the legislature to a corporation, with a reservation of the right to repeal it, if the franchises should be abused or misused, and in point of fact the abuse and misuse occurred, after the happening of that event, the corporators held their franchises as mere tenants at will, and the legislature was invested with as full power to repeal the charter as if the reservation had been unconditional. *Erie & N. E. R. Co. v. Casey*, 26 Pa. St. 287.—DISTINGUISHED IN *People v. O'Brien*, 36 Am. & Eng. R. Cas. 78, 111 N. Y. 1, 18 N. E. Rep. 692, 19 N. Y. S. R. 173. QUOTED

IN *Hallenbeck v. Hahn*, 2 Neb. 377. REVIEWED IN *Flint & F. Plank-road Co. v. Woodhull*, 25 Mich. 99.

Judicial proceedings instituted by the commonwealth against the corporation, to restrain and enjoin the acts complained of as abuse or misuse, did not disarm the legislature of its reserved right to repeal, nor enlarge the estate of the corporation in its franchises, nor change the terms of the original grant, neither the judiciary nor the executive having the power to do these things. *Erie & N. E. R. Co. v. Casey*, 26 Pa. St. 287.

Where the right is reserved to the state to repeal a charter for abuse, it is competent for the legislature to repeal the charter without proof in court of an abuse, and of a judicial determination; and if the corporation then wishes to contest the validity of the repealing act, it may show in a court that no abuse occurred. *Erie & N. E. R. Co. v. Casey*, 26 Pa. St. 287.—FOLLOWED IN *Greenwood v. Union Freight R. Co.*, 105 U. S. 13.

Where the legislature reserved in the charter a right to repeal a charter for misuse or abuse, the repealing act will be held constitutional, unless the company can show by plain and satisfactory evidence that the privileges granted in the charter were not misused or abused. *Erie & N. E. R. Co. v. Casey*, 26 Pa. St. 287.—QUOTED IN *Scofield v. Lake Shore & M. S. R. Co.*, 23 Am. & Eng. R. Cas. 612, 43 Ohio St. 571. REVIEWED IN *Baltimore v. Pittsburg & C. R. Co.*, 1 Abb. (U. S.) 9.

45. What amendments may be made under the reserved power.—

Where a charter was granted to a railroad, under a law making such reservation, which authorized a city to subscribe to the stock of the company and to elect four out of the thirteen directors, it was competent for the legislature to subsequently amend the charter so as to allow the city to elect seven directors. *Miller v. New York*, 15 Wall. (U. S.) 478, 4 Am. Ry. Rep. 23.

Where a charter is granted to a railroad company, with the right reserved to the state "to amend, alter, or repeal," it is competent to afterward pass a law requiring the company to erect a new station on its line, with necessary accommodations, and to stop its trains there. *Commonwealth v. Eastern R. Co.*, 103 Mass. 254.—APPROVED IN *Railroad Com'rs v. Portland & O. C. R.*

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The consent of the Connecticut railroad commissioners that a company may discontinue certain stations does not constitute a contract so that a subsequent legislature could not amend the charter so as to re-establish the stations, the charter reserving to the legislature the right to amend, alter, or repeal it. *New Haven & N. Co. v. Hamersley*, 2 Am. & Eng. R. Cas. 418, 104 U. S. 1.—APPROVING *State v. New Haven & N. Co.*, 37 Conn. 163.

A railroad corporation, having power by its charter, granted in 1888, to locate and construct its road where it may think proper, may, by amendment to its charter, made after the company has located but before it has constructed its road, be confined to a particular route on certain prescribed conditions as to a portion of the line through a given county. This results from the reserved power of the state, declared in §§ 1651, 1682 of the Code, to withdraw the franchises or change, modify, or destroy the corporation at the will of its creator. *Macon & B. R. Co. v. Gibson*, 43 Am. & Eng. R. Cas. 318, 85 Ga. 1, 11 S. E. Rep. 442.—DISTINGUISHING *Detroit v. Detroit & H. P. R. Co.*, 43 Mich. 140.

The right of the state so to amend the charter is not in any degree abridged or affected by executory contracts between the company and a construction company, and between the latter and subcontractors, touching the construction and equipment of the road. In so far as the amendment may render the performance of these contracts impossible, the impossibility will result from act of law, and performance to that extent will be excused. All parties contracting with a corporation must take notice of the conditions on which it holds its franchises and of its subjection to the legislative will. *Macon & B. R. Co. v. Gibson*, 43 Am. & Eng. R. Cas. 318, 85 Ga. 1, 11 S. E. Rep. 442.

Any allowable modification of the charter of a private corporation may be made by an amendment adding a proviso to one of its sections. The form of the amending act has no influence on its construction or effect. *Macon & B. R. Co. v. Gibson*, 43 Am. & Eng. R. Cas. 318, 85 Ga. 1, 11 S. E. Rep. 442.

The legislature have power to determine

in what manner a railroad company, whose charter was made subject to alteration, amendment, or repeal at the pleasure of the legislature, shall exercise its franchise, and to make changes in the level, grade, and connections thereof, and to direct the construction of a new connecting track, if this is essential in order to preserve the continuity of the road; and to provide in what manner and under whose supervision the work shall be done, and how paid for. *Fitchburg R. Co. v. Grand Junction R. & D. Co.*, 4 Allen (Mass.) 198.—FOLLOWED IN *Mayor of Worcester v. Norwich & W. R. Co.*, 109 Mass. 103.

Where a railroad charter is granted, subject to repeal, and after the road is partially built and the company is out of funds, it is competent for the legislature, in conferring authority upon the public to vote stock in the road, to provide that the original stockholders shall waive certain rights and allow the new stockholders to stand on an equal footing with them. *Shelby County v. Shelby R. Co.*, 5 Bush (Ky.) 225.

The reservation to the state of the right to alter, modify, or repeal charters does not empower the legislature to authorize local authorities to appropriate a part of a railroad, and to impose other serious burdens without compensation. It is not competent for the legislature to require a railroad company to allow a new road or street to cross its track, and require the company to make all necessary embankments and do other work in constructing the road across the track at its own expense. *Miller v. New York & E. R. Co.*, 21 Barb. (N. Y.) 513.

Where the original charter of a railroad company provided that the legislature might make such amendments to the charter as the company might at any time desire—held, that the amendments contemplated were such as might facilitate the construction of the road provided for in the charter, and not such as would, in effect, create a new company for a different purpose. The word "company," as there used, probably means the stockholders. *Booe v. Junction R. Co.*, 10 Ind. 93.

46. Modification of charter by general law.—When a charter is taken subject to future legislation, it may be modified not only by special amendments but also by a general law. *St. Albans v. National Car Co.*, 57 Vt. 68.

An act general in its terms and applicable

to all railroads is within the meaning of the Maine Statute of 1831, ch. 503, empowering the legislature to modify the charters of corporations, and affects the charter of any railroad company which contains no express limitation to the contrary. *Bangor, O. & M. R. Co. v. Smith*, 47 Me. 34.—FOLLOWING *Roxbury v. Boston & P. R. Co.*, 6 Cush. (Mass.) 431.

If, in a special act of the legislature chartering a company and conferring upon it specified privileges exceeding those granted to other like corporations by the general law of the state, there be reserved the right to amend this act by a future legislature, and the legislature subsequently passes a general act applicable to all corporations of this character, whereby the specified privilege, while not withdrawn, is so modified as to render it far less valuable to the corporation, which had been chartered by this special act, this cannot be regarded as an exercise by the legislature of the reserved right to amend any act, as it cannot properly be called an amendment of this special act, for by W. Va. Const. art. 6, § 30, it is provided that "no law shall be amended by reference to its title only; but the section amended shall be inserted at large in the new act." But such general act is not necessarily inoperative on such corporation, as it may or may not be subjected to such law; this depending upon whether the legislature has the constitutional power so to control the corporation in this respect. *Laurel Fork & S. H. R. Co. v. West Virginia Transp. Co.*, 25 W. Va. 324.—FOLLOWED IN *West Virginia Transp. Co. v. Sweetzer*, 25 W. Va. 434.

The charter of a railroad company, which required only such construction of the road with reference to the safety of travel upon a highway as should be approved by a committee, was open to amendment by the general assembly. *Held*, that a general statute requiring all railroad companies to maintain fences along their roads where running within the limits of any highway, was an amendment of the charter. *Durand v. New Haven & N. Co.*, 42 Conn. 211.

47. Repeal by subsequent inconsistent charter.—An act of incorporation of a railroad, where the legislature has reserved the right of repeal, may be repealed, or repealed in part, by implication, by another act of incorporation of a railroad inconsistent therewith. *West End & A. St.*

R. Co. v. Atlanta St. R. Co., 49 Ga. 151.—FOLLOWING *Union Branch R. Co. v. East Tenn. & G. R. Co.*, 14 Ga. 328.

3. Chartering Second Company.

48. Charter not an exclusive grant unless expressly made so.—It is competent for the legislature, after granting a franchise to one person or corporation, which affects the rights of the public, to grant a similar franchise to another person or corporation, the use of which shall impair or even destroy the value of the first franchise, although the right so to do may not be reserved in the first grant; unless the right to do so is expressly prohibited by the first grant. *Ft. Plain Bridge Co. v. Smith*, 30 N. Y. 44.—FOLLOWING *Charles River Bridge v. Warren Bridge*, 11 Pet. (U. S.) 420.

Where there has been a legislative grant to a private corporation to erect a bridge, turnpike, or other public convenience, which is not in its terms exclusive, there is no constitutional obligation on the legislature not to grant to a second corporation the right to erect another bridge or turnpike for a similar purpose, to be constructed so near the former as greatly to impair, or even to destroy, the value of the former; and this without making compensation to the first corporation for the consequential injury. *White River Turnpike Co. v. Vermont C. R. Co.*, 21 Vt. 590.

A monopoly cannot be implied from the mere grant of a charter to a company to construct a work of public improvement, and to take the profits. To give such a monopoly there must be an express provision in the charter, whereby the legislature restrains itself from granting charters for rival and competing works. So where the legislature granted a charter to a company to construct a canal through the valley of a stream, and to take the profits of it, without any provision against the exercise of the power to charter other and rival companies, the legislature is not prohibited from granting a charter to a company to construct a railroad through the same valley, though it should afford the same public accommodation as the canal, and impair or annihilate its profits. *Tuckahoe Canal Co. v. Tuckahoe & J. R. R. Co.*, 11 Leigh (Va.) 43.

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after grant the right to build other railroads parallel with it between the same *termini*; nor does it imply an obligation on behalf of the state that other railroads, with their tracks and switches, shall not thereafter be granted the right to cross the state in a different direction, and thus pass over its tracks and switches. *East St. Louis Con. R. Co. v. East St. Louis Union R. Co.*, 17 *Am. & Eng. R. Cas.* 163, 108 *Ill.* 265.—DISTINGUISHING *Central City Horse R. Co. v. Ft. Clark Horse R. Co.*, 81 *Ill.* 523. QUOTING *Lake Shore & M. S. R. Co. v. Chicago & W. I. R. Co.*, 97 *Ill.* 506.—*State v. Noyes*, 47 *Me.* 189.

The grant of the franchise of a railway is not in its nature exclusive so as to preclude the state from interfering with it by the creation of another similar franchise tending materially to impair its value. The charter is not a contract standing above and beyond legislative interference nor a grant of the fee simple in the soil, but a mere easement, and the legislature has full power to grant as many more easements on the same territory, as public convenience may require, always making indemnity for damage done to those corporations which were the first objects of its bounty, or the recipients of antecedent grants. *In re Citizens' Pass. R. Co.*, 2 *Pittsb. (Pa.)* 10.

The public welfare requires that the business of carrying shall be open to competition, as far as possible, and no monopoly in that regard, however limited the sphere of its operation, can be presumed to have been intended by the legislature in the enactment of the general law for the formation of railroad corporations. *East St. Louis Con. R. Co. v. East St. Louis Union R. Co.*, 17 *Am. & Eng. R. Cas.* 163, 108 *Ill.* 265.

Where a charter is granted authorizing the erection of a toll-bridge, and prohibiting the erection of another bridge within two miles, it is still competent for the legislature to subsequently authorize a second bridge within the two-mile limit. *Chenango Bridge Co. v. Einghamton Bridge Co.*, 27 *N. Y.* 87, 26 *How. Pr.* 124; *reversed in 3 Wall. (U. S.)* 51.

A legislature having the reserved power to alter, amend, or repeal railroad charters, may lawfully authorize a second street-railway corporation to lay a similar track through the same streets or to use the track of the first company, making compensation for the use and wear of the track,

without making any compensation for the diminution of its profits or of the value of its franchises. *Metropolitan R. Co. v. Highland St. R. Co.*, 118 *Mass.* 290, 9 *Am. Ry. Rep.* 285.—DISTINGUISHING *Metropolitan R. Co. v. Quincy R. Co.*, 12 *Allen (Mass.)* 262; *Jersey City & B. R. Co. v. Jersey City & H. R. Co.*, 20 *N. J. Eq.* 61. QUOTING *Commonwealth v. Temple*, 14 *Gray (Mass.)* 69.—APPROVED IN *Canal & C. R. Co. v. Orleans R. Co.*, 44 *La. Ann.* 54.

49. Second grant is within reserved power to alter, amend, or repeal.—To grant to one railroad corporation the right to use the location of another and to leave the compensation for such use to be determined by a board of commissioners designated for the purpose, are clearly within the power reserved by the legislature to alter, amend, or repeal charters. *Worcester & N. R. Co. v. Railroad Com'rs*, 118 *Mass.* 561.

50. Second grant valid, if not repugnant to or in derogation of first.

—A state chartered a railroad between certain designated points and pledged itself not to allow another road to be constructed between the same points, or any part of the distance. Afterward a second road was chartered, which struck the first some distance from the starting point, crossed the track, and continued thence in something like a parallel line to the starting point of the first road. *Held*, that the charter contract with the first company was not thereby impaired, within the meaning of the United States constitution. *Richmond, F. & P. R. Co. v. Louisa R. Co.*, 13 *How. (U. S.)* 71.—FOLLOWED IN *Greenwood v. Union Freight R. Co.*, 105 *U. S.* 13. QUOTED IN *Richmond, F. & P. R. Co. v. Richmond, 26 Gratt. (Va.)* 83.

In the first charter there was an implied reservation of the power to incorporate companies to transport other articles than passengers; and if the second road should infringe upon the rights of the first a remedy at law exists, but the apprehension of it will not justify an injunction to prevent building the road. *Richmond, F. & P. R. Co. v. Louisa R. Co.*, 13 *How. (U. S.)* 71.

The obligation of a contract created by a charter granting the exclusive right to construct and operate a railroad between certain points is not impaired by authorizing a second road to cross the first road. A franchise may be condemned in the same man-

ner as individual property. *Richmond, F. & P. R. Co. v. Louisa R. Co.*, 13 *How. (U. S.)* 71.—QUOTED IN *Chicago, R. I. & P. R. Co. v. Lake*, 71 *Ill.* 333; *Thorpe v. Rutland & B. R. Co.*, 27 *Vt.* 140. REVIEWED IN *North Carolina R. Co. v. Carolina C. R. Co.*, 83 *N. Car.* 489; *Baltimore & O. R. Co. v. Pittsburg, W. & K. R. Co.*, 10 *Am. & Eng. R. Cas.* 444, 17 *W. Va.* 812.

A charter granting the exclusive privilege of constructing and using a railroad or railway to and from the city of New Orleans, its faubourgs, and the incorporated limits thereof to and from Lake Pontchartrain, is not infringed by the granting of a charter to two separate companies to construct railways a portion of the way between each point. The connection of the two railways, made in good faith to accommodate different lines of travel and trade and not to engross the same travel and trade which would naturally pass over plaintiff's road, is lawful, and though occasionally a person might use first one road and then the other to arrive at the lake or city, it is not an infringement. If, however, the union of the two roads was made for the purpose of transporting freight or passengers to and from the prohibited points, there is no ground upon which the act granting their charters can be maintained. The legislature could no more grant this power to two or more companies than it could grant the same power to one. *Pontchartrain R. Co. v. New Orleans & C. R. Co.*, 11 *La. Ann.* 253.—APPROVING *Boston & L. R. Corp. v. Salem & L. R. Co.*, 2 *Gray (Mass.)* 1. DISTINGUISHING *Pontchartrain R. Co. v. Lafayette & P. R. Co.*, 10 *La. Ann.* 741; *Pontchartrain R. Co. v. Orleans Nav. Co.*, 15 *La.* 404.

Neither of the acts incorporating the defendant is unconstitutional in itself, because the roads were not within the prohibited points. But the moment they by their union connect these points by railroad, their act becomes unconstitutional, so far as it concerns direct travel between the two points, as much so as would have been a single act of incorporation and railroad for the like purpose. *Pontchartrain R. Co. v. New Orleans & C. R. Co.*, 11 *La. Ann.* 253.

Where a public grant vests in each of two corporations franchises and privileges for unlike occupations, such as a telephone and a trolley railroad on the same street,

the grant to one is not necessarily repugnant to the grant to the other, or in derogation of it, unless it is impossible for the one to co-exist with the other. *Hudson River Tel. Co. v. Waterliet T. & R. Co.*, 56 *Hun (N. Y.)* 67, 29 *N. Y. S. R.* 694, 9 *N. Y. Supp.* 177; *appeal dismissed in 121 N. Y.* 397.

III. INTERPRETATION.

1. Powers Conferred, Generally.*

51. Must be given by charter, either expressly or by necessary implication.—A corporation has only such power as has been conferred on it by its charter or with which it has been otherwise empowered by law. *Rio Grande R. Co. v. Brownsville*, 45 *Tex.* 88, 13 *Am. Ry. Rep.* 223. *Gulf, C. & S. F. R. Co. v. Morriss*, 35 *Am. & Eng. R. Cas.* 94, 67 *Tex.* 692, 4 *S. W. Rep.* 156.

Corporations have no other powers than such as are expressly granted by their charter, or as are necessary to carry into effect the powers expressly granted. *Wheeling v. Mayor, etc., of Baltimore*, 1 *Hughes (U. S.)* 90.—REVIEWING *Lafayette v. Cox*, 5 *Ind.* 38.—*Camden & A. R. & T. Co. v. Remer*, 4 *Barb. (N. Y.)* 127. *Lakin v. Willamette V. & C. R. Co.*, 26 *Am. & Eng. R. Cas.* 611, 13 *Oreg.* 436, 11 *Pac. Rep.* 68, 57 *Am. Rep.* 25.

The charter of a corporation is the measure of its powers, and the enumeration of these powers implies the exclusion of all others. *State ex rel. v. Atchison & N. R. Co.*, 32 *Am. & Eng. R. Cas.* 388, 24 *Neb.* 143, 38 *N. W. Rep.* 43. *Attorney-General v. Great Eastern R. Co.*, L. R. 5 *App. Cas.* 473, 49 *L. J. Ch.* 545, 42 *L. T.* 810, 28 *W. R.* 769; *affirming L. R.* 11 *Ch. D.* 449, 48 *L. J. Ch.* 428, 40 *L. T.* 265, 27 *W. R.* 759.—CONSIDERED IN *Attorney-General v. Shrewsbury Bridge Co.*, L. R. 21 *Ch. D.* 752, 51 *L. J. Ch.* 746, 46 *L. T.* 687, 30 *W. R.* 916.

The powers of a corporation organized under statutes are such, and such only, as those statutes confer, express and implied. *American Union Tel. Co. v. Union Pac. R. Co.*, 1 *McCrory (U. S.)* 188.

A company incorporated under general law acquires no rights other than a corporate existence, and no powers except those which the law declares it may exercise, except such as are necessary and proper to

* Construction of charter powers, see note, 3 *AM. & ENG. R. CAS.* 175.

the carrying on of its business. *Ft. Worth St. R. Co. v. Rosedale St. R. Co.*, 32 *Am. & Eng. R. Cas.* 283, 68 *Tex.* 169, 5 *S. W. Rep.* 534.

That which a company is authorized to do by its act of incorporation, it may do; beyond that, all its acts are illegal. The powers of a corporation must be given in plain words or by necessary implication. All powers not given in this direct and unmistakable manner are withheld. A corporation can take nothing by construction. *Commonwealth v. Erie & N. E. R. Co.*, 27 *Pa. St.* 339.—FOLLOWED IN *Philadelphia v. Philadelphia & R. R. Co.*, 58 *Pa. St.* 253. QUOTED IN *Pennsylvania R. Co. v. National R. Co.*, 23 *N. J. Eq.* 441; *Philadelphia v. Philadelphia & R. R. Co.*, 19 *Phila. (Pa.)* 507. REVIEWED IN *Talmadge v. North American C. & T. Co.*, 3 *Head (Tenn.)* 337.—*Philadelphia v. Philadelphia & R. R. Co.*, 58 *Pa. St.* 253.—FOLLOWING *Commonwealth v. Erie & N. E. R. Co.*, 27 *Pa. St.* 339.

Corporations can exercise no power over the incorporators, beyond those conferred by the charter to which they have subscribed, except on the condition of their agreement and consent. *Winter v. Muscogee R. Co.*, 11 *Ga.* 438.—APPROVING *Hartford & N. H. R. Co. v. Crowell*, 5 *Hill (N. Y.)* 386.

A railroad company gets its life and authority from the statute of its creation, and only for the purposes named in the statute. It has no vicarious power to act in behalf of the supervisors of a town in grading a street, under the highway laws of the state. *Buchner v. Chicago, M. & N. W. R. Co.*, 14 *Am. & Eng. R. Cas.* 447, 60 *Wis.* 264, 19 *N. W. Rep.* 56.

52. Implied powers.—Where a corporation is authorized by a general grant to exercise a franchise or to carry on a business, and the grant contains no words either defining or limiting the powers which the corporation may exercise, it will take, by implication, all such powers as are reasonably necessary to enable it to accomplish the purposes of its creation. *Halsey v. Rapid Transit St. R. Co.*, 46 *Am. & Eng. R. Cas.* 76, 47 *N. J. Eq.* 380, 20 *Atl. Rep.* 859.

Acts of incorporation, like other statutes, must have a reasonable and sensible interpretation, so as to accomplish the intention of the legislature; and all such powers are implied as may be necessary to carry into

effect those expressly granted; that is to say, such as are reasonably incidental to the exercise of the express powers. *Mayor, etc., of Baltimore v. Baltimore & O. R. Co.*, 21 *Md.* 50.

The charter of a corporation read in connection with the general laws applicable to it is the measure of its powers, and whatever, under the charter and such general laws reasonably construed, may fairly be regarded as incidental to the objects for which the corporation was created, or to which its powers have been extended, will be treated within its powers. Corporations, in addition to the express and substantial powers conferred upon them by their charters or such general laws, take by inference or implication all the reasonable modes of executing the powers conferred upon them which a natural person would have in the exercise of similar powers, and by such general laws may be enabled to do acts or make contracts which otherwise would be void as *ultra vires*. *Wehrhane v. Nashville, C. & St. L. R. Co.*, 4 *N. Y. S. R.* 541, 42 *Hun* 660.

The charter power conferred on a railway company to rent, sell, lease, or consolidate with another railway company cannot exist in the absence of some law authorizing it, and cannot be implied from a prohibition extending only to parallel or competing lines. *East Line & R. R. Co. v. State*, 40 *Am. & Eng. R. Cas.* 574, 75 *Tex.* 434, 12 *S. W. Rep.* 690.

53. Rule that corporation must act in strict conformity with charter.

—The powers and capital of a company incorporated by act of parliament must be exercised and applied in strict conformity with the act. *Attorney-General v. Great Northern R. Co.*, 1 *D. & S.* 154.—DISCUSSED IN *Attorney-General v. Great Eastern R. Co.*, L. R. 11 *Ch. D.* 449, 48 *L. J. Ch.* 429, 40 *L. T.* 265.

Where an act of parliament authorizes the construction of a railway, it is to be construed strictly with reference to the rights of those who are empowered to make it. *Eversfield v. Mid-Sussex R. Co.*, 5 *Jur. N. S.* 776, 3 *De G. & J.* 286.

A railroad corporation cannot engage in any distinct or separate branch of business not authorized by its charter, for the purpose of raising funds to accomplish the objects for which it was created. *Waldo v. Chicago, St. P. & F. du L. R. Co.*, 14 *Wis.*

575.—FOLLOWING *Clark v. Farrington*, 11 Wis. 306.

If the powers or privileges be coupled with conditions, they must be strictly complied with; but if no conditions be annexed, the powers granted may be exercised in a reasonable manner, having due regard to the rights of others whose interests may be affected thereby. *Pittsburgh, Ft. W. & C. R. Co. v. Pittsburgh*, 1 *Pittsb. (Pa.)* 392.

Where the thing done by a corporation is substantially that which its charter authorized, courts have not been disposed to declare the act unauthorized, though not strictly and literally the same as that mentioned in the law. *Mayor, etc., of Baltimore v. Baltimore & O. R. Co.*, 21 *Md.* 50.

Where the decision of questions of expediency as to the fitness of means employed is confided by the law to the board of directors of a corporation, courts of justice will not undertake to pass upon them; they are manifestly incompetent to the task, and to attempt to do so would often defeat the ends of the law; their province is to determine whether the corporation in the act complained of has exceeded its corporate powers. *Mayor, etc., of Baltimore v. Baltimore & O. R. Co.*, 21 *Md.* 50.

An act creating a corporation with the powers and privileges of another corporation formerly created, by reference, without setting them forth, should be construed strictly against the corporation where the rights of others are affected. *Bowling Green & M. R. Co. v. Warren County Court*, 10 *Bush (Ky.)* 711.

Where a charter shows a clear intention to create a "passenger railway," the company cannot construct and operate a road suitable for freights. *Commonwealth ex rel. v. Central Pass. R. Co.*, 52 *Pa. St.* 506.—QUALIFIED IN *Millvale v. Evergreen R. Co.*, 46 *Am. & Eng. R. Cas.* 219, 131 *Pa. St.* 1.

A charter of incorporation creating a company for the purpose of effecting a communication by a plank-road between designated points, with the privilege of taking tolls, does not authorize the company to establish a stage line upon their road, nor to contract for carrying the United States mail. *Wiswall v. Greenville & R. P. R. Co.*, 3 *Jones Eq. (N. Car.)* 183.—REVIEWED IN *Central R. Co. v. Collins*, 40 *Ga.* 582.

54. Construction of charter as respects powers conferred.—Railroad

charters are to receive such a construction as is reasonable and consistent with the public objects to be subserved by them. *Railroad Com'rs v. Portland & O. C. R. Co.*, 63 *Me.* 269.—QUOTING *Worcester v. Western R. Co.*, 4 *Metc. (Mass.)* 564.

The interpretation of a railroad charter, like the interpretation of any other grant, is the ascertainment of intention. *Burke v. Concord R. Co.*, 8 *Am. & Eng. R. Cas.* 552, 61 *N. H.* 160.

Every act of incorporation must be construed in such manner, if possible, as not to exceed the sovereignty of the legislature granting it. It ought not therefore to be deemed to authorize any act to be done which would exceed the jurisdictional power of the state, or interfere with the rights of other states. A railroad corporation is no exception to the rule requiring a strict construction of corporate powers. *Mayor, etc., of Baltimore v. Baltimore & O. R. Co.*, 21 *Md.* 50.

The rule of close construction of charters only applies where an ambiguity exists, or where a power is claimed by the corporation by implication, and not where a power is expressly conferred. Thus, where a road is authorized to construct lateral branches, the court will not interfere to fix any limit as to the length of the branch. *Newhall v. Galena & C. U. R. Co.*, 14 *Ill.* 273.

A grant of new and extraordinary power to a private corporation in contravention of the established rights of the public must be construed with a reasonable strictness. *Greenwich v. Easton & A. R. Co.*, 24 *N. J. Eq.* 217; affirmed in 25 *N. J. Eq.* 565.

Powers conferred upon corporations are of two descriptions: some are general, others special and limited. Some have reference to the mode in which acts are to be done, and are merely directory; others are in the nature of a limitation of power or a condition precedent. Third persons, acting in good faith, are not usually to be affected by an excess or violation of the former on the part of the company; but of the latter they are. The act itself must be regarded as illegal, and knowledge is presumed. *James v. Cincinnati, H. & D. R. Co.*, 2 *Disney (Ohio)* 261.

An act to extend the charter of a company whose rights have been assigned to another should be understood as conferring the new privilege upon either the company named in the act, if in existence, or upon

any other company which has succeeded to its rights. *Washington, A. & G. R. Co. v. Martin*, 7 D. C. 120.

A provision in a railroad charter authorizing the company to construct and operate a road, or to "farm out" the road, authorizes it to make a lease of the road; and North Carolina Act of 1871-72, ch. 138, which authorizes, among other things, railroads to consolidate with connecting roads, whether in or out of the state, clearly authorizes a North Carolina company to lease its road to a corporation created in another state, and owning a connecting road. *State v. Richmond & D. R. Co.*, 72 N. Car. 634.

A railroad company was authorized "to hold land and mine coal, oil, and other minerals, to cultivate and improve," etc., and also "construct a railroad or railroads from any other lands to connect with any road or to any navigable stream." *Held*, that if the company had no land it could not build a road, and could only build from its own land to carry off its products. It could not build a road independent of its own lands for the accommodation of the public and for the company's profit rising from general traffic. *Warren & F. R. Co. v. Clarion L. & I. Co.*, 54 Pa. St. 28.

55. Power to borrow money.—A corporation created to construct a road has the power to borrow money as one of the implied means necessary and proper to carry into effect specified powers; and this is so though the charter direct that the funds shall be raised by subscription. Though a special mode of doing a thing be subscribed to a corporation, this does not necessarily exclude all other modes. *Union Bank v. Jacobs*, 6 Humph. (Tenn.) 515.

A clause in the charter of a corporation authorizing the company to borrow money "on such terms as might be agreed upon between the parties," empowers them to borrow at a rate of interest beyond that established by the general law. *Morrison & H. R. Co.*, 14 Ind. 110.

Where a railroad was chartered with an authorized capital of \$1,000,000, with power to borrow money not exceeding "one half of the par value of the capital stock," the words "one half of the par value of the capital stock"—*held*, to mean capital stock actually paid in, and not authorized capital, and only authorizing a loan of one half of the stock paid in. *Commonwealth v. Lehigh*

Ave. R. Co., 129 Pa. St. 405, 18 Atl. Rep. 414, 498.

The act of incorporation gave the directors power to "issue and sell or pledge all or any of the said bonds for the purpose of raising money for the prosecution of the said undertaking." *Held*, that the expression "raising money" should be given a liberal construction, and that using the bonds in paying for the construction of the road was really a raising money for the prosecution of the undertaking. *Winnipeg & H. B. R. Co. v. Mann*, 7 Man. 81.

56. Power to acquire and dispose of real property.—Where a railroad company acquires an estate in land for the use of its tracks by contract with the owner, and not by proceedings under the right of eminent domain, the character and extent of the estate are to be determined by the contract, and are not affected by charter provisions authorizing it to acquire a greater estate than that contracted for. *Cincinnati, I., St. L. & C. R. Co. v. Geisel*, 119 Ind. 77, 21 N. E. Rep. 470.

The power in a railroad charter to take land carries with it a right of way over the land, under the maxim *Omne majus continet in se minus*. *Philadelphia, W. & B. R. Co. v. Williams*, 54 Pa. St. 103.—DISAPPROVED IN *Lodge v. Philadelphia, W. & B. R. Co.*, 8 Phila. (Pa.) 345.

Where the enacting section of the charter of a railroad contained the words "and they and their successors, by the said name and style, shall be capable of purchasing, holding, and conveying any lands, tenements, goods, and chattels whatever, necessary and expedient to the objects of this incorporation"—*held*, that this only authorized property to be sold or conveyed when necessary or expedient for the objects of the incorporation, and that it did not allow the source from which the corporation derived its income to be sold and conveyed. *Kean v. Johnson*, 9 N. J. Eq. 401.

A railroad charter contained a provision that the company should not "hold, purchase, or deal in any lands other than the lands on which the road should run, or which might be actually necessary for the construction or maintenance thereof, and of warehouses, machine-shops," etc. *Held*, that the provision was intended only to prevent direct dealing in lands, and did not prevent the company incidentally acquiring an interest in lands for the protection of its

legal rights; and after having purchased such lands it might convey title thereto. *Blunt v. Walker*, 11 Wis. 349.—FOLLOWING *Clark v. Farrington*, 11 Wis. 306.—FOLLOWED IN *Lyon v. Ewings*, 17 Wis. 61; *Andrews v. Hart*, 17 Wis. 297.

57. Construction in favor of public and against corporation.—Grants and charters to corporations are to be construed favorably to the rights of the public, and most strongly against those claiming under them. *Camden & A. R. Co. v. Briggs*, 22 N. J. L. 623; *following* 21 N. J. L. 406. *Southwark R. Co. v. Philadelphia*, 47 Pa. St. 314. *Pittsburgh, Ft. W. & C. R. Co. v. Pittsburgh*, 1 Pittsb. (Pa.) 392. *South Carolina R. Co. v. Columbia & A. R. Co.*, 13 Rich. Eq. (So. Car.) 339.

In the construction of charters, it is a well-settled rule that, so far as the rights granted thereby encroach upon public or common rights, then they are to be construed most strongly against those setting them up and in favor of the public. They are not extended beyond the express words in which they are given or their clear import, and whatever is not given in unequivocal terms is to be deemed as expressly withheld. *People's Pass. R. Co. v. Marshall St. R. Co.*, 20 Phila. (Pa.) 203.

This rule of construction is not to deprive the company of the benefit arising from the obvious sense of the charter; and whatever is essential to the enjoyment of the thing granted will be necessarily implied in the grant. *Tennessee & A. R. Co. v. Adams*, 3 Head (Tenn.) 596.

And where a corporation is seeking to repudiate liability upon a contract fairly entered into, a modified rule of construction exists. So it does where creditors attack corporation contracts after the company has become insolvent. *Tod v. Kentucky Union Land Co.*, 57 Fed. Rep. 47.—FOLLOWING *Chicago, R. I. & P. R. Co. v. Union Pac. R. Co.*, 47 Fed. Rep. 16.

The words used in charters, amendments thereto, etc., are to be taken to be, in some respects, the words of their "promoters," or, in other words, of those who "lobby" for them, and not as the words of the state. *McAden v. Jenkins*, 64 N. Car. 796.

Under the ordinary rules applied in the construction of laws and contracts, the specific mention of certain turnouts, switches, and constructions would be interpreted to exclude others, and public grants are to be

strictly construed. If there is doubt as to the extent of the grant the doubt is resolved in favor of the public. *Galveston Wharf Co. v. Gulf, C. & S. F. R. Co.*, 81 Tex. 494, 17 S. W. Rep. 57.

A railroad charter provided that it should be "so constructed" as not to impede travel on highways. *Held*, that this did not limit the impeding of travel to the time when the road was being built or "constructed," but included also the use of the road afterward. *Commonwealth v. Erie & N. E. R. Co.*, 27 Pa. St. 339.—APPROVED IN *Hinchman v. Paterson Horse R. Co.*, 17 N. J. Eq. 75. QUOTED IN *Stroudsburg v. Stroudsburg Pass. R. Co.*, 2 Pa. Dist. 35; *Philadelphia, G. & N. R. Co. v. Pennsylvania S. V. R. Co.*, 16 Phila. (Pa.) 636; *Philadelphia v. Thirteenth & F. St. Pass. R. Co.*, 8 Phila. (Pa.) 648.

58. General statutory provisions control specific charters.*—The repeal of the whole of a general statute is not to be inferred from the fact that a part of it has been incorporated into a charter; and where such general statute imposes obligations upon the corporation, it cannot avoid such obligations because that portion of the statute is not incorporated into its charter. *Pratt v. Atlantic & St. L. R. Co.*, 42 Me. 579.—QUOTED IN *Kansas Pac. R. Co. v. Mower*, 16 Kan. 573.

59. Obligations imposed by charter.—A railway company, in whomsoever may be its ownership, stands charged with every duty and obligation to the public imposed upon it by its charter and the nature of its business. From these obligations it cannot escape save by consent of the state. *Gulf, C. & S. F. R. Co. v. Newell*, 38 Am. & Eng. R. Cas. 503, 73 Tex. 334, 11 S. W. Rep. 342.

No positive obligation to build a road, either in whole or in part, rests upon the corporation from having obtained a charter for that purpose. The incorporators may not be able to procure the money, or upon more mature examination may become satisfied that the enterprise is unprofitable, in which case it seems that they are not obliged to prosecute the work. And it seems that the same rule applies as to the completion of the work after it has been begun. *People v.*

* Whether general statutory provisions control specific charters, see note, 5 AM. & ENG. R. CAS. 280.

Albany & V. R. Co., 37 *Barb.* (N. Y.) 216; *affirming* 11 *Abb. Pr.* 136, 19 *How. Pr.* 523.

60. Privileges and exemptions.—The exemption of the servants of a railroad company from military duty, service on juries, and working on public roads, contained in a charter, is a right or privilege of the corporation and not a mere personal privilege to officers, agents, and servants of the company. *Johnson v. State*, 41 *Am. & Eng. R. Cas.* 275, 88 *Ala.* 176, 7 *So. Rep.* 253.

2. *Provisions as to Location, Completion, Termini, Connections, etc.*

61. Construction of road—Powers conferred, generally.—The grant of power to construct "a railroad" includes all structures which are necessary and essential to its operation. *United States v. Denver & R. G. R. Co.*, 150 *U. S.* 1, 14 *Sup. Ct. Rep.* 11.

The selection, by the managers of a railroad, of the starting point will not be interfered with where the charter leaves it largely to their discretion, unless it appears that they have clearly erred. *Hentz v. Long Island R. Co.*, 13 *Barb.* (N. Y.) 646.

A railroad company chartered under the general law of the state may complete and operate a part of its railroad, and, as to the part so completed and operated, retain its corporate existence, franchise, and powers. Chapter 54, § 66, *W. Va. Code* (ed. 1887). *Wheeling B. & T. R. Co. v. Camden Con. Oil Co.*, 47 *Am. & Eng. R. Cas.* 27, 35 *W. Va.* 205, 13 *S. E. Rep.* 369.

A charter of a railroad provided that it might "enter in and upon and occupy, for the purpose of making the road, * * * any land, * * * the road not to be more than five rods wide." *Held*, that it could occupy five rods for the purpose of the road and no more, and that by implication depots, wood and water stations, toll-houses, watch-houses, and others of a similar nature were included, but not a warehouse. *Cumberland Valley R. Co. v. McLanahan*, 59 *Pa. St.* 23.—*QUOTED IN* Appeal of Western Pa. R. Co., 18 *Phila.* (Pa.) 614.

62. Time allowed for construction.—Where the charter of a railroad defines the beginning point and terminus of the road, gives the general direction, and requires a survey of the route to be made, and a map made and filed in the office of the secretary of state within twelve months

from the granting of the charter, this is not a material condition in the charter, and a failure to comply with it will not work a forfeiture of the franchise. *Harris v. Mississippi V. & S. I. R. Co.*, 51 *Miss.* 602.

Equity will not countenance a substantial evasion of the general railroad act, *N. Y. Laws of 1850*, ch. 140, § 47, requiring railroads to complete and put in operation their roads within five years after their articles of association are filed. *Troy & B. R. Co. v. Boston, H. T. & W. R. Co.*, 7 *Am. & Eng. R. Cas.* 49, 86 *N. Y.* 107.—*APPLYING* *Wood v. Bedford & B. R. Co.*, 8 *Phila.* (Pa.) 94.

A railroad charter contained a provision that it should be void if the road was not constructed and put in operation within five years. When the road was but partly constructed, and within six days of the expiration of the five years, the legislature authorized the company to issue a large amount of bonds, and authorized a certain city to guarantee the bonds and take a mortgage on the road as security. *Held*, that such act was an implied extension of the time of completion of the road for an indefinite time. *Foster v. Fitch*, 36 *Conn.* 236.

63. Designating and locating the termini.*—Where a company, under its charter, is authorized to select and locate its *termini*, and is required to operate its road as a continuous line, it will be required to operate the same to the points selected by it as its *termini*. The requirement of the law is not met by the use of short trains for transfer purposes. *Illinois C. R. Co. v. People*, 143 *Ill.* 434, 33 *N. E. Rep.* 173.—*APPROVING* *Union Pac. R. Co. v. Hall*, 91 *U. S.* 343; *State v. Hartford & N. H. R. Co.*, 29 *Conn.* 539; *United States v. Union Pac. R. Co.*, 4 *Dill.* (U. S.) 478; *People v. Louisville & N. R. Co.*, 120 *Ill.* 48; *Ohio & M. R. Co. v. People*, 120 *Ill.* 200.

A designation of the starting point of a railroad as "at or near the Bergen cut" is a sufficient compliance with a provision of law requiring the terminal points of the road to be specified. *Central R. Co. v. Pennsylvania R. Co.*, 31 *N. J. Eq.* 475; *reversed on another point* in 32 *N. J. Eq.* 755.—*REVIEWING* *State v. Hudson Tunnel R. Co.*, 38 *N. J. L.* 548; *Chicago, B. & Q. R. Co. v. Chamberlain*, 84 *Ill.* 333.

* Decisive act of company in fixing location and *termini*; exhaustion of powers, see note, 4 *Am. & Eng. R. Cas.* 199.

An act of assembly authorizing a company to construct a railroad "to connect with any railroad constructed or to be constructed at any point on the northern boundary of Erie or Warren county," granted power to terminate the road at any point in the boundary named which the company might select, and did not limit the terminus to another railroad. *Commonwealth v. Cross Cut R. Co.*, 53 Pa. St. 62.

By a proviso it was directed "that the gauge of said road shall not exceed four feet ten inches, etc." *Held*, that "said road" referred to the road of the company incorporated, not to the road "constructed or to be constructed." *Commonwealth v. Cross Cut R. Co.*, 53 Pa. St. 62.

The rights and powers of the Newcastle and Richmond R. R. Co., and of the Peru and Indianapolis R. R. Co., under their respective charters and the amendments thereto as respects their *termini*, title to land occupied, etc., explained. *Newcastle & R. R. Co. v. Peru & I. R. Co.*, 3 Ind. 464.—QUOTED IN *Cleveland, C., C. & I. R. Co. v. Coburn*, 17 Am. & Eng. R. Cas. 37, 91 Ind. 557.

64. Locating terminus within city or town.*—(1) "*To and from*."—The words "to and from" a place or city are construed to mean to or from a point within the place to or from which a corporation is authorized to construct a railroad. Authority to construct and operate a railroad from the city of Chicago to any point in the town of Evanston is held to authorize the location and operation of the road from any point within the city of Chicago. *McCartney v. Chicago & E. R. Co.*, 29 Am. & Eng. R. Cas. 326, 112 Ill. 611.—CRITICISING *North Eastern R. Co. v. Payne*, 8 Rich. (So. Car.) 177.

There cannot be derived from the charter provisions of the company to run "to and from" a town the obligation to run trains to a particular spot within its limits. *People ex rel. v. Chicago & A. R. Co.*, (Ill.) 35 Am. & Eng. R. Cas. 462, 22 N. E. Rep. 857.

(2) "*From*."—The words "from a town or city," used in a charter granted to a railroad company, are to be taken inclusively; and in the construction of their road they have the right to enter the corporate limits of such a town or city. *Tennessee & A.*

R. Co. v. Adams, 3 Head (Tenn.) 596. *Chicago & N. W. R. Co. v. Chicago & E. R. Co.*, 25 Am. & Eng. R. Cas. 158, 112 Ill. 589.—QUOTED IN *Colorado Eastern R. Co. v. Union Pac. R. Co.*, 44 Am. & Eng. R. Cas. 10, 41 Fed. Rep. 293.—*In re Bronson*, 1 Ont. 415.—REVIEWING *Commonwealth v. Erie & N. E. R. Co.*, 27 Pa. St. 339.

The charter of a railroad company authorized them to construct the road "from Charleston," etc. *Held*, that the company had no authority to enter the city, but that the boundary of the city was the *terminus a quo*. *North Eastern R. Co. v. Payne*, 8 Rich. (So. Car.) 177.—CRITICISED IN *McCartney v. Chicago & E. R. Co.*, 29 Am. & Eng. R. Cas. 326, 112 Ill. 611; *In re Bronson*, 1 Ont. 415.

Where the charter of a railway company gives it the right to build "from" a certain city, the mere fact that it originally made its terminus at the outskirts of such city does not, unless it affirmatively appears that it had elected to fix its terminus at that point, preclude it from building its road to the union depot within such city. *Colorado Eastern R. Co. v. Union Pac. R. Co.*, 44 Am. & Eng. R. Cas. 10, 41 Fed. Rep. 293.—APPLYING *Morris & E. R. Co. v. Central R. Co.*, 31 N. J. L. 211. QUOTING *Chicago & N. W. R. Co. v. Chicago & E. R. Co.*, 112 Ill. 601; *Ward v. Minnesota & N. W. R. Co.*, 119 Ill. 287, 10 N. E. Rep. 365.

The act of the legislature, assented to on the 4th of December, 1861, amendatory of the charter of the Savannah, Albany and Gulf railroad company, authorizing them to "extend their road from any point at or in the city of Savannah to the island of Tybee," does not authorize them to extend their road into the city, in a direction differing from that to Tybee island, and to lay their track through the entire length of one of the streets, with a grade requiring deep excavations and high embankments. *Savannah, A. & G. R. Co. v. Shiels*, 33 Ga. 601.—DISTINGUISHING *Hamilton v. New York & H. R. Co.*, 9 Paige (N. Y.) 171; *Drake v. Hudson River R. Co.*, 7 Barb. (N. Y.) 508. QUOTING *Mayor, etc., of Macon v. Macon & W. R. Co.*, 7 Ga. 221; *Justices of Pike County v. Griffin & W. P. Plank Road Co.*, 9 Ga. 475; *Saxingfield v. Connecticut River R. Co.*, 4 Cush. (Mass.) 63.

Where a railway company is authorized to build a railroad from a city to another place, the fact that it is also empowered to

* Location of terminus of railroad within city, see note, 44 AM. & ENG. R. CAS. 24.

contract with a horse-railroad company for the joint or separate operation of either or both companies' roads, as may be agreed on, will not operate as a limitation upon the railway company in respect to its entrance into the city. *McCartney v. Chicago & E. R. Co.*, 29 *Am. & Eng. R. Cas.* 326, 112 *Ill.* 611.

The charter of a company authorized them to build a railroad from the borough of Erie, then bounded on the south by Twelfth street. The borough was subsequently extended farther south; afterwards the company built their road from a point within the enlarged borough, 60 rods south of the borough line, as it was at the date of their act of incorporation. *Held*, that it was not a compliance with the terms of their charter. *Commonwealth v. Erie & N. E. R. Co.*, 27 *Pa. St.* 339.—REVIEWED IN *State v. Southern Minn. R. Co.*, 18 *Minn.* 40; *People's Pass. R. Co. v. Marshall St. R. Co.*, 20 *Phila. (Pa.)* 203.

A railroad company, authorized by its charter to construct a road from an incorporated city to another point, accepted an ordinance passed by the councils of said city granting it a right of way up to a certain point therein. It then built its track up to that point and established there its freight and passenger depots. *Held*, that the power reposed in the company to locate and establish a terminus had not been exhausted, and that it might, with the consent of the city councils, subsequently extend its line to a point beyond that where its depots were situate. *Appeal of Western Pa. R. Co.*, 4 *Am. & Eng. R. Cas.* 191, 99 *Pa. St.* 155.—DISTINGUISHED IN *Sharon R. Co. v. Sharpsville R. Co.*, 122 *Pa. St.* 533; *Philadelphia v. Philadelphia & R. R. Co.*, 19 *Phila. (Pa.)* 507. FOLLOWED IN *McAboy's Appeal*, 107 *Pa. St.* 548. REVIEWED IN *Volmer v. Schuylkill River E. S. R. Co.*, 18 *Phila. (Pa.)* 248.

(3) "To."—Provisions in a railroad charter authorizing the company to build "to" a designated city and to acquire property "within" it authorize it to enter the city. *Moses v. Pittsburg, Ft. W. & C. R. Co.*, 21 *Ill.* 516.

A charter authorizing the construction of a railroad "to Brownsville, on the Rio Grande," is not to be restricted to the right to build the road to the limits of the city, but it imports an authority to extend the

road within the corporate limits of the city. *Rio Grande R. Co. v. Brownsville*, 45 *Tex.* 88, 13 *Am. Ry. Rep.* 223.

A charter authorizing a company to build its road "to" a certain city and to connect with other tracks does not authorize it to build "through" the city for the purpose of making the connection. *City Council v. Port Royal & A. R. Co.*, 74 *Ga.* 658.—FOLLOWING Mayor, etc., of Macon *v. Macon & W. R. Co.*, 7 *Ga.* 221.

Where a railroad company had, by its charter, the exclusive right to transport and carry persons, produce, merchandise, and all other things over their road from Atlanta to Macon—*held*, that its charter did not confer on the company the right to engage in the business of transporting produce through the city of Macon, across the Ocmulgee bridge, from their railroad depot to another depot, for the accommodation of their customers. *Mayor, etc., of Macon v. Macon & W. R. Co.*, 7 *Ga.* 221.—FOLLOWED IN *City Council v. Port Royal & A. R. Co.*, 74 *Ga.* 658. QUOTED IN *Savannah, A. & G. R. Co. v. Shiels*, 33 *Ga.* 601.

(4) "At" or "near."—A provision in a railroad charter, requiring the road to commence "at or near" a certain city, and to run thence on the north side of a certain river, upon which the city is located, but on the south side, authorizes the company to commence its road on the north side of the river near the city, or at some suitable point on the south side at or within the city, and then to cross the river by a bridge to the north side. *Mohawk Bridge Co. v. Utica & S. R. Co.*, 6 *Paige (N. Y.)* 554.—REVIEWED IN *Mason v. Brooklyn City & N. R. Co.*, 35 *Barb. (N. Y.)* 373.

A provision in a railroad charter requiring the road to be located within 20 rods of a designated village—*held*, to mean that the road should be constructed to run within 20 rods of the village. *Jewett v. Lawrenceburgh & U. M. R. Co.*, 10 *Ind.* 539.—DISTINGUISHED IN *Williamson v. Chicago, R. I. & P. R. Co.*, 53 *Iowa* 126.

When a railroad is empowered to connect with another railroad "at the city of Charlotte, at the point which may be found most practicable," and the connection is made at a point 1000 yards outside the city limits, but at the most practicable point, this is within the charter. "At" does not necessarily mean "in" the city. *Purifoy v. Richmond & D. R. Co.*, 46 *Am. & Eng. R.*

Cas. 232, 108 *N. Car.* 100, 12 *S. E. Rep.* 741.

65. Occupying streets and highways.*—(1) *General rules.*—An act which authorizes the construction of a railroad between certain *termini*, without prescribing its precise course and direction, does not *prima facie* confer power to lay out the road on and along an existing public highway; but it is competent for the legislature to grant such authority, either by express words or by necessary implication; and such implication may result either from the language of the act or from its being shown, by an application of the act to the subject-matter, that the railroad cannot, by reasonable intendment, be laid in any other line. *Springfield v. Connecticut River R. Co.*, 4 *Cush. (Mass.)* 63.—APPROVED IN *Clinton v. Cedar Rapids & M. R. R. Co.*, 24 *Iowa* 455. CRITICISED IN *State v. Montclair R. Co.*, 35 *N. J. L.* 328. DISTINGUISHED IN *Starr v. Camden & A. R. Co.*, 24 *N. J. L.* 592. FOLLOWED IN *Re Boston & A. R. Co.*, 53 *N. Y.* 574. QUOTED IN *Reichert v. St. Louis & S. F. R. Co.*, 51 *Ark.* 491; *Morris & E. R. Co. v. Newark*, 10 *N. J. Eq.* 352; *Williams v. New York C. R. Co.*, 16 *N. Y.* 97; *Petition of Providence & W. R. Co.*, 17 *R. I.* 324; *Ford v. Chicago & N. W. R. Co.*, 14 *Wis.* 609. REVIEWED IN *New London Northern R. Co. v. Boston & A. R. Co.*, 102 *Mass.* 386; *North Carolina R. Co. v. Carolina C. R. Co.*, 83 *N. Car.* 489.

The grant to a railroad company by its charter, of power to lay out and construct a railroad between designated *termini*, carries with it, as an incident of the grant, power to cross streets and highways within the location of its road without any special grant to that effect. *Allen v. Mayor, etc., of Jersey City*, 53 *N. J. L.* 522, 22 *Atl. Rep.* 257.

But a grant will not be implied to construct a railroad upon or along a public highway, unless this is necessary for the route as authorized. *Attorney-General ex rel. v. Morris & E. R. Co.*, 19 *N. J. Eq.* 386; *reversed in* 19 *N. J. Eq.* 575.—FOLLOWING *Morris & E. R. Co. v. Newark*, 10 *N. J. Eq.* 352.

The power granted by the charter of a railroad company to construct their road within a city or town carries with it, by implication, the power, if necessary, to lo-

cate their road upon a street or alley. And if a company be authorized to build a railroad by a straight line between two designated points, the power, by implication, is conferred to run upon, along, or across all the streets or roads which lie in the course of such line. *Tennessee & A. R. Co. v. Adams*, 3 *Head (Tenn.)* 596.

A charter to build a railroad to a city imports authority to extend the road within the corporate limits, and the statute confers on a railroad having such charter the right to use any public street within such city, without making compensation therefor; the particular street being either agreed upon with the authorities of the city or designated in the manner pointed out by the statute. *Houston & T. C. R. Co. v. Odum*, 2 *Am. & Eng. R. Cas.* 503, 53 *Tex.* 343.—QUOTED IN *Gulf, C. & S. F. R. Co. v. Graves*, (Tex.) 10 *Am. & Eng. R. Cas.* 199; *Ft. Worth & R. G. R. Co. v. Jennings*, 46 *Am. & Eng. R. Cas.* 574, 76 *Tex.* 373, 13 *S. W. Rep.* 270, 8 *L. R. A.* 180.

(2) *Illustrations.*—A statute provided that where a railroad "intersected" a highway, the company should restore it to its former usefulness. *Held*, that where a road was located along the borders of a turnpike, sometimes on the footpath, for two miles, it was not within the provisions of the statute. *State v. New Haven & N. Co.*, 45 *Conn.* 331.

A charter provided that a railroad should be so located in a certain town that its construction and use should not interfere with a certain turnpike road "so as to obstruct, impede, or endanger public travel." *Held*, that it was not the intention of the statute to remove all danger incident to the operation of a railroad; and the road being once constructed to the satisfaction of the public authorities, the duty to keep it safe, after there was an increase of travel and of population, was not a continuing one. *State v. New Haven & N. Co.*, 45 *Conn.* 331.

A railroad was located for two miles along the border of a turnpike, and the commissioners approved the location and a committee reported that the company had complied with its charter as to the safe construction of the road. Thirty years afterward, when there was an increase of travel upon the highway and an increase of business on the road, so as to increase the risk of accidents, the state applied for a

* See also STREETS AND HIGHWAYS.

mandamus to compel the company to change the location of its road. The location and construction of the road had been approved at the beginning. *Held*, that the mandamus should not be granted. *State v. New Haven & N. Co.*, 45 Conn. 331.—DISTINGUISHED IN *State v. St. Paul, M. & M. R. Co.*, 35 Minn. 131.

A railway company was authorized by its charter to construct its tracks on a certain street. In order to avoid an obstruction at a certain point in said street, it was authorized to "use such portions of adjacent streets as may be necessary." The company accordingly laid its track on a portion of an adjacent street and continued for several years to run its cars on such track. Subsequently, the obstruction being removed, it undertook to construct its track wholly on the first-named street. A bill in equity being filed by another company having its tracks on part of such cross-street to restrain said construction—*held*: (1) that the first-named company had not made such an election of its location as to preclude it from altering the same, so as to run on the first-named street; (2) that complainant had no standing in court to obtain an injunction on such ground. The commonwealth or the city alone could institute such a proceeding. *Philadelphia & G. F. Pass. R. Co.'s Appeal*, 20 Am. & Eng. R. Cas. 1, 102 Pa. St. 123.

The defendant company was empowered by its acts to arch over the public thoroughfares in the parish, not only for the construction of the railway itself, but also for the erection of a station, although local acts existed for the removal of obstructions abutting near streets. *Attorney-General v. Eastern Counties R. Co.*, 10 M. & W. 263, 12 L. J. Ex. 106; see 2 Railw. Cas. 823.

66. Crossing navigable water.—An unrestricted grant of authority to construct a railroad from one designated point to another carries with it the authority to cross a navigable stream, if the railroad cannot reasonably be constructed without doing so. *Fall River Iron Works Co. v. Old Colony & F. R. R. Co.*, 5 Allen (Mass.) 221.

A charter, authorizing the construction of a railroad "to the place of shipping lumber" on a tide-water river, gives the right of extending the road across the flats and over the tide-water, to a point at which

lumber may be conveniently shipped. *Peavey v. Calais R. Co.*, 30 Me. 498.

A railroad company may be authorized to build its road across a canal, but in doing so it must construct the road so as not to obstruct or impair navigation. If it obstructs, it is liable to the canal company in damages. *Tuckahoe Canal Co. v. Tuckahoe & J. R. R. Co.*, 11 Leigh (Va.) 43.

Where a railroad is chartered so as to cross a navigable lake, it is not thereby relieved from paying damages to riparian owners on either side of the lake. *Dela-plaine v. Chicago & N. W. R. Co.*, 42 Wis. 214, 15 Am. Ky. Rep. 28.

67. Building branch roads, side-tracks, switches, etc.—The chartered right to build a railroad into a city implies the right to build also all the side-tracks and switches that safety, convenience, and utility may demand. *Cleveland & P. R. Co. v. Speer*, 56 Pa. St. 325.—DISTINGUISHED IN *Drady v. Des Moines & Ft. D. R. Co.*, 14 Am. & Eng. R. Cas. 130, 57 Iowa 393.

A charter to construct a "railroad" from coal-fields to a shipping point on a navigable river includes the right to construct sidings and branches to wharves, with the right to increase the same with increase of business. *Black v. Philadelphia & R. R. Co.*, 58 Pa. St. 249.—DISTINGUISHED IN *Philadelphia v. Philadelphia & R. R. Co.*, 19 Phila. (Pa.) 507. FOLLOWED IN *Knickerbocker Ice Co. v. Philadelphia & R. R. Co.*, 15 Phila. (Pa.) 48.

Where the charter of a company authorizes it to establish a railway along a public street to a particular point, and to run a locomotive on the road, the company will be entitled to make a turn-out from the main track to communicate with a depot erected by them near the terminus of the road, containing the machinery necessary for reversing the engine, etc., where no objection exists to the construction of a turn-out at that particular point; subject, however, to the police power of the municipality, and so constructed and used as to interfere as little as possible with the free use of the public way. *New Orleans & C. R. Co. v. Second Municipality*, 1 La. Ann. 128.—FOLLOWED IN *Knight v. Carrollton R. Co.*, 9 La. Ann. 284. REVIEWED IN *Mississippi & T. R. Co. v. Devaney*, 42 Miss. 555, 2 Am. Rep. 608.

The charter of a company authorizes

them, "as soon as they conveniently can," to construct a road with one or more tracks, and to make and erect "such warehouses, etc., and all the works and appendages for the convenience of said company for the use of said railroad." This gives the right to construct sidings, turn-outs, stations, engine-house, and all works and appendages usual in the convenient operation of a railroad. *Philadelphia, W. & B. R. Co. v. Williams*, 54 Pa. St. 103.

A railroad company was empowered by its charter to construct a railway between designated *termini*, so situated as to make it necessary to cross a turnpike road. In addition to the main line it built a lateral road across the turnpike so as to connect with another road. *Held*, that the right to cross the turnpike with the lateral road could not be implied from a provision in the company's charter, authorizing all railroad companies, upon equal terms, to run over its tracks. *Baltimore & H. de G. Turnpike Co. v. Union R. Co.*, 35 Md. 224.

The charter of a railroad company authorized them to construct "a railroad or lateral roads," together with a certain branch road, between certain *termini*, and also to build and maintain, at the river adjacent to one of the *termini*, or within a certain number of miles from such terminus, such wharves, bridges, and other facilities as they might think necessary for the enjoyment of the benefits conferred by the act. Several years after the road had been laid out and gone into operation the company attempted to build an additional branch road near the terminus aforesaid. *Held*, that such action was not authorized by the charter. *Morris & E. R. Co. v. Central R. Co.*, 31 N. J. L. 205.—APPLIED IN *Colorado Eastern R. Co. v. Union Pac. R. Co.*, 44 Am. & Eng. R. Cas. 10, 41 Fed. Rep. 293. REVIEWED IN *Re Bronson*, 1 Ont. 415.

68. Change of route — Choice of routes.—All railroad charters which do not express the contrary must be taken to allow the exercise of such a discretion in the location of the route as is incident to an ordinary practical survey of the same, made with reference to the nature of the country to be passed over and the obstacles to be encountered or avoided. *Southern Minn. R. Co. v. Stoddard*, 6 Minn. 150 (Gil. 92).

Where a railroad company has, by its charter, a right to use one of three routes,

it cannot complain that one of those not adopted, or abandoned by it, was adopted by another company. *Louisville & P. R. Co. v. Louisville C. R. Co.*, 2 Div. (Ky.) 175.

Where a railroad company constructs a new route and withdraws its through trains from the old one, a private individual, who only claims to be injured thereby by a depreciation of his property, cannot raise the question that the company has violated its charter. *Kinealy v. St. Louis, K. C. & N. R. Co.*, 69 Mo. 658.—FOLLOWING *Martindale v. Kansas City, St. J. & C. B. R. Co.*, 60 Mo. 510.

The 7th section of the defendant's charter provided that it should be lawful for the company to change or alter the location of said road or to locate new lines, when "additional tracks should be required at point or points between Phillipsburg and Elizabethport. *Held*, that as the company had not, since the passage of the act, established any new lines, its power in that respect was not exhausted, and that by the terms "between Phillipsburgh and Easton," as used in the charter, those two places, being the *termini* of the road, are not excluded. *Morris & E. R. Co. v. Central R. Co.*, 31 N. J. L. 205.—DISTINGUISHED IN *Childs v. Central R. Co.*, 33 N. J. L. 323.

A charter as originally granted authorized the company to change the location of its road upon the happening of certain contingencies. Afterward the state extended its credit in aiding the company to make a loan in such a manner as to give it the right to object to a change of route; but a subsequent act gave the assent of the state to such change. *Held*, that the latter act only gave the company the power that it had under its original charter, and therefore the board of directors could make the change without the assent of the stockholders. *Stewart v. Little Miami R. Co.*, 14 Ohio 353.

69. Purchasing road already built.*

—Where a company is authorized by its charter to construct a road between designated points, and is further authorized "to have, purchase, possess, enjoy, and retain lands, rents, hereditaments, tenements, goods, chattels, and effects of whatever kind, nature, or quality the same may be, and the same to sell, grant," etc., this authorizes the company to buy a road already

* See also title SALES OF RAILWAYS.

built over a portion of the route. *Branch v. Atlantic & G. R. Co.*, 3 Woods (U. S.) 481.

A railroad company chartered with the above powers and authorized to incorporate its stock with the stock of any other company, has power to sell its road to any other company authorized to buy it. *Branch v. Atlantic & G. R. Co.*, 3 Woods (U. S.) 481.

A railroad company was authorized by its charter to construct and use a railroad along a certain line, and also to connect with another road. By another section the company was authorized to purchase a road already built on the designated line. *Held*, that it was immaterial whether the company purchased or built the road. *Cleveland, P. & A. R. Co. v. Erie*, 27 Pa. St. 380.

70. Connecting with other lines of transportation.—A corporation whose railroad extends across the state of Wisconsin from Lake Michigan to the Mississippi river, and which is authorized by its charter to make "such contracts with any other person or corporation whatsoever as the management of its railroad and the convenience and interest of the corporation and the conduct of its affairs may, in the judgment of its directors, require;" and, by general laws, to make such contracts with any railroad company whose road terminates on the eastern shore of Lake Michigan "as will enable them to run their roads in connection with each other in such manner as they shall deem most beneficial to their interest;" and "to build, construct, and run, as part of its corporate property, such number of steamboats or vessels as they may deem necessary to facilitate the business operations of such company or companies;" and also "to accept from any other state or territory of the United States, and use any powers or privileges applicable to the carrying of persons and property by railway or steamboat in said state or territory"—has the power, for the purpose of carrying passengers and freight in connection with its own railroad and business, to enter into an agreement with the proprietors of steamboats running, by way of the great lakes, between its eastern terminus and Buffalo, in the state of New York, by which it guarantees that the gross earnings of each boat for two years shall amount to a certain sum. *Green Bay & M. R. Co. v. Union Steamboat Co.*, 107 U. S. 98, 2 Sup. Ct. Rep. 221.—
QUOTED IN *Venner v. Atchison*, T. & S. F.

R. Co., 28 Fed. Rep. 581; *Tod v. Kentucky Union Land Co.*, 57 Fed. Rep. 47.

A provision in the charter of a railroad company requiring the company to permit other companies to form "running connections" with it, does not impose any obligation upon such company to carry freight in the cars in which it may be tendered by a connecting line, when its own cars are not in use, and the freight would not be injured by transfer to another car. *Oregon S. L. & U. N. R. Co. v. Northern Pac. R. Co.*, 51 Am. & Eng. R. Cas. 145, 51 Fed. Rep. 465.

The grant to a railroad company of a right to extend and unite with any other railroad in the state gives a general authority to extend to any other road within the prescribed limits. *Belleville & I. R. Co. v. Gregory*, 15 Ill. 20.

In 1846 one railroad company, by a provision in its charter, was authorized to locate a portion of its road on the location of another company north of a certain point, and to use a part of the road north of the same point upon paying "a reasonable compensation for the use of their road, as is granted by this act; the amount to be paid in one sum, and not as annual rent, and to be determined, in case of disagreement, by three referees." *Held*, that the "use" of the road contemplated was the use of a part of the location of the existing road for the construction of the new one, and not the use of the residue of the existing road, that use being regulated by another statute; neither did it include the use of branches constructed before 1846. *Lowell & L. R. Co. v. Boston & L. R. Corp.*, 7 Gray (Mass.) 27.

When authority is given to connect with the C. & S. C. railroad or with the N. C. railroad, at Charlotte, and the railroad locates its line and proceeds to construct it to a junction with the N. C. railroad, but a few months before its completion to the latter point crosses another railroad which connects with the C. & S. C. railroad, and by permission of this latter railroad it runs its cars temporarily over it to the C. & S. C. railroad (laying down a third rail by reason of difference in gauge), this is not a "construction of its railroad to a junction with the C. & S. C. railroad" which deprives it of its election to connect with the N. C. railroad. *Purifoy v. Richmond & D. R. Co.*, 46 Am. & Eng. R. Cas. 232, 108 N. Car. 100, 12 S. E. Rep. 741.

A railroad company was authorized to connect their road with any road legally authorized to come within the limits of a certain city named. Another section of its charter authorized it to purchase a road which had been built along the same route, and forfeited to the state. A third road had been built from the designated city for some distance in another direction, which had been also declared forfeited. *Held*, that the company could either build a road or occupy or purchase the one already built; that the second one mentioned as built and forfeited was a legally constructed road for the purpose of making a connection; and that the legality of the road could not be inquired into collaterally. *Cleveland, P. & A. R. Co. v. Erie*, 27 Pa. St. 380.

71. Extending the line.—A provision in the charter of a railroad company, authorizing it to change the location of its road between the terminal points named, gives no power to change the terminal points themselves. *Attorney-General v. West Wisconsin R. Co.*, 36 Wis. 466, 9 Am. Ry. Rep. 141.

Where a company by an amendment is authorized to extend its road to a point named, which is not on a direct continuing line of the road as designated in the original charter, it is not authorized to depart from the original terminus of the road as fixed by charter and build a direct line to the new point on the extension. *Works v. Junction R. Co.*, 5 McLean (U. S.) 425.

Under Wis. Act of 1863, ch. 243, chartering the Tomah & L. S. C. R. Co., and providing in section 5 that the company was authorized to "locate, construct, and operate a railroad from such point as the directors shall determine, in the town of Tomah * * * or on the track of the Milwaukee and La Crosse railroad, or any other railway running out of Tomah" to a point on Lake St. Croix, the southern terminus of the road is required to be in Tomah and on the track of some other road. *Attorney-General v. West Wisconsin R. Co.*, 36 Wis. 466, 9 Am. Ry. Rep. 141.—QUOTING *People v. Albany & V. R. Co.*, 19 How. Pr. 523, 37 Barb. 216, 24 N. Y. 261.—DISTINGUISHED IN *Atlantic & P. R. Co. v. St. Louis*, 66 Mo. 228; *Trester v. Missouri Pac. R. Co.*, 33 Neb. 171.

3. Conditions, Reservations, Exemptions.

72. Conditions, generally.—Where the legislature has expressed the conditions

on which the grant of a franchise shall depend, it is not competent to raise other and additional conditions by mere implications. *Cheraw & C. R. Co. v. White*, 10 So. Car. 155.

A stipulation in the charter of a railroad company that the company shall pay to the state a bonus, or a portion of its earnings, is not repugnant to the constitution of the United States. Such a stipulation is different in principle from the imposition of a tax on the movement or transportation of goods or persons from one state to another. The latter is an interference with and a regulation of commerce between the states and beyond the power of the state to impose. The former is not. *Baltimore & O. R. Co. v. Maryland*, 21 Wall. (U. S.) 456, 6 Am. Ry. Rep. 483.

73. Conditions precedent.—Where the plea of *nul tiel* corporation is filed to an action of replevin brought by a railway company, it must appear that the body has accepted the charter and complied with the conditions precedent to its organization. When no such acts are shown, but it appears that another company is in possession and exercising the franchises, the presumption will be indulged that the plaintiff has not organized. *Wheadon v. Peoria, P. & J. R. Co.*, 42 Ill. 494.

A condition precedent is anything which, by the express provisions of the statute, is made a condition to be performed on the part of the corporation before, and as a foundation of the exercise of the powers and privileges under the charter. *Lyons v. Orange, A. & M. R. Co.*, 32 Md. 18.

An act incorporating a railroad company, with a condition inserted therein that it shall be void if not carried into effect within a time limited, and containing also a proviso that, after 20 years, the commonwealth may, in a certain contingency, purchase the franchise of the road, is not, in virtue of either of these provisions, expressly limited as to its duration, within the Massachusetts Act of 1830, ch. 81 (Rev. St. ch. 44, § 23). *Roxbury v. Boston & P. R. Corp.*, 6 Cush. (Mass.) 424.

Where a railroad charter confers corporate powers in language importing an immediate grant, with a proviso "that said persons shall commence operations upon said road within two years after the passage of this act and complete the same within five years," the requirements of the proviso

are not conditions precedent to a corporate existence. *Cheraw & C. R. Co. v. White*, 14 So. Car. 51.—FOLLOWED IN *Cheraw & C. R. Co. v. Garland*, 14 So. Car. 63.

74. Reservations.—A reservation, in the charter of a railroad corporation, of a right to authorize other railroad corporations to enter upon and use this railroad, extends to a branch railroad purchased from another corporation, whose charter contained no such reservation, although the legislature, since the purchase, have enacted that the corporation purchasing "shall have all the powers and privileges, and be subject to all the duties, restrictions, and liabilities" set forth in that charter. *Lexington & W. C. R. Co. v. Fitchburg R. Co.*, 14 Gray (Mass.) 266.

75. Exemptions, generally.—A provision in a railroad charter, giving the company the fee-simple title to the land in its right of way, and providing that it shall have the "sole use and occupation of the same, and no person, body corporate or politic shall in any way interfere therewith, molest, disturb, or injure any of the rights and privileges granted, or that would be calculated to detract from or affect the profits of said corporation," does not relieve the company from the operation of a subsequent statute, making railroad companies liable for stock killed, unless the road is properly fenced. *Indianapolis & C. R. Co. v. Kercheval*, 16 Ind. 84.

For acts done under legislative sanction which are essentially private wrongs and a direct invasion of private property, the company's charter is no justification. *Costigan v. Pennsylvania R. Co.*, 54 N. J. L. 233, 23 Atl. Rep. 810.

The authority granted to a corporation by its charter to construct a railroad does not thereby confer upon it an immunity from liability for damages to others in respect to their adjacent lands, when, under the same circumstances, a private individual would be liable. Such immunity expressly granted by the legislature would be in conflict with the Magna Charta and the constitution. *Staton v. Norfolk & C. R. Co.*, 52 Am. & Eng. R. Cas. 686, 111 N. Car. 278, 16 S. E. Rep. 181.—QUOTING *Raleigh & G. R. Co. v. Davis*, 2 Dev. & B. 451; *Cornelius v. Glen*, 7 Jones 512; *State v. Glen*, 7 Jones, 321; *Johnston v. Rankin*, 70 N. Car. 550. REVIEWING *Jenkins v. Wilmington & W. R. Co.*, 110 N. Car. 438.

76. Exemption from taxation.*—

The payment by a corporation to the government of the state of a bonus for granting a charter of incorporation does not protect the grantee of the franchise from all taxation, except such as the state has reserved a right to impose in the charter itself. *Minot v. Philadelphia, W. & B. R. Co.*, 2 Abb. (U. S.) 323; affirmed in 18 Wall. 206.—QUOTING *Philadelphia & W. R. Co. v. Maryland*, 10 How. (U. S.) 376.

The exemption from taxation granted by its charter to the Georgia R. & B. Co. is a contract with the state, and such exemption cannot be affected or withdrawn by subsequent legislation. *State v. Georgia R. & B. Co.*, 54 Ga. 423.

Whilst the words in limiting the taxing power of the state are very broad in the original charter of 1845 of the defendant, the limitation covering the railway and its appurtenances and all property therewith connected, yet, under the rules for the construction of such grants, they will not be construed to embrace real estate other than that the continuous use of which is necessary for the road—that is, that lying each side of its track and that covered by its depots, yards, and shops, and other places necessary to the full exercise of its franchise. *Wright v. Southwestern R. Co.*, 64 Ga. 783.

A provision in a railroad charter that the company should pay a certain sum to the state as taxes, "and no more," is a limitation as to the amount of state taxation, but does not relieve the company from local or county taxes. *Kentucky C. R. Co. v. Pendleton County*, (Ky.) 2 S. W. Rep. 176.—FOLLOWING *Kentucky C. R. Co. v. Bourbon County*, 82 Ky. 497.

Under the Md. Act of 1831, ch. 296, incorporating the Delaware & Maryland R. Co., and exempting it from taxation "except upon that portion of the *termini* and fixed works of said company which may be within the state of Maryland," it is not competent for the legislature to impose a tax upon the

* See also TAXES, VI.

Charter contracts exempting from taxation, see note, 17 AM. & ENG. R. CAS. 398.

Charter subject to reserved power of amendment; taxation may be imposed notwithstanding exemption clause, see note, 17 AM. & ENG. R. CAS. 410.

Exemption from taxation. Yazoo & Mississippi Valley Railroad Company's charter construed, see 37 AM. & ENG. R. CAS. 394, *abstr.*

gross receipts upon that portion of the road after it has become consolidated with another. *State v. Philadelphia, W. & B. R. Co.*, 45 Md. 361.—REVIEWING *Wilmington R. Co. v. Reid*, 13 Wall. (U. S.) 264; *Philadelphia, W. & B. R. Co. v. Bayless*, 2 Gill (Md.) 355.

A provision in a charter of a railroad company that they should be subject to a certain specified tax in lieu of all other taxes will apply to all property held by the company necessary to accomplish the end for which they were incorporated. *State (New Jersey R. & T. Co., pros.) v. Hancock*, 35 N. J. L. 537, 3 Am. Ry. Rep. 223; reversing 33 N. J. L. 315.—FOLLOWING *Gardner v. State*, 21 N. J. L. 357; *State v. Flavell*, 24 N. J. L. 370; *State v. Ross*, 24 N. J. L. 497; *State v. Blundell*, 24 N. J. L. 403; *State v. Collector*, 26 N. J. L. 519, *State v. Leicester*, 29 N. J. L. 541; *Cook v. State*, 33 N. J. L. 475.—DISTINGUISHED IN *State v. Mayor, etc., of Jersey City*, 49 N. J. L. 540, 9 Atl. Rep. 782, 8 Cent. Rep. 633. FOLLOWED IN *State v. Woodruff*, 36 N. J. L. 94; *State v. Binninger*, 1 Am. & Eng. R. Cas. 410, 42 N. J. L. 528.

The word "necessary" in this connection does not mean "indispensable"; it embraces all things suitable and proper for carrying into execution the powers granted, and it is not to be contradistinguished from the word "convenient." *State (New Jersey R. & T. Co., pros.) v. Hancock*, 35 N. J. L. 537, 3 Am. Ry. Rep. 223; reversing 33 N. J. L. 315.—REVIEWING AND CRITICISING *State v. Com'rs of Mansfield*, 23 N. J. L. 510.—DISTINGUISHED IN *United N. J. R. & C. Co. v. Jersey City*, 53 N. J. L. 547. EXPLAINED IN *Greenwich v. Easton & A. R. Co.*, 24 N. J. Eq. 217.

A charter of a railroad company provided that the company should be subject to a certain specified tax, and that no other tax should be imposed. *Held*, that such exemption extended to a tract of gravel land purchased to provide materials for the repair of their road, and also to a branch road connecting said gravel-pits with their tramway. *State (New Jersey R. & T. Co., pros.) v. Hancock*, 35 N. J. L. 537, 3 Am. Ry. Rep. 223; reversing 33 N. J. L. 315.—QUOTED IN *State v. Fuller*, 40 N. J. L. 328.

A provision in a charter that a railroad company shall not be liable for taxes for a term of twenty years, in consideration that it will carry, without charge, all state troops,

and munitions of war, which the state requires it to carry, violates a provision of the Oregon constitution requiring all taxation to be equal and uniform, and that there shall be a just valuation for taxation of all property. *Hogg v. Mackay*, 23 Oreg. 339, 31 Pac. Rep. 779, 19 L. R. A. 77.—DISAPPROVING *Hunsaker v. Wright*, 30 Ill. 146. QUOTING *Huntington v. Worthen*, 120 U. S. 97, 7 Sup. Ct. Rep. 469; *Washington University v. Rouse*, 8 Wall. (U. S.) 439. REVIEWING *Memphis & C. R. Co. v. Gaines*, 3 Tenn. Ch. 604; *Ellis v. Louisville & N. R. Co.*, 8 Baxt. (Tenn.) 530.

IV. ABANDONMENT AND FORFEITURE.

77. Grounds of forfeiture, generally.*—When a charter expressly imposes a duty which the corporation is to perform, not merely to the citizen, but towards the sovereign itself, although it may not declare that non-performance shall work a forfeiture, yet it must be taken to have been required by the state as a material stipulation, for the non-performance of which by the corporation the state may put an end to the contract. *Attorney-General v. Petersburg & R. R. Co.*, 6 Ired. (N. Car.) 456.

A railroad corporation does not necessarily forfeit its charter where, under legislative authority, it conveys its road to another corporation. *State v. St. Paul & S. C. R. Co.*, 35 Minn. 222, 28 N. W. Rep. 245.

The fact that a railroad has been sued and declared insolvent, and a receiver appointed, does not justify the court in declaring its charter forfeited, and restraining a further construction of the road, where no proceeding of forfeiture has been taken by the people. *Moran v. Lydecker*, 27 Hun (N. Y.) 582, 11 Abb. N. Cas. 298.

The fact that the subscribers to the capital stock of a corporation do not, at the time of subscription, pay \$5 on each share

* Forfeiture of charter of corporation, see note, 29 AM. & ENG. R. CAS. 451.

Forfeiture of benefits conferred by congress, see note, 13 AM. & ENG. R. CAS. 172.

Failure to observe implied conditions as grounds of forfeiture of charter, see note, 8 AM. ST. REP. 188.

Substantial performance of conditions of charter is all that is required to prevent forfeiture, see note, 8 AM. ST. REP. 182.

Abandonment of business, transfer of assets, and insolvency as grounds for forfeiture of charter, see note, 8 AM. ST. REP. 190.

Charters only forfeited by acts in which public has an interest, see note, 8 AM. ST. REP. 182.

subscribed will not invalidate the charter. *Commonwealth v. West Chester R. Co.*, 3 *Grant Cas. (Pa.)* 200.—DISTINGUISHED IN *People v. Chambers*, 42 Cal. 201.

A Pennsylvania corporation obtained a charter also from Maryland, and then instituted suit in a federal court to test the validity of certain Pennsylvania laws. *Held*, that a federal court sitting in Pennsylvania is not a court of another sovereign, but one of the courts of that state; therefore suing in such court was no breach of duty that the corporation owed to Pennsylvania, and, as a result, no cause for forfeiture of its charter. *Commonwealth ex rel. v. Pittsburgh & C. R. Co.*, 58 Pa. St. 26.

Under an act of the legislature a railroad succeeded to the property and franchises of a former company, on condition that it pay certain debts of the former, which was made a condition precedent to the exercise of its charter privileges. *Held*, that a failure to pay a debt might work a forfeiture of the charter, at the suit of the state; but this could not affect the right of an individual to proceed by suit to collect such a debt. *St. Louis, A. & T. H. R. Co. v. Miller*, 43 Ill. 199.

78. Failure to construct road within time limited.*—Under a provision in a statute that upon failure to build a road within a specified time, all unbuilt portions thereof, "with the properties, rights, and franchises appertaining hereto, shall be absolutely forfeited," the failure to build a branch road causes the forfeiture of the corporate charter only as to such particular branch. *State v. St. Paul & S. C. R. Co.*, 35 Minn. 222, 28 N. W. Rep. 245.

The provisions of a railroad charter, requiring that a certain section of the road shall be completed within a specified time, and that on failure the charter should be null and void, are not of the essence of the contract between the corporation and stockholder. *San Antonio v. Jones*, 28 Tex. 19.

79. Misuse, non-use, or abuse of franchise.†—It is a tacit condition, an-

nexed to or implied in the charter of every private corporation, that the government may resume its corporate franchises for a misuser or non-user thereof. *State ex rel. v. Minnesota C. R. Co.*, 29 Am. & Eng. R. Cas. 440, 36 Minn. 246, 30 N. W. Rep. 816.

Where a charter provides that "if the corporation shall at any time misuse or abuse" its franchises, the legislature may revoke the grant, the power of revocation is thereby made conditional upon the fact of some misuse or abuse; and this fact must be proved upon some inquiry giving the corporation an opportunity to be heard in defense before the charter can be revoked. *Baltimore v. Pittsburgh & C. R. Co.*, 1 Abb. (U. S.) 9.

It is not every non-user that will furnish a sufficient ground of forfeiture of a charter. *Chesapeake & O. Canal Co. v. Baltimore & O. R. Co.*, 4 Gill & J. (Md.) 1.

A railroad corporation assumes the performance of duties for the benefit of the public generally. When such corporation, for a period of five years, fails to construct the line of railroad named in its charter, but condemns private property and constructs a railroad wholly unsuited to the wants of the public, and for the benefit only of coal mines, owned and operated by the principal corporators and stockholders of such railroad company, it is a misuse of its corporate powers, franchises, and privileges. *State v. Hazelton & L. R. Co.*, 14 Am. & Eng. R. Cas. 51, 20 Am. & Eng. R. Cas. 560, 40 Ohio St. 504.

80. Non-residence of officers and directors.—The failure of the president or vice-president and a majority of the directors of a railroad corporation to reside in Texas after the 19th of June, 1858, as required by the act of 1857, is a good ground of forfeiture of the charter. That the act was passed after the organization of the company, under its charter, does not affect its validity or render it liable to the objection that it is an unconstitutional provision which impairs the obligation of the contract. *State v. Southern Pac. R. Co.*, 24 Tex. 80.

The statutes of Wisconsin relating to the levy of an attachment or execution upon shares of stockholders in corporations, to proceedings by or against corporations, and

trusts, are ground for forfeiture of charter, see note, 8 Am. ST. REP. 191.

* Failure to observe express conditions as ground of forfeiture of charter, see note, 8 Am. ST. REP. 186.

† Misuser or non-user as ground for forfeiture of franchises, see notes, 20 AM. & ENG. R. CAS. 561; 14 Id. 46.

Willful abuse or improper neglect is necessary to work forfeiture of charter, see note, 8 Am. ST. REP. 183.

Illegal acts, such as forming combinations or

to the exercise of the visitatorial powers of the state over them, as well as the act regulating the duties of the railroad commissioner and the general act concerning railroad corporations, under which the defendant was organized, and other statutes, require, at least by necessary implication, that the principal place of business, the records, and the residence of the principal officers of private corporations created by the state shall be within the state, at least so far as may be necessary to give full effect to those statutes; and the charter of such a corporation may be adjudged forfeited for continued neglect of such duty, under Wis. Acts 1874, ch. 283. *State ex rel. v. Milwaukee, L. S. & W. R. Co.*, 45 Wis. 579.

Independently of statutes, it is the duty of a private corporation to keep its principal place of business, its records, and the residence of its officers so located as to render it accessible to the progress and to the exercise of the visitatorial power of the state by which it is created; and a forfeiture may be adjudged for violation of this common-law obligation. *State ex rel. v. Milwaukee, L. S. & W. R. Co.*, 45 Wis. 579.

81. Intent to neglect duty in future no ground.—A railroad company organized under the general law cannot shirk or avoid any duty which it owes to the public; and an allegation or claim that the company at some future time intends to neglect the performance of its full duty to the public is not a ground for forfeiture; nor can the question of whether the company intends in good faith to carry out the declared objects of its organization be inquired into in *quo warranto* proceedings. *State v. Martin*, 51 Kan. 462, 33 Pac. Rep. 9.

82. The courts, not the legislature, to enforce forfeitures.*—It seems that a proper mode for the legislature to institute the necessary preliminary inquiry into the fact of misuse would be to pass a resolution directing that the attorney-general institute the proper proceeding in the courts, to ascertain the fact; and that if, in such proceeding, the charge be found true, the charter be revoked. *Baltimore v. Pittsburgh & C. R. Co.*, 1 Abb. (U. S.) 9.—REVIEWING *Erie & N. E. R. Co. v. Casey*, 26 Pa. St. 287, 1 Grant Cas. 274.

* Generally forfeiture of charter is a judicial question and cannot be determined by legislature, see note, 8 AM. ST. REP. 197.

Where a charter is granted with the provision that the legislature may repeal the same upon "misuse or abuse of any of the privileges granted," the legislature is not the sole and exclusive judge of the facts that constitute misuse or abuse. That rests in the courts. *Commonwealth ex rel v. Pittsburg & C. R. Co.*, 58 Pa. St. 26.—DISAPPROVING *Miners' Bank v. United States*, 1 Greene (Iowa) 553.—QUOTED IN *Lejee v. Continental Pass. R. Co.*, 10 Phila. (Pa.) 362.

To authorize the institution of a suit, in the name of the state, to forfeit the charter of a corporation, it is not necessary that the legislature should, by some general or special statute, have authorized and directed it to be brought. *State v. Southern Pac. R. Co.*, 24 Tex. 80.—QUOTED IN *State v. Rio Grande R. Co.*, 41 Tex. 217.

The language used in a charter is that upon the failure of the company to construct its road to S. A. within the prescribed time, "then this charter shall be forfeited." This language neither prescribes nor indicates the manner of forfeiture. In cases where such words are employed the uniform construction is that they prescribe a ground of forfeiture, and that the manner must be by a judicial proceeding instituted for that purpose. *Galveston, H. & S. A. R. Co. v. State*, 51 Am. & Eng. R. Cas. 287, 81 Tex. 572, 17 S. W. Rep. 67.

83. Necessity of a judicial inquiry—Forfeitures declared by statute.*—While a forfeiture at common law does not operate to divest the title of the owner until, by a proper judgment in a suit instituted for that purpose, the rights of the state have been established, it is otherwise when the forfeiture is declared by statute. In the latter case the title to the thing forfeited immediately vests in the state, upon the commission of the offense or happening of the event for which the forfeiture is declared, or at such other time and upon such other conditions as the statute may name. *Oakland R. Co. v. Oakland, B. & F. V. R. Co.*, 45 Cal. 365, 5 Am. Ry. Rep. 148.—FOLLOWING *United States v. Grundy*,

* Forfeitures declared by statute, see note, 38 AM. & ENG. R. CAS. 501.

Proceedings to declare forfeiture of charter, see note, 8 AM. ST. REP. 198.

When cause of forfeiture of charter is shown, can company excuse or atone therefor? See note, 8 AM. ST. REP. 185.

3 Cranch (U. S.) 337; *Fountaine v. Phoenix Ins. Co.*, 11 Johns. (N. Y.) 293; *Borland v. Lewis*, 43 Cal. 569. QUOTING *Bennett v. American Art Union*, 5 Sandf. (N. Y.) 614; *New York, H. & N. R. Co. v. Boston, H. & E. R. Co.*, 36 Conn. 196.

A corporation failing to comply with New York General Railroad Act of 1850, ch. 140, § 47, as amended in 1867, ch. 775, § 1, requiring companies chartered under it to commence the construction of their road within five years, becomes extinct, and no action or judicial proceeding is needed to declare a forfeiture of the charter. *In re Brooklyn, W. & N. R. Co.*, 75 N. Y. 335.—DISTINGUISHED IN *Re Brooklyn El. R. Co.*, 125 N. Y. 434. FOLLOWED IN *Farnham v. Benedict*, 107 N. Y. 159.—*S. P.*, *Bywaters v. Paris & G. N. R. Co.*, 38 Am. & Eng. R. Cas. 498, 73 Tex. 624, 11 S. W. Rep. 856.—QUOTING *In re Brooklyn, W. & N. R. Co.*, 72 N. Y. 248.—*Sulphur Springs & M. P. R. Co. v. St. Louis, A. & T. R. Co.*, 2 Tex. Civ. App. 650, 22 S. W. Rep. 107, 23 S. W. Rep. 1012.

When apt words are used to express that the forfeiture shall take place upon the happening of a contingency without the necessity of a judicial declaration, then the courts will give effect to that intention whenever the question is presented in a judicial inquiry. *Galveston, H. & S. A. R. Co. v. State*, 51 Am. & Eng. R. Cas. 287, 81 Tex. 572, 17 S. W. Rep. 67.

The Brooklyn Steam Transit Co. was incorporated by N. Y. act of 1871, ch. 940, with authority to construct an underground and elevated railroad in the city of Brooklyn. Section 17 of the act provided that the franchises, powers, and rights thereby granted should be deemed forfeited and terminated unless the company organized and constructed at least one mile of its road within three years. By an amendatory act of 1873, ch. 61, § 4, the time was extended to July 4, 1876. The company organized within the time, transacted business, made by-laws, procured surveys, plans, and estimates for the road, but built no portion of its road until June, 1878, when it laid one mile of track outside of the city, and commenced about the same time to lay foundations for an elevated track on the streets of the city. The city authorities interfered to prevent further work, and the company procured an injunction to restrain such interference. *Held*, that the company had lost its corpo-

rate right to construct a road, and the city had a right to interfere; that the limitations in the charter were not abrogated by not being repeated in the amendatory act; that the provisions of the charter remained in force except so far as modified by the latter act; that the company was not kept alive by New York Act of 1875, ch. 593, relieving from forfeiture companies then in default, as it was not then in default; that the company could not claim the benefits of the act of 1879, ch. 350, amending the act of 1875, as it was passed after judgment had been rendered in the trial court. And it seems that the amendatory act relates only to corporations not in default at the time of its passage, and so did not apply to this company. *Brooklyn Steam Transit Co. v. Brooklyn*, 78 N. Y. 524.—DISTINGUISHED IN *Bybee v. Oregon & C. R. Co.*, 139 U. S. 663; *Hughes v. Northern Pac. R. Co.*, 9 Sawy. (U. S.) 313, 18 Fed. Rep. 106; *In re Kings County El. R. Co.*, 105 N. Y. 97, 13 N. E. Rep. 18, 7 N. Y. S. R. 186, 7 Cent. Rep. 232; *Day v. Ogdensburgh & L. C. R. Co.*, 107 N. Y. 129; *In re Brooklyn El. R. Co.*, 125 N. Y. 434. REFERRED TO IN *Re Brooklyn, W. & N. R. Co.*, 81 N. Y. 69.

84. Equity cannot decree a forfeiture.*—Corporate franchises cannot be declared forfeited to the commonwealth in a proceeding in equity; but under Pennsylvania act of June 19, 1871, an equity court may interfere by injunction to restrain an injury which it is claimed will result by a company claiming to have a franchise. *Lejee v. Continental Pass. R. Co.*, 10 Phila. (Pa.) 362.

The Pennsylvania act of June 19, 1871, enables a private citizen, by bill in equity, to call upon a corporation to show, by its charter, that it has the power to do a certain act; or, on the other hand, the complainant may show, from the said charter, that powers once possessed by the defendant corporation have been forfeited by lapse of time or otherwise. But the act does not authorize investigation, by such citizen, into causes of forfeiture, other than those which may appear from the conditions and limitations of the charter. *Western Pa. R. Co.'s Appeal*, 104 Pa. St. 399.—DISTINGUISHING *McCandless' Appeal*, 70 Pa. St. 210; *Edgewood R. Co.'s*

* Court of equity cannot decree forfeiture of charter, see note, 8 AM. ST. REP. 200.

Appeal, 79 Pa. St. 257.—QUOTED IN *Weidenfeld v. Sugar Run R. Co.*, 51 Am. & Eng. R. Cas. 505, 48 Fed. Rep. 615.

85. Forfeiture not declared in a collateral proceeding.*—Advantage cannot be taken of non-user or misuser of an act of incorporation in any collateral action. *Union Branch R. Co. v. East Tenn. & G. R. Co.*, 14 Ga. 327.

The charter of incorporation of a regularly incorporated company cannot be called in question or assailed in any merely collateral suit affecting the rights of the corporation, such as a bill for an injunction to restrain the exercise of powers embraced within its charter, filed by a private suitor. Such a collateral attack is unauthorized by act of June 19, 1871, P. L. 1361. *Twelfth-St. Market Co. v. Philadelphia & R. T. R. Co.*, 47 Am. & Eng. R. Cas. 98, 142 Pa. St. 580, 21 Atl. Rep. 902.

86. Not declared at instance of private parties.†—A state cannot proceed through its attorney-general to have a charter declared forfeited except for causes of forfeiture provided for in the charter, or for wilful abuse or improper neglect on the part of the corporation of its duties or franchises. A stockholder cannot institute such a proceeding. *State v. Rio Grande R. Co.*, 41 Tex. 217.—QUOTING *State v. Southern Pac. R. Co.*, 24 Tex. 80.

Where a property owner seeks an injunction to restrain a railroad company from laying side-tracks, on the ground that the company has forfeited its rights under its charter by failing to complete its road within the prescribed time, the court will not assume that the company has forfeited its rights under the charter, in the absence of anything to show that any proceeding against it has been instituted by the state, and where the company is still claiming to act under its charter. *Haight v. New York El. R. Co.*, 49 How. Pr. (N. Y.) 20.—FOLLOWING *Currier v. West Side El. P. R. Co.*, 6 Blatchf. (U. S.) 487; *People v. Kerr*, 27 N. Y. 188.

87. Not available as a defense to suit by corporation.—In a suit by a cor-

poration it cannot be shown in defense that the plaintiffs have forfeited their corporate rights by misuser or non-user. *Hammitt v. Little Rock & N. R. Co.*, 20 Ark. 204.

That which would operate to forfeit a charter granted by the legislature cannot be taken advantage of by a stockholder of the corporation in an action brought against him for the recovery of assessments on his stock. The state alone can claim such forfeiture. *Connecticut & P. R. R. Co. v. Bailey*, 24 Vt. 465.

Where the charter of a railroad corporation contained a provision requiring its road to be commenced and completed within times specified, and that in case of default it should "forfeit the rights acquired by" it under the acts of incorporation—held, that the provision did not *ex proprio vigore* put an end to its corporate life in case of default, but simply exposed it to proceedings on behalf of the state to establish and enforce the forfeiture; and until the state thus intervened a private individual might not set up the forfeiture or in any way challenge the corporate existence, and therefore the fact that the company had made default was no answer or defense in proceedings on the part of the company to acquire title to lands for the purposes of its road. *In re Brooklyn El. R. Co.*, 46 Am. & Eng. R. Cas. 251, 125 N. Y. 434, 26 N. E. Rep. 474, 35 N. Y. S. R. 451; *affirming* 57 Hun 590, 32 N. Y. S. R. 1065, 11 N. Y. Supp. 161.

The distinction pointed out between such a case and one where the charter provides that in case of default the "corporate existence and powers shall cease," or that "all the powers, rights, and franchises * * * granted shall be deemed forfeited and terminated." *In re Brooklyn El. R. Co.*, 46 Am. & Eng. R. Cas. 251, 125 N. Y. 434, 26 N. E. Rep. 474, 35 N. Y. S. R. 451; *affirming* 57 Hun 590, 32 N. Y. S. R. 1065, 11 N. Y. Supp. 161.—DISTINGUISHING *In re Brooklyn, W. & N. R. Co.*, 72 N. Y. 245, 75 N. Y. 335; *Brooklyn Steam Transit Co. v. Brooklyn*, 78 N. Y. 524.

88. — except in eminent domain proceedings.—Where a railroad company is proceeding under the right of eminent domain to appropriate private lands for its corporate purposes, the owner may defend on the ground that the company has forfeited its charter by reason of non-performance of certain conditions therein contained. *In re Brooklyn, W. & N. R.*

* Cause of forfeiture cannot be taken advantage of collaterally. See note, 14 AM. & ENG. R. CAS. 47.

† As a rule, forfeiture of charter must be adjudged in direct proceeding by state. See full collection of authorities in note, 8 AM. ST. REP. 193.

Co., 72 N. Y. 245, 55 How. Pr. 14.—DISTINGUISHED IN *Bybee v. Oregon & C. R. Co.*, 139 U. S. 663; *Hughes v. Northern Pac. R. Co.*, 9 Sawy. (U. S.) 313, 18 Fed. Rep. 106; In re Kings County El. R. Co., 105 N. Y. 97, 13 N. E. Rep. 18, 7 N. Y. S. R. 186, 7 Cent. Rep. 232; *Day v. Ogdensburgh & L. C. R. Co.*, 107 N. Y. 129; In re Brooklyn El. R. Co., 125 N. Y. 434. FOLLOWED IN *Brooklyn Steam Transit Co. v. Brooklyn*, 78 N. Y. 524; *New York Cable Co. v. Mayor*, etc., of N. Y., 104 N. Y. 1, 10 N. E. Rep. 332, 4 N. Y. S. R. 308; *Farnham v. Benedict*, 107 N. Y. 159. QUOTED IN *Bywaters v. Paris & G. N. R. Co.*, 38 Am. & Eng. R. Cas. 498, 73 Tex. 624, 11 S. W. Rep. 856.

89. Enforcement by *scire facias*.—While it is clear that proceedings by *scire facias*, or otherwise, against a corporation for the forfeiture of its charter cannot be maintained, except by the sanction and authority of the legislature, a special act of assembly for this purpose is not required. The legislature may, by a general law, authorize suits for this purpose to be instituted at the instance of private parties, or confer the power upon the governor to cause the proceeding to be instituted whenever he may consider the public interest so requires. Both of these powers have been conferred in Maryland by the Act of 1818, ch. 177, § 4 (Code, art. 12), and the Act of 1868, ch. 471, § 176. *State v. Consolidation Coal Co.*, 46 Md. 1.

90. Waiver of grounds of forfeiture.*—Although the charter of an incorporated company may be forfeited, yet the government which granted it may not choose to enforce the forfeiture, and may give it validity by recognizing its existence, and by the extension of further franchises; and when the company accepts the provisions of such extension the former grant must give way to it wherever the provisions are inconsistent. *Baltimore & O. R. Co. v. Sup'rs of Marshall County*, 3 W. Va. 319.

The four years, at the expiration of which a charter of incorporation becomes by the statute forfeited unless the company be organized and its business commenced within that time, do not run against a corporation observing the statutory requirement within that time after its charter has been amended.

* Waiver by state of cause of forfeiture, see notes, 14 AM. & ENG. R. CAS. 47; 8 AM. ST. REP. 200.

The amendment is a legislative waiver of any forfeiture. *Farnsworth v. Lime Rock R. Co.*, 47 Am. & Eng. R. Cas. 54, 83 Me. 440, 22 Atl. Rep. 373.

Nothing contained in the Texas act of March 28, 1885, evidences the intention of the legislature to waive the forfeiture of the charter of a railway corporation, chartered by Texas, which has misused its franchise or failed to carry out the purposes for which it was created. *East Line & R. R. Co. v. State*, 40 Am. & Eng. R. Cas. 574, 75 Tex. 434, 12 S. W. Rep. 690.

Where a corporation has forfeited its charter by non-user, but is still maintaining a *de facto* existence, and the legislature passes an act reviving and continuing in force the charter, if it be silent as to the existing officers, or how others shall be elected, it must be construed as continuing the organization as existing at the time of the passage of the act. *Phillips v. Albany*, 28 Wis. 340, 5 Am. Ry. Rep. 46.

The charter of a railroad provided that it should be null and void if the road was not commenced in five years and completed in ten. *Held*, that this was but a privilege reserved to the state to declare the charter forfeited, which might be waived by subsequent acts extending the time or recognizing the existence of the corporation. *Commonwealth ex rel. v. Councils of Pittsburgh*, 41 Pa. St. 278.

91. Consent to forfeiture.—An incorporated company may consent to a forfeiture of its charter, though such consent, it seems, can only be given by all the stockholders; and a statute which declares a forfeiture, with the consent of the company, does not impair the obligation of contracts. *Mobile & O. R. Co. v. State*, 29 Ala. 573.

92. Effect of forfeiture.—Under our statutes the forfeiture of the charter of a railway corporation does not have the effect without compensation to divest the stockholders of their property rights in the road-bed acquired by their means; and to remove any apprehension from the minds of investors that the strict common-law rule, vesting in the state the right to the road-bed of the forfeited railway corporation, might be the rule of decision here, was probably the principal reason for the enactment of our statutes touching this subject. *Sulphur Springs & M. P. R. Co. v. St. Louis, A. & T. R. Co.*, 2 Tex. Civ. App. 650, 22 S. W. Rep. 107, 23 S. W. Rep. 1012.

If upon the forfeiture of the charter of a railway corporation its roadbed becomes the property of the state, another corporation, by simply taking out a charter calling for the terminal points of the forfeited charter, cannot thereby acquire from the state the title to such roadbed. *Sulphur Springs & M. P. R. Co. v. St. Louis, A. & T. R. Co.*, 2 *Tex. Civ. App.* 650, 22 *S. W. Rep.* 107, 23 *S. W. Rep.* 1012.

V. PARTICULAR CHARTERS.

93. Alabama & T. Riv. R. Co.—The company was chartered in 1848 to build a road from Selma, Ala., to some convenient point on the Tennessee river, in the northern part of the state, but in 1866, only 135 miles of the road having been built, it was authorized to change its terminus to "such point on the Georgia state line as the company might select," and was authorized to consolidate its stock and franchises with any other company in or out of the state. At the time two roads were chartered in Georgia to build a road from Dalton to some other point near there, "to or toward the Alabama line." These three roads consolidated, which was afterward approved by both states. *Held*, that the two Georgia companies became merged in the Alabama company, and it continued with its powers unimpaired and its charter unaltered, except so far as it was authorized to extend its road into Georgia; and the subsequent consolidated road, under the name of Selma, Rome and Dalton railroad company, must be regarded as the same corporation as the original Alabama company and held liable for its obligations. *Meyer v. Johnston*, 53 *Ala.* 237, 15 *Am. Ry. Rep.* 467.

94. Amherst & B. R. Co.—The charter (Act of 1851, ch. 277) does not require the northern terminus of the southern section of the road to be in the "village" of Amherst; and taking land in said town for a route not terminating in either village of that town, is not the exercise of a franchise not granted the company, within the prohibition of the Act of 1852, ch. 319, § 42. *Hastings v. Amherst & B. R. Co.*, 9 *Cush. (Mass.)* 596.

95. Androscoggin R. Co.—Under Maine Act of March 28, 1845, ch. 270, § 7, chartering the Androscoggin and Kennebec railroad, the legislature reserved the power to authorize other railroads coming from a northerly or easterly direction to connect

with that railroad. *Held*, that the section gives each company the right to elect whether it will connect with the other, and the provision about connecting must be regarded as a privilege and not a contract. *Androscoggin & K. R. Co. v. Androscoggin R. Co.*, 52 *Me.* 417.

96. Atchison, T. & S. F. R. Co.—Under Kansas Territorial Act of 1859, ch. 47, chartering the road, the company was authorized "to construct a branch to any point on the southern boundary of Kansas, in the direction of the Gulf of Mexico, and to connect with other roads intersecting or connecting with it, or running its road in connection with such other roads." By the Act of 1873, ch. 105, § 1, a law was passed authorizing any connecting or intersecting road to purchase or guarantee the stock or bonds of another road. *Held*, that this conferred upon the road power to buy a road chartered by congress through the Indian territory to the southern line of Kansas. *Venner v. Atchison, T. & S. F. R. Co.*, 28 *Fed. Rep.* 581.—FOLLOWING *Ryan v. Leavenworth, A. & N. R. Co.*, 21 *Kan.* 365; *Burgess v. Seligman*, 107 *U. S.* 20, 2 *Sup. Ct. Rep.* 10. QUOTING *Atchison, T. & S. F. R. Co. v. Fletcher*, 35 *Kan.* 236, 10 *Pac. Rep.* 596; *Green Bay & M. R. Co. v. Union Steamboat Co.*, 107 *U. S.* 101, 2 *Sup. Ct. Rep.* 221; *Mayor of Knoxville v. Knoxville & O. R. Co.*, 22 *Fed. Rep.* 758.

97. Atlantic & M. R. Co.—If it be conceded that the company was not a valid corporation, under the Illinois act "to provide for a general system of railroad incorporations," yet it is expressly declared to be a "valid and subsisting corporation" by the act of Feb. 23, 1854, and has the power to construct its road. *People v. Mississippi & A. R. Co.*, 14 *Ill.* 440.

98. Atlantic & St. L. R. Co.—The company is not, by its charter (*Me. Spec. L.* of 1845, ch. 195), exempted from the operation of the statute of 1842, ch. 9. *Pratt v. Atlantic & St. L. R. Co.*, 42 *Me.* 579.

99. Baltimore & O. R. Co.*—The Maryland act of 1827, incorporating the road, did not become wholly inoperative because the road was not completed within the time limited therein; neither was it superseded by the Virginia act of March 6, 1847, under which the company was authorized to complete its road through Virginia,

* See also title BALTIMORE & OHIO R. Co.

subject to such parts of its original charter as remained unaltered. The act of 1827 was only substituted by the act of 1847 and the former act of 1837, so far as it was inconsistent therewith. *Baltimore & O. R. Co. v. Sup'rs of Marshall County*, 3 W. Va. 319.

Section 23 of the charter, which reserved the right to any other road thereafter to be built from the main route to any part of the state to connect with the road of the defendant, in no way limited the grant of the exclusive use of its tracks given by § 18. The right to connect thus reserved was no such right as that attempted to be given by the act of 1874. *Pennsylvania R. Co. v. Baltimore & O. R. Co.*, 14 Am. & Eng. R. Cas. 79, 60 Md. 263.

The charter of the company for constructing and operating the branch railroad between Baltimore and Washington contained a stipulation that the company, at the end of every six months, should pay to the state one fifth of the whole amount received for the transportation of passengers. This charter was accepted and complied with for many years. *Held*: (1) that this stipulation was not repugnant to the constitution of the United States; (2) that it was a contract to pay, and not a receipt of money belonging to the state, and if unconstitutional, the objection could be set up as a defense to an action brought by the state to recover the money; (3) that, as the alleged unconstitutionality of the stipulation was set up as a defense, the state court was bound to pass upon it; and, having decided against the exemption thus claimed, this court is authorized to review the decision. *Baltimore & O. R. Co. v. Maryland*, 21 Wall. (U. S.) 456, 6 Am. Ry. Rep. 483.

100. Boston & L. R. Co.—The provision of § 12 of the act incorporating the road (St. 1830, ch. 4), "that no other railroad than the one hereby granted shall, within thirty years from and after the passing of this act, be authorized to be made, leading from Boston, Charlestown, or Cambridge to Lowell" (the legislature also reserving in this act the right to regulate the tolls to a certain extent, and to purchase the franchise upon certain terms), constituted a contract by the commonwealth with the corporation that no other railroad from Boston, Charlestown, or Cambridge to Lowell should be lawfully made for thirty years, and was within the constitutional

power of the legislature to make, and binding upon their successors. *Boston & L. R. Corp. v. Salem & L. R. Co.*, 2 Gray (Mass.) 1.

The provision in the charter providing that the legislature might authorize any other company to enter upon and connect with it upon making compensation, does not form a perpetual contract when such connection is made. So the road, having made such connection, is not liable for afterward completing its own track and for carrying its passengers and freight through on its own road. *Boston & L. R. Corp. v. Boston & M. R. Co.*, 5 Cush. (Mass.) 375.

101. Boston & P. R. Co.—The corporation, having accepted their act of incorporation, passed since the Act of 1830, ch. 81, by which the legislature reserved power to amend, alter, or repeal, at pleasure, all acts of incorporation which should be subsequently passed, are bound by any reasonable alteration or amendment of their charter which the legislature may see fit to make, and are consequently subject to the provisions of the General Acts of 1842, ch. 22, and 1849, ch. 222, relative to railroad crossings. *Roxbury v. Boston & P. R. Corp.*, 6 Cush. (Mass.) 424.—FOLLOWED IN *Bangor, O. & M. R. Co. v. Smith*, 47 Me. 34.

102. Brooklyn, W. & N. R. Co.—New York Act of 1878, ch. 20⁶, purporting to amend the act of 1874, ch. 575, in relation to the road, by extending the time in which the company is required to finish and put in operation its road to five years from the passage of the act, is in conflict with N. Y. Const. art. 3, § 18, prohibiting the legislature from passing a private or local bill granting to any corporation the right to lay down railroad tracks. *In re Brooklyn, W. & N. R. Co.*, 75 N. Y. 335.—DISTINGUISHING *In re New York El. R. Co.*, 70 N. Y. 327.

103. Camden & Amboy R. Co.—The charter of the company authorizing their use of steam-engines upon their road, the company is not responsible for the injury or disturbance resulting from the use of such engines near the road of a turnpike company previously incorporated, unless the right to use such engines is exercised in an extraordinary and unlawful manner not contemplated or warranted by the legislature. *Bordentown & S. A. Turnpike Road v. Camden & A. R. & T. Co.*, 17 N. J. L. 314.

—REVIEWED IN *Costigan v. Pennsylvania R. Co.*, 54 N. J. L. 233.

There is not, in the charter, any specific grant of power for this particular bridge (over South river). But there is a special authority to erect bridges and all other works necessary for the completion of this particular road. The conclusion is, that the power to construct bridges over all the streams on the route, so as to best carry into effect the object of the incorporation, is given in the act, if not in express terms, yet by necessary implication; and the grant thus made is constitutional. *Attorney-General v. Stevens*, 1 N. J. Eq. 369.

The power must, nevertheless, be exercised discreetly and with a due regard to the privileges of others. If any injurious and wanton exercise of it be shown to this court it will interfere and regulate it on proper principles. To warrant such interference the exercise of the power must be shown to be not only injurious, but wilfully or wantonly so; a mere mistake in judgment will not be sufficient. *Attorney-General v. Stevens*, 1 N. J. Eq. 369.

The word "survey" does not necessarily, *ex vi termini*, mean a map or profile; they are sometimes used as convertible terms, not always. The books filed by the company in the office of the secretary of state, containing a description (in words and figures) of the commencement of the road, the different stations made at the time of the survey, the courses and distances between those stations, and the number of stations to the termination of the road, is "a survey," within the meaning of that provision of the charter which requires that "a survey of such route and location (of the road) shall be deposited in the office of the secretary of state," at least so far as to warrant the court in refusing an injunction on the ground that no survey whatever has been made. *Attorney-General v. Stevens*, 1 N. J. Eq. 369.

The several legislative acts giving to the company the exclusive franchise to carry passengers and goods between the cities of New York and Philadelphia, in part by means of a railroad across the state—constructed and held to be constitutional and valid, as a contract between the state and the company. *Raritan & D. B. R. Co. v. Delaware & R. Canal Co.*, 18 N. J. Eq. 546; modifying 16 N. J. Eq. 356.—COMMENTING ON *Charles River Bridge v. Warren Bridge*,

11 Pet. (U. S.) 420. DISTINGUISHING *Erie R. Co. v. State*, 31 N. J. L. 531.

104. Camden & Atlantic R. Co.—The fifteenth section of the charter was not designed as a limitation of the powers of the corporation, but as a grant of additional power. *Lucas v. Pitney*, 27 N. J. L. 221.

The exclusive franchise granted to the Delaware and Raritan canal and Camden and Amboy railroad and transportation company to act as common carriers across the state of New Jersey, between the cities of Philadelphia and New York, is not violated by the incorporation of the Camden and Atlantic railroad to operate a road between Camden and the sea, nor by the incorporation of the Raritan and Delaware bay railroad company to operate between Cape Island and Raritan bay. *Delaware & R. Canal Co. v. Camden & A. R. Co.*, 15 N. J. Eq. 13.

105. Cedar Rapids & M. R. R. Co.—The company is authorized to build a railroad from Lyons, in Clinton county, to a point of intersection with the Chicago, Iowa and Nebraska railroad, within the corporate limits of the city of Clinton. *Clinton v. Cedar Rapids & M. R. R. Co.*, 24 Iowa 455.

106. Charlestown Branch R. Co.—The duties and liabilities of the company under the acts of March 13, 1841, and March 17, 1841, authorizing an extension of the line, defined. *Cambridge v. Charlestown Branch R. Co.*, 7 Metc. (Mass.) 70.

107. Cleveland & P. R. Co.—Under the Pennsylvania act of 1862, extending the time of completing the road ten years, the company had the right to extend their road into the city of Pittsburgh, and it was a matter wholly within the discretion of the president and directors of the company where the work should begin. *Cleveland & P. R. Co. v. Speer*, 56 Pa. St. 325.—QUOTED IN *Philadelphia, G. & N. R. Co. v. Pennsylvania S. V. R. Co.*, 16 Phila. (Pa.) 636.

108. Cleveland, Z. & C. R. Co.—The company was authorized by its charter to build from Hudson, in Summit county, to Millersburg, to connect with the Ohio and Pennsylvania railroad, or any other railroad running in the direction of Columbus. *Pennock v. Coe*, 23 How. (U. S.) 117.

109. Clinton & P. H. R. Co.—The company had, by its charter, power to transfer, by indorsement, negotiable notes be-

longing to it. *Haynes v. Beckman*, 6 La. Ann. 224.

110. Concord R. Corp.—The charter of the company shows that the road was not intended to be a detached and isolated road, but one of several connecting roads, forming a line between Boston and Concord. It is authorized to make a business connection with the Nashua and Lowell railroad as will form such continuance, but not to enter into a partnership with that road for the operation of the roads as joint principals. *Burkev. Concord R. Corp.*, 8 Am. & Eng. R. Cas. 552, 61 N. H. 160.—**FOLLOWING** Ogdensburg & L. C. R. Co. v. Pratt, 22 Wall. (U. S.) 123; *Barter v. Wheeler*, 49 N. H. 9; *Nashua Lock Co. v. Worcester & N. R. Co.*, 48 N. H. 339.

111. Cumberland & O. R. Co.—The exact line and precise terminal points of the road are not fixed by the charter, but they are held to be substantially and sufficiently designated by the provisions of the charter quoted in the opinion. *Shelby County Court v. Cumberland & O. R. Co.*, 8 Bush (Ky.) 209.

112. Cumberland Coal & I. Co.—Under the provisions of the charter of this road the power to build a railroad was conferred upon the defendant primarily for its benefit, with the privilege reserved to others to send their products over the road so long as the company saw proper to use it for itself; but if the business of the company no longer justified it to operate the road, or if it saw fit to adopt some other more convenient and less expensive mode of sending the products of its mines to market, it had the right to discontinue the use of the road, and this without incurring any liability to the plaintiffs. *Montell v. Consolidation Coal Co.*, 45 Md. 16.

113. Drum Point R. Co.—There is nothing in Md. Acts 1876, ch. 377, amending the charter of the company which prevents the state from asserting all its rights as a stockholder in the Annapolis and Elk Ridge R. Co. *Harrison v. Annapolis & E. R. R. Co.*, 50 Md. 490.

114. Florida Southern R. Co.—An original incorporator in this road, first known as the Gainesville, Ocala, and Charlotte Harbor R. Co., was not, as such, independent of a contract with the directors of the company, entitled under the charter of the corporation, or the common law controlling the subject, to a proportion of the

stock, to be determined by the number of original incorporators named in the articles of incorporation. *Brown v. Florida Southern R. Co.*, 16 Am. & Eng. R. Cas. 463, 19 Fla. 472.

115. Fort Wayne & S. R. Co.—The road, chartered in Indiana in 1839, by failing to accept or act under its charter prior to November, 1852, when a new constitution was adopted prohibiting the incorporation of such companies by special act, lost all its rights as a corporation. *Gillespie v. Ft. Wayne & S. R. Co.*, 17 Ind. 243.

116. Franklin Canal Co.—By the Pennsylvania act of April 9, 1849, authorizing the company to construct a railroad from the north end of the Franklin division of the Pennsylvania canal to Lake Erie, and from the south end thereof to Pittsburgh, "by such route as said company shall deem most expedient and advantageous," it was intended to have a connection by railroad between Pittsburgh and Lake Erie. *Commonwealth v. Franklin Canal Co.*, 21 Pa. St. 117.

The construction of a railroad beginning at the depot of the Erie and Northeast railroad, about three quarters of a mile from Lake Erie, and extending westward to the Ohio line, and there connecting with the railroad extending to Cleveland, is not a compliance with the provisions of the said act of 1849, but is in violation of the duty imposed by said act. *Commonwealth v. Franklin Canal Co.*, 21 Pa. St. 117.

Though the act of 1849 authorizes the road to be constructed between the extreme points "by such route as the company shall deem most expedient and advantageous," this does not authorize the company in the location of the road to consult their own advantage; but the advantage of the route as a route between the points designated in the act was intended. *Commonwealth v. Franklin Canal Co.*, 21 Pa. St. 117.

117. Grand Gulf R. & B. Co.—The provision of the charter which, in case the company cannot agree with the owners of land over which said road is to pass upon the compensation to be paid therefor, authorizes the company to petition to the circuit court of Claiborne county, to summon and empanel a jury to assess the damages, and directs the court, upon valuation assessed, to convey the land to the company and give judgment and execution against the company, and in favor of the

owner of the land, for the amount of the valuation, is unconstitutional. Judgment and execution are not compensation within the meaning of the constitution. *Thompson v. Grand Gulf R. & B. Co.*, 4 Miss. 240. — QUOTED IN *Moody v. Jacksonville, T. & K. W. R. Co.*, 14 Am. & Eng. R. Cas. 53, 20 Fla. 597. REVIEWED IN *Cushman v. Smith*, 34 Me. 247.

118. Grand Junction R. Co.—Under the Ontario act, 34 Vict. c. 48, the company was recognized as an incorporated company; otherwise that it was actually incorporated by act 37 Vict. c. 43, the effect of the two acts being to give to the company so incorporated the benefit of a by-law of the respondent corporation, which under certain conditions provided a bonus for the railway. *Grand Junction & M. R. Co. v. Peterborough*, 13 App. Cas. 136.

Under the act of 1871 the said by-law was legal, valid, and binding on the corporation, but the railway company had not on the evidence complied with the conditions precedent. The stipulated certificate of the chief engineer had not been produced, and although under paragraph 8 of the by-law debentures might be delivered to trustees without a certificate, that applied to a time when the debentures or their proceeds were to be held in suspense, not to a time when the trusts were spent and the payment, if made at all, should be made direct to the company. *Grand Junction & M. R. Co. v. Peterborough*, 13 App. Cas. 136.

119. Great Western R. Co.—Construction of the special act as to charges for loading, unloading, and weighing, for parcels, for goods of one kind or class, as to tonnage rate and parcel rate, and equality of charges. *Parker v. Great Western R. Co.*, 11 C. B. 545. *Edwards v. Great Western R. Co.*, 11 C. B. 588, 1 Ry. & C. T. Cas. 22.

120. Gravesend & C. I. R. Co.—Under the provision of the New York Act of 1873, Laws of 1873, ch. 531, authorizing the company to construct its road and lay its track upon Gravesend avenue, said company is excused from complying with the prerequisites to proceedings to acquire title to lands prescribed by the general railroad act; i. e., the making and filing of a map or profile of its route; the giving of notice of such proceedings to actual occupants, and notice to the highway commissioners; and also from making an application to and obtaining an order of the supreme court as

required by the Act of 1854, Laws of 1854, ch. 582. *In re Prospect Park & C. I. R. Co.*, 67 N. Y. 371, 15 Am. Ry. Rep. 102; *affirming 8 Hun* 30.—FOLLOWING *In re Boston & A. R. Co.*, 53 N. Y. 574.

So far as said act is valid, and so far as its valid provisions are inconsistent with the general railroad acts, it is a special charter for said corporation, and so far exempts the corporation from the force of those laws. Where it is not in conflict, the corporation is bound by, and may avail itself of, the privileges given by said laws; among others, the privilege of perfecting a defective title. *In re Prospect Park & C. I. R. Co.*, 67 N. Y. 371, 15 Am. Ry. Rep. 102; *affirming 8 Hun* 30.

121. Harlem R. Co.—The time limited for the completion of the road only applied to the road as originally authorized by its charter. And the extension authorized by the act of 1832 may be made from time to time, as the common council of the city of New York shall think proper, to authorize it to be done at any time during the existence of the charter of the company. *Hamilton v. New York & H. R. Co.*, 9 Paige (N. Y.) 171.—DISTINGUISHED IN *Savannah, A. & G. R. Co. v. Shiels*, 33 Ga. 601.

122. Houston & G. N. R. Co.—The Texas constitution of 1869 has declared the legislature of 1866 to have been provisional only; that "its acts are to be respected only so far as they were not in violation of the constitution and laws of the United States, or were not intended to reward those who participated in the late rebellion, and to discriminate between citizens on account of race or color, or to operate prejudicially to any class of citizens." Held, that in the charter and franchises conferred by the legislature of 1866 there is nothing obnoxious to these denunciations of the constitution of 1869; and the charter of the company, and the rights and franchises therein conferred, constituted a contract between the state of Texas and the incorporators; and the 16th section of the charter, providing that "the company shall be entitled to receive such donations of land as are provided for the encouragement of internal improvements by any general law of this state," entitles the company to the benefits of the acts of January 30th, 1854, upon its compliance with the requirements of those acts and of its charter. *Houston & G. N. R. Co. v. Kuechler*, 36 Tex. 382.

123. Hudson Riv. R. Co.—The company is required by its charter to build or extend wharves or docks along the Hudson river which may be cut off by the road, so as to restore them to their former usefulness; but it is not required to extend a wharf over a deep bay to which the company is required to furnish access by a drawbridge. *Tillotson v. Hudson River R. Co.*, 9 N. Y. 575; *affirming* 15 Barb. 406.

124. Illinois R. Co.—The amended charter provided that "the company shall have power to make, ordain, and establish all such by-laws, rules, and regulations as may be deemed expedient and necessary to fulfil the purposes and carry into effect the provisions of this act, and for the well-ordering, regulating, and securing the affairs, business, and interests of the company; provided that the same be not repugnant to the constitution and laws of the United States, or repugnant to this act. The board of directors shall have power to establish such rates of toll for the conveyance of persons and property as they shall from time to time by their by-laws determine." *Held*, that the charter as thus amended did not release the company from state control or laws imposing restrictions upon the amount of rates. *Ruggles v. Illinois*, 108 U. S. 526, 2 Sup. Ct. Rep. 832.

125. Illinois Cent. R. Co.—By the act of February 27, 1854, the charter was so amended as to authorize a sale of its lands upon a credit, and a new contract was thereby entered into between it and the state, which the state has no authority to change without the consent of the company. *People v. Ketchum*, 72 Ill. 212.

The act of February 27, 1854, conferred upon the company the option of selling lands for cash, or on such credit as it might deem expedient, and the state has no authority to compel it to sell at a price fixed, thus interfering with the right of the company to sell for a larger price upon credit. *People v. Ketchum*, 72 Ill. 212.

The state having vested the company with power to issue bonds and with authority to pledge its lands for their final redemption, and the company having so pledged them, the state is bound to take no steps which shall endanger the validity of the bonds or lessen their value. *People v. Ketchum*, 72 Ill. 212.

126. Illinois South. R. Co.—As to whether the act of February 28, 1869, 2 D. R. D.—46.

amending the charter, is in violation of the Illinois Constitution of 1848, art. 3, § 23, providing that no private or local law shall embrace more than one subject, which shall be expressed in its title, *quære*. *Welch v. Post*, 5 Am. & Eng. R. Cas. 158, 99 Ill. 471.—*Explained in* *Abington v. Cabene*, 12 Am. & Eng. R. Cas. 581, 106 Ill. 200.

127. Indianapolis & C. R. Co.—There is nothing peculiar in the charter which would prevent the legislature from requiring the company to pay for the killing of animals upon the road, in default of keeping it fenced. The cost of making and keeping the fences in repair or the amount paid in the way of damages for stock killed does not "detract from or affect the profits of the corporation" in the sense intended by the charter. *Indianapolis & C. R. Co. v. Kercheval*, 16 Ind. 84.

128. Jeffersonville R. Co.—The company was incorporated by special charter, Jan. 20, 1846. By section 33 of the act the legislature reserved the right to alter the charter. *Held*, that under the power reserved the legislature might properly apply the general law regulating the liability of railroad companies for stock killed to this company. *Jeffersonville R. Co. v. Gabbert*, 25 Ind. 431.

129. Jeffersonville, M. & I. R. Co.—Neither by the original charter of the company, nor its amended charter, nor the general laws of the state, can the width of its right of way be enlarged above that defined in the original charter. *Prather v. Jeffersonville, M. & I. R. Co.*, 52 Ind. 16; *further appeal, sub nom. Prather v. Western Union Tel. Co.*, 14 Am. & Eng. R. Cas. 1, 89 Ind. 501.

While said company might have acquired title to sixty feet in width of land if it had taken possession thereof and occupied such space, yet, having appropriated and used less than that width, its right being limited by its necessities to the extent that it occupied and used, it became entitled, not merely to the strip of ground on which the railroad track was constructed and the ground actually occupied by telegraph poles, but also to the amount of land necessary for the purpose of constructing its road, with all necessary appendages, and for putting and keeping the same in repair, and for doing all proper business thereon, including sufficient land for the erection of telegraph poles at a safe distance from the

track, together with the right to the exclusive use of the intervening space between said track and the fixture or appendage so erected. *Prather v. Jeffersonville, M. & I. R. Co.*, 52 Ind. 16.

Said company having so erected telegraph poles on but one side of its road and made no use of the other side, except for the purpose of keeping its track in repair, for a period of eighteen years from the time of the original appropriation, it possessed no right to erect telegraph poles on the other side of its track at the distance of twenty-nine feet from the centre thereof, without condemnation and payment of damages in the mode provided by the law or charter by which such railroad was governed at the time of such new appropriation. *Prather v. Jeffersonville, M. & I. R. Co.*, 52 Ind. 16.

130. Kennebec & P. R. Co.—The charter, with its additional enactments, authorizes the erection of bridges and causeways across navigable waters, but requires them not to be built in such manner as to prevent the navigation of such water or to occasion unreasonable detentions thereon. *Rogers v. Kennebec & P. R. Co.*, 35 Me. 319.

Me. act of Feb. 16, 1836, was repealed by act of 1841, in its application to the charter; and the act of 1841, in its turn, was modified by Act of 1855, ch. 169. The acts passed subsequently to that of Feb. 16, 1836, continued the liability of stockholders, but modified the remedy in some respects. *Hathorn v. Caief*, 53 Me. 471.

By the Act of 1857, ch. 106, additional to an act to incorporate the company, the railroad was made subject to all the general laws of the state relating to railroads, and consequently became subject to the reserved right of the state to alter, amend, or repeal its charter. *State v. Maine C. R. Co.*, 66 Me. 488, 19 Am. Ry. Rep. 323.—QUOTING *Tomlinson v. Jessup*, 15 Wall. (U. S.) 454.

131. La Grange & M. R. Co.—In 1835 the legislature of Tennessee incorporated the road; in 1848 the legislature extended the time six years during which the company should finish their road, "provided the same is not sold and transferred to the M. & C. R. R. Co." This transfer was made in January, 1851, and, by the 7th section of the act of February, 1852, the creditors of the road were allowed to satisfy their debts out of any property of the company, in preference to any lien the state

might have. *Held*, that this act was a recognition on the part of the state of the existence of the company at the date of the act, and that the state, by extending the time to complete the road, waived its right to enforce the forfeiture; but if the L. & M. railroad was sold to the M. & C. R. Co., then the waiver was withdrawn, and the right of the state to enforce the forfeiture would be revived. The state never having enforced the forfeiture of the charter, the L. & M. R. Co. was a legal entity, and could sue and be sued. *La Grange & M. R. Co. v. Rainey*, 7 Coldw. (Tenn.) 420.

132. Lancaster & S. B. R. Co.—The company was authorized to locate its road from a certain point, "thence running through Acton, Sudbury, Stow, Marlborough, and other places." *Held*, that it was not obliged to locate its road through these places in the order in which they were named. It was competent to locate its road from Acton through Stow and thence through Sudbury, etc. *Commonwealth v. Fitchburg R. Co.*, 8 Cush. (Mass.) 240.

133. Leeds & F. R. Co.—By virtue of Me. St. 1864, ch. 238, § 4, the company became subject to the reserved right of the state to alter, amend, or repeal its charter. *State v. Maine C. R. Co.*, 66 Me. 488, 19 Am. Ry. Rep. 323.

134. Little Rock & N. R. Co.—The act to incorporate the company is a public law, and created a corporation. *Hammitt v. Little Rock & N. R. Co.*, 20 Ark. 204.

Under it it was created an immediate corporation, and having in good faith commenced the construction of its road before the adoption of the constitution of 1874, the charter was not revoked by art. 12, § 1, thereof. *Little Rock & N. R. Co. v. Little Rock, M. R. & T. R. Co.*, 4 Am. & Eng. R. Cas. 392, 36 Ark. 663.

135. Louisiana & M. Riv. R. Co.—The act of 1868, which professed to amend the charter, was illegal and void, and did not constitute a new charter of the road. *State v. Callaway County Court*, 51 Mo. 395, 3 Am. Ry. Rep. 172.—FOLLOWING *State v. Saline County Court*, 51 Mo. 350.

136. Macon & B. R. Co.—The company, under its charter and its amendments authorizing it to construct a railroad from the city of Brunswick to the city of Macon, and clothing it with the rights, privileges, and immunities of the Central railroad, is authorized to construct its road into the

city of Macon, and is not limited to the city line. *Hazlehurst v. Freeman*, 52 Ga. 244.

The company has no power, under its charter, to purchase stock in another railroad, or to contract with others, for a consideration, to purchase the same and run it in the control of said other road for the benefit of the Macon and Brunswick railroad. Such a contract is *ultra vires*, and the use of the state-indorsed bonds, issued by virtue of the act of 1871, is illegal, and any stockholder may come into equity to prevent it. *Hazlehurst v. Savannah, G. & N. A. R. Co.*, 43 Ga. 13.—FOLLOWING Central R. Co. v. Collins, 40 Ga. 582.

137. Memphis & C. R. Co.—The Alabama act of Jan. 7, 1850, entitled "An act to incorporate the Memphis & Charleston Railroad Co.," makes the company, as to that state, an Alabama corporation. *Copeland v. Memphis & C. R. Co.*, 3 Woods (U. S.) 651.—DISTINGUISHING *Williams v. Missouri, K. & T. R. Co.*, 3 Dill. (U. S.) 267. REVIEWING *Baltimore & O. R. Co. v. Harris*, 12 Wall (U. S.) 65; *Memphis & C. R. Co. v. Bibb*, 37 Ala. 699.

138. Milwaukee & B. R. Co.—The Wisconsin act of April, 1857, attempting to amend the charter is unconstitutional so far as it attempts to provide for the taking of property without just compensation; and to that extent it cannot operate as a repeal of the original charter. *Shepardson v. Milwaukee & B. R. Co.*, 6 Wis. 605.

139. Milwaukee & W. R. Co.—Under the territorial act it was provided, among other things, that the company should become a corporation as soon as a certain amount of stock was subscribed and a certain portion thereof paid in. *Held*, that the conditions thus named were conditions precedent to the existence of the corporation, and it did not become a corporation until they were complied with. *Attorney-General v. Chicago & N. W. R. Co.*, 35 Wis. 425.

Under the above provisions of said charter, where it appears that the corporation is in existence a considerable time thereafter, a presumption exists that it was organized immediately after the passage of the charter. *Attorney-General v. Chicago & N. W. R. Co.*, 35 Wis. 425.

By Wisconsin territorial act of March 11, 1848, amending the charter of Feb. 11, 1847, the company was authorized to extend its road from Waukesha to the Missis-

sippi river, and authorized by it to increase its capital stock for that purpose. *Held*, that the passage of the amendment raised a presumption that the corporation was then in existence—that is, that it had so organized under its charter as to have a corporate existence; but such presumption is overthrown by proof that the conditions precedent to the existence of a company were not complied with until after such amendatory act, and after the adoption of a state constitution in 1848. *Attorney-General v. Chicago & N. W. R. Co.*, 35 Wis. 425.—QUOTING *Kenosha, R. & I. R. Co. v. Marsh*, 17 Wis. 13; *Whiting v. Sheboygan & F. du L. R. Co.*, 25 Wis. 167; *West Wisconsin R. Co. v. Sup'rs of Trempealeau County*, 35 Wis. 257.

The Wisconsin territorial acts of 1847 and 1848 were continued in force after the establishment of a state government by virtue of the constitution adopted, art. 14, § 2, providing that all laws then in force and not repugnant to the constitution should remain in force until they should expire by their own limitation or be repealed; but such charter became subject to alteration or repeal according to the provisions of said constitution. *Attorney-General v. Chicago & N. W. R. Co.*, 35 Wis. 425. *Stone v. Wisconsin*, 94 U. S. 181.—FOLLOWING *Attorney-General v. Chicago & N. W. R. Co.*, 35 Wis. 599.

140. Minneapolis & St. L. R. Co.—The plaintiff's charter (Laws 1853, ch. 10) fixes its capital stock at \$2,000,000, provides that, as soon as \$100,000 thereof shall have been subscribed, certain persons shall give notice of a meeting of the stockholders to choose directors, and confers upon the directors the general usual authority to manage the business of the corporation, and, among other things, authorizes them to "receive payment to the subscriptions to the capital stock, at such time, in such proportion not exceeding twenty-five per cent. at any one instalment, under such conditions as they shall deem fit." *Held*: (1) that these provisions authorize the organization of the corporation upon a stock subscription of \$100,000, and also authorize the directors, upon such organization, to proceed with the business of the corporation, and, among other things, to collect instalments of the stock; (2) that the allegation in the complaint in this case, that the plaintiff corporation is duly organized, in-

volves the fact of a stock subscription to at least the requisite amount of \$100,000; (3) that the mode of subscription provided for in section 4 of plaintiff's charter, as amended by Sp. Laws 1869, ch. 117, § 2, relates to subscriptions made before organization, and that as to subscriptions made after organization the taking of them is left to the corporation, acting through its board of directors. *Minneapolis & St. L. R. Co. v. Morrison*, 23 Minn. 308, 17 Am. Ry. Rep. 85.

Section 6 of plaintiff's charter authorizes the directors to "receive payment to the subscriptions to the capital stock, * * * in such proportion, not exceeding twenty-five per cent. at any one instalment, under such conditions as they shall deem fit," and makes it their duty, at least thirty days previous to the appointed time of such required payment, to give notice thereof "in some newspaper printed in the territory of Minnesota, and in such other place or places as may be thought advisable." *Held*: (1) that these provisions do not make it necessary that each payment required should be called for separately, or that separate notice should be given of each required payment, or that there should be an interval of thirty days between the appointed times of payment; but that it is competent for the directors, at one time and in one call, to require several instalments to be paid, each at a different future date, and to give one notice of all the required payments; (2) that the allegation in the complaint that payment of the several instalments called "was duly demanded of defendant, by publication of notice for thirty days in the Minneapolis Daily Tribune," is, as against a demurrer, a sufficient allegation that the proper notice was published in a proper newspaper, and in proper time; (3) that the giving of the other notice provided for is left to the option of the directors. *Minneapolis & St. L. R. Co. v. Morrison*, 23 Minn. 308, 17 Am. Ry. Rep. 85.

141. Minnesota and Pac. R. Co.—The act of March 10, 1862, entitled "An act to facilitate the construction of the Minnesota and Pacific railroad, and to amend and to continue the act of incorporation in relation thereto," transferred to the persons therein named all the roads, lands, and franchises of the company, including the right to be a corporation under the corporate franchise of that company. *First Div. St. P. & P. R. Co. v. Parcher*, 14 Minn. 297 (Gil. 224).

—APPROVED IN *Secombe v. Milwaukee & St. P. R. Co.*, 23 Wall. (U S.) 108.

Under section 13 of the charter, a notice of application and application for the appointment of commissioners to appraise lands taken for the use of the company, in which the lands to be taken are referred to only as being on the line of a designated division or part of said company's railroad or branches, sufficiently designated the lands and the owners. Nor need they state the specific use for which the lands are to be taken or held. *Wilkin v. First Div. St. P. & P. R. Co.*, 16 Minn. 271 (Gil. 244).

142. Minnesota West. R. Co.—The charter (Minn. Spec. Laws 1853, ch. 66) imposes a continuous duty as to restoring public streets to usefulness. *State v. Minneapolis & St. L. R. Co.*, 35 Am. & Eng. R. Cas. 250, 39 Minn. 219, 39 N. W. Rep. 153.

143. Mississippi & A. R. Co.—The charter confers the power of holding real estate, for the purpose of erecting thereon the bank buildings, as well as of erecting a railroad, etc. *Doe v. Lane*, 11 Miss. 763.

144. Mississippi & T. R. Co.—The company, under the provision in their charter vesting the company "with all the rights, privileges, and powers requisite and necessary for the construction and repair and maintenance of the road," are empowered and authorized to take lands *in invitum*, after the location and completion of their road, for the purpose of relocating a portion of their line of road, if the necessity to exercise the power be the preservation of some existing right, which would otherwise be impaired. *Mississippi & T. R. Co. v. Devaney*, 42 Miss. 555, 2 Am. Rep. 608.—QUOTED IN *Atlantic & P. R. Co. v. St. Louis*, 66 Mo. 228.

145. Missouri & M. R. Co.—The tax of one twentieth of one per cent. authorized by section 13 of the charter (Mo. Acts 1865, p. 86) is the only tax authorized by law to be collected to pay bonds issued under that charter. The common fund of the county collected for the purpose of defraying the current expenses of the county government is not applicable to their payment. *State ex rel. v. Macon County Court*, 68 Mo. 29.—DISAPPROVING *United States v. Clark County*, 96 U. S. 211.

146. Missouri Valley R. Co.—Under the charter of the company and its successor the Kansas City, St. Joseph & Council Bluffs R. R. Co., and the acts amendatory

thereof, the latter company is bound to maintain railroad connection between the cities of St. Joseph and Savannah, and to run a train of cars daily between those points; but it is not bound to make Savannah a point on its main track, or to run all its trains to the old depot at that place. In maintaining a switch from this depot to the depot on the new line located and established under and by authority of the amendatory act of 1871, and running a train of cars daily over this switch to the old depot, the company sufficiently complies with the law. *State v. Kansas City, St. J. & C. B. R. Co.*, 16 *Am. & Eng. R. Cas.* 297, 77 *Mo.* 143.

147. Montclair R. Co.—By a charter granted in 1867 the company was incorporated and empowered to build a railway, but at the same time was required to construct and maintain bridges where highways should cross its railway. In 1875, upon foreclosure of a mortgage, the property and franchises of that company were sold and transferred to the Montclair and Greenwood Lake railway company then organized in pursuance of Revision, p. 916, § 56; and in 1878, upon another mortgage foreclosure, the same property and franchises were sold and transferred to the New York and Greenwood Lake railway company, also organized under Revision, p. 916, § 56. One of these companies graded a right of way across an avenue in Montclair township, Essex county, making a cut 22 feet deep and 69 feet wide through the avenue, but did not lay rails upon it. The last named of these companies now owns and controls that right of way. By a supplement to the act to authorize the formation of railroad corporations and regulate the same (*Id.* 925), which was approved in 1887 (P. L. 226), after the said right of way was graded and said cut made, it was made the duty of any company that owned or controlled a right of way for a railroad which had been graded in whole or in part, but upon which tracks had not been completely laid, to construct a bridge over such right of way where a public highway should cross it, and provision was made that the duty thus imposed may be specially enforced by bill in the court of chancery, or, at the option of the corporation charged with the care of the highway, such latter corporation may build the bridge and recover the cost thereof from the railroad company by suit. *Held*, that the supplement referred to imposed a duty upon the

New York and Greenwood Lake railway company, which was reasonable, and which did not defeat or impair the object of the grant to the Montclair railway company, to which the New York and Greenwood Lake railway company succeeded, or any vested rights under it; and also that the court of chancery, by virtue of the provisions of that supplement, had jurisdiction to compel the specific performance of the duty imposed. *Montclair Tp. v. New York & G. L. R. Co.*, 40 *Am. & Eng. R. Cas.* 342, 45 *N. J. Eq.* 436, 18 *Atl. Rep.* 242.—*QUOTING* Parker v. Metropolitan R. Co., 109 Mass. 506. *REVIEWING* People v. Boston & A. R. Co., 70 N. Y. 569; Roxbury v. Boston & P. R. Corp., 6 Cush. (Mass.) 424.

148. Morgan L. & T. R. & S. Co.—Section 12 of the charter exempts it from suit outside of the city of New Orleans, except in cases of trespass. *Payne v. Morgan's L. & T. R. & S. Co.*, 43 *La. Ann.* 981, 10 *So. Rep.* 10.

149. Morris & E. R. Co.—The third section of the act of 1846 concerning corporations (Nix. Dig. 168), providing that in addition to the powers enumerated in the first section of the act (which are the ordinary powers of all corporations), "and to those expressly given in its charter or in the act under which it is or shall be incorporated, no corporation shall possess or exercise any corporate powers except such as shall be necessary to the exercise of the powers so enumerated and given," must be taken as a prohibition of any acts not within the scope of the powers permitted; and contracts in contravention of it are illegal. *Held*, that it was not within the scope of the charter and supplements of the Morris and Essex R. Co. to make a contract with the Sussex R. Co. for rates of freight and fare over extensions not authorized at the time of the contract, and that such a contract, if intended to include extensions afterwards authorized and built, was illegal, and could not be enforced as to them, there being, in this case, no ratification by the legislature or by authority of the corporation after the extensions were authorized. *Morris & E. R. Co. v. Sussex R. Co.*, 20 *N. J. Eq.* 542.

150. Nashville & C. R. Co.—In 1848 the charter was amended with a provision that the company be required to pay semi-annually to the several stockholders a sum equal to six per cent. per annum on the

capital stock paid in, provided a majority of the stockholders at their first regular meeting agree thereto, which amendment was accepted. In 1852 the Tennessee and Alabama Railroad Co. was chartered, with all the "privileges, liabilities, and restrictions" conferred upon the above company. *Held*, that the above amendment to the charter of the Nashville and Chattanooga company became a part of the organic law of the Tennessee and Alabama company without any action on the part of its stockholders accepting the same. *Mulloy v. Nashville & D. R. Co.*, 8 *Lea* (Tenn.) 427.

151. Nashville, C. & St. L. R. Co.—The purchase of the majority of the stock of the Owensburgh and Nashville Railroad Co., a Kentucky corporation, was within the powers of the Nashville, Chattanooga and St. Louis R. Co., chartered under the laws of Tennessee, where such purchase was for the purpose of getting control of the road and issuing its bonds for its further equipment and construction. *Wehrhane v. Nashville, C. & St. L. R. Co.*, 4 *N. Y. S. R.* 541, 42 *Hun* 660.

152. Newark & B. R. Co.—By the supplement to the charter passed March 26, 1852, § 3, it is enacted that nothing in the supplement contained shall be construed to impair in any manner any reversionary interest or vested right which the state or any incorporated company or companies, or any individual, may possess under the charter of the Bridge company. This provision is also in effect contained in the constitution. *Gifford v. New Jersey R. & T. Co.*, 10 *N. J. Eq.* 171.

The supplement to the charter does not contravene the article of the constitution of this state, which declares that every law shall embrace but one object, and that shall be expressed in the title, as the objects in the statute are parts of the same enterprise, and have a proper relation to one another. *Gifford v. New Jersey R. & T. Co.*, 10 *N. J. Eq.* 171.

153. New Orleans & P. R. Co.—The obvious meaning and intent of section 4 of Act 14 of 1876, the legislative charter of the plaintiff company, was to secure Shreveport as the northwestern terminus, and to prevent the company from evading this requirement by building connections to other possible termini, under the name of branches, before completing the line to Shreveport. The company had the right

to begin its route at Baton Rouge or to build via that point, and the construction of the Baton Rouge branch, while the main line was in process of completion, did not violate the spirit or meaning of the law. *New Orleans & P. R. Co. v. Robertson*, 34 *La. Ann.* 865.

154. Northern Pac. & M. R. Co.—The act incorporating the company does not of itself supersede the power given to the railway commissioner by 51 Vict. c. 5, with reference to the building of the extension of the Red River valley railway to Portage la Prairie. *Canadian Pac. R. Co. v. Northern Pac. & M. R. Co.*, 5 *Man.* 301.

155. Ohio R. Co.—The company was authorized by its charter to purchase and hold real estate when necessary for the procurement of materials, or for the economical construction of the road. *Overmyer v. Williams*, 15 *Ohio* 26.

156. Ohio & I. R. Co.—The act incorporating the company is a private act. *Ohio & I. R. Co. v. Ridge*, 5 *Blackf. (Ind.)* 78.

157. Panama R. Co.—The company was chartered with a provision that one of the objects of the company was the "purchasing and navigating such steam or sailing vessels as may be proper and convenient to be used in connection with the said road." *Held*, sufficiently broad to authorize the purchase of vessels to navigate between New York and Aspinwall, or between Panama and San Francisco, in connection with the road, and it was not necessary that such objects of the corporation be expressed in its title. *Freeman v. Panama R. Co.*, 7 *Hun* (N. Y.) 122.

158. Pennsylvania R. Co.—The company derives its authority to build its branch from the Schuylkill river to 15th street, Philadelphia, from the act of May 16, 1857, granting the company additional powers, and was accepted subject to the act of May 3, 1855, which provided that charters, granted or to be granted, should be held subject to legislative control. *Pennsylvania R. Co. v. Duncan*, 29 *Am. & Eng. R. Cas.* 354, 111 *Pa. St.* 352, 5 *Atl. Rep.* 742.

The company accepted as part of its charter the act of April 4, 1868, and so became subject to the constitutional amendment of 1857, and, as a consequence, to the legislative power of the general assembly; and the power of a constitutional convention to amend a charter was the same as

the general assembly. *Pennsylvania R. Co. v. Duncan*, 29 *Am. & Eng. R. Cas.* 354, 111 *Pa. St.* 352, 5 *Atl. Rep.* 742.

The company had at the adoption of the constitution of 1874 no vested charter rights which would prevent its becoming subject to the provisions of the 8th section of the 16th article of said constitution, providing an additional liability for damages to private property "injured or destroyed." *Pennsylvania R. Co. v. Duncan*, 29 *Am. & Eng. R. Cas.* 354, 111 *Pa. St.* 352, 5 *Atl. Rep.* 742.

150. Penobscot R. Co.—The company, under its charter and the general laws of Maine, has a right to construct its railroad over or under a highway, and for that purpose to raise or lower the highway. *Veasie v. Penobscot R. Co.*, 49 *Me.* 119.

The charter vested in the directors the power to prescribe the times and places in which it would receive persons and property. *Held*, that the Maine act of March 26, 1858, entitled "An act to secure safety and convenience of travelers on railroads," imposed additional duties and burdens, and was therefore invalid. *State v. Noyes*, 47 *Me.* 189.

160. Pensacola & G. R. Co.—By the terms used in the third section of the original charter the legislature intended to confer upon the board of directors an unrestricted power to fix the terminus of said road, after leaving Pensacola bay and running thence eastwardly, anywhere and at any point on the boundary line between the states of Florida and Georgia, and that said directors have fixed said terminus via Alligator, now called Lake City, the same being in an eastwardly direction to the boundary line of Georgia. *Florida, A. & G. C. R. Co. v. Pensacola & G. R. Co.*, 10 *Fla.* 145.

Said charter construed as respects route, branch roads, and *termini*, and junction with the Florida, Atlantic and Gulf Central railroad. *Florida, A. & G. C. R. Co. v. Pensacola & G. R. Co.*, 10 *Fla.* 145.

The acceptance by the company of the provisions of the act of January 6, 1855, to provide for and encourage a liberal system of internal improvements in this state, did not materially alter or change the original charter of said company. *Johnson v. Pensacola & G. R. Co.*, 9 *Fla.* 299.

161. Philadelphia, W. & B. R. Co.—The company has neither under its charter of incorporation nor under the act of March 17, 1869, any power to build branch

railroads from its main line. *Philadelphia, W. & B. R. Co. v. Philadelphia & R. R. Co.*, 1 *Pa. Dist.* 73.

162. Pontchartrain R. Co.—The exclusive privilege vested in the plaintiffs by the act of 1830, to construct a railroad, within certain limits, must be construed with reference to the extent of the city of New Orleans at the time of the passage of the act. *Pontchartrain R. Co. v. Lafayette & P. R. Co.*, 10 *La. Ann.* 741.—DISTINGUISHED IN *Pontchartrain R. Co. v. New Orleans & C. R. Co.*, 11 *La. Ann.* 253.

In the year 1830, Jackson street, now in the fourth district, was within the limits in which the company had the exclusive right, for twenty-five years, of constructing a railroad to Lake Pontchartrain, and the construction of a railroad by defendants in Jackson street, within twenty-five years from the 26th of January, 1830, is an infringement of the rights of the plaintiffs and therefore unlawful. *Pontchartrain R. Co. v. Lafayette & P. R. Co.*, 10 *La. Ann.* 741.—DISTINGUISHED IN *Pontchartrain R. Co. v. New Orleans & C. R. Co.*, 11 *La. Ann.* 253.

163. Pontiac R. Co.—It is no objection to the constitutionality of the charter that it does not provide for notice to the owners of lands of proceedings to assess the damages for taking the same. *Swan v. Williams*, 2 *Mich.* 427.—QUOTED IN *Leavenworth County Com'rs v. Miller*, 7 *Kan.* 479.

164. Port Hope, L. & B. R. Co.—The company is an established corporation, it being recognized as such by the statutes 16 *Vict. c.* 241, and 18 *Vict. c.* 36. *Smith v. Spencer*, 12 *U. C. C. P.* 277.

165. Providence & W. R. Co.—Under section 11 of the charter, which prohibits the company from obstructing private ways, and gives a party injured an action for damages, the company has no right where its road crosses a street to divert it from its usual course by widening it, or by making a cut that completely obstructs the old driveway, and opening a new one alongside of it, though the town council may have acquiesced in such change and it is, as a matter of fact, for the convenience of the public. *Hughes v. Providence & W. R. Co.*, 2 *R. I.* 493.

166. Raleigh & G. R. Co.—The company did not incur the penalties imposed by the N. C. Rev. Code, ch. 101, § 30, by trans-

porting its passengers and freights in boats, across the Roanoke, at Gaston, during the time that there was no bridge at that point, in consequence of its having been burned by the military in 1865. *Pugh v. Raleigh & G. R. Co., Phil. (N. Car.)* 359.

167. Rensselaer & S. R. Co.—The company are authorized, by their act of incorporation, to build a bridge across the Hudson river from the city of Troy to Green island on the opposite side of the river. *People v. Rensselaer & S. R. Co., 15 Wend. (N. Y.)* 113.—QUOTED IN *Decker v. Baltimore & N. Y. R. Co., 30 Fed. Rep.* 723.

168. Richmond, F. & P. R. Co.—Section 34 of the charter, requiring work thereby required of the company to be finished in ten years, refers to building the main track, for doing which within that period the company is promised, by § 38, immunity from competition for thirty years. *Blanton v. Richmond, F. & P. R. Co., 43 Am. & Eng. R. Cas.* 617, 86 Va. 618, 14 Va. L. J. 120, 10 S. E. Rep. 925.

169. St. Paul & Pac. R. Co.—The Minnesota Act of March 2, 1865, ch. 6, modifying the exemption from ordinary taxation originally granted to the company, was ineffectual until accepted. It not appearing that it was accepted until after the Act of March 4, 1865, ch. 9, the latter act is to be deemed a tender by the state of a new contract, which upon acceptance became effectual. *Stevens County v. St. Paul, M. & M. R. Co., 29 Am. & Eng. R. Cas.* 225, 36 Minn. 467, 31 N. W. Rep. 942.

170. St. Paul & S. C. R. Co.—Under the charter the court determines the title to the land to be taken for the road at the time of appointing the commissioners. It is not a question before the latter. *St. Paul & S. C. R. Co. v. Matthews, 16 Minn.* 341 (*Gil.* 303).

171. St. Paul, M. & M. R. Co.—Sections 2, 3, sub-section 1, ch. 1, Minnesota Laws 1857, Ex. Sess., authorized the company to change the location of its line after it should have been located and constructed, and to exercise the power of eminent domain to obtain land for the right of way so located. The act of 1862 (ch. 20, Sp. Laws 1862) specified the times within which specified portions of the road should be built. *Held*, that this act related only to the first or original locating and constructing it, and did not affect such authority.

Hewitt v. St. Paul, M. & M. R. Co., 27 Am. & Eng. R. Cas. 342, 35 Minn. 226, 28 N. W. Rep. 255.

172. San Antonio & M. G. R. Co.—The act of the legislature approved Sept. 5, 1850, entitled, "An act to incorporate the San Antonio and Mexican Gulf railroad," is unconstitutional in so far as, in the twelfth section, it provides that the city of San Antonio and the towns upon the line and at the terminus of the road on the gulf may issue bonds to aid in the construction of said railroad, because it embraces a distinct object not expressed in the title of the act, and is therefore repugnant to section 24 of art. 5 of the constitution of 1845. *Peck v. San Antonio, 51 Tex.* 490.—DISAPPROVING *San Antonio v. Mehaffy, 96 U. S.* 312. FOLLOWING *Giddings v. San Antonio, 47 Tex.* 548. NOT FOLLOWING *San Antonio v. Lane, 32 Tex.* 405.

173. Selma, R. & D. R. Co.—One of the provisions of the charter granted by the state of Georgia authorized the company to lease or sell their property within said state to any other company which might be authorized to purchase or lease, the purchasing company to have all the "rights and privileges" of the selling company. *Held*, that the purchase of said road by a corporation of another state would not make it a corporation of Georgia. *Morgan v. East Tenn. & V. R. Co., 4 Woods (U. S.)* 523.—APPROVING *Baltimore & O. R. Co. v. Cary, 28 Ohio St.* 208. DISTINGUISHING *Baltimore & O. R. Co. v. Koontz, 104 U. S.* 5. REVIEWING *Baltimore & O. R. Co. v. Harris, 12 Wall. (U. S.)* 65.

174. Somerville & E. R. Co.—A supplement to the charter provides that the company shall pay annually to the state treasurer "a tax of one half of one per centum upon the cost of said road, as shown by the annual report of such cost made the year preceding." The report included, as required by law, the cost of the road and equipments. *Held*, that the company are only required to pay tax upon the cost of their road and its appendages, and are not bound to pay tax upon their engines, cars, boats, or other personal property. *State v. Somerville & E. R. Co., 28 N. J. L.* 21.—REVIEWING *State v. Mintop, 23 N. J. L.* 531.

175. South Carolina R. Co.—The company are not authorized by their charter, or by the acts of 1828 or 1832, to use steam-power in propelling the cars on that

part of the road which extends from Line street to Mary street, on Charleston Neck. *State v. Tupper, Dudley (So. Car.)* 135.

The company has the right, under its charter, to extend its road to the boundary street of Charleston, by running it over the lands of private individuals against their consent, and to have those lands valued by commissioners, to be for that purpose appointed by the court. *Ex parte South Carolina R. Co., 2 Rich. (So. Car.)* 434.

176. Southern K. & P. R. Co.—The evidence in this case considered, and the plaintiff held to be a legally organized corporation under the laws of the state, and the railroad built in the county of Clark to Ashland and Englewood, in 1887 and 1888, to have been constructed by it. *Southern Kan. & P. R. Co. v. Townner, 41 Kan.* 72, 21 *Pac. Rep.* 221.—**DISTINGUISHING** *Memphis, K. & C. R. Co. v. Thompson, 24 Kan.* 170. **FOLLOWING** *Chicago, K. & W. R. Co. v. Com'rs of Stafford County, 36 Kan.* 121; *Atchison, T. & S. F. R. Co. v. Davis, 34 Kan.* 209.

177. Southern Transcontinental R. Co.—The right of the Pacific railway company to acquire lands in Texas by virtue of the act of congress incorporating it, and the acts of the legislature of Texas incorporating the Southern Transcontinental railroad, other than such as were reasonably necessary to its maintenance and operation, can only be questioned by the state. When a corporation is incompetent by its charter to take title to real estate, a conveyance to it is not void but only voidable, and the sovereign alone can object. *Russell v. Texas & P. R. Co., 68 Tex.* 646, 5 *S. W. Rep.* 686.

178. Sunbury & E. R. Co.—The act of March 27, 1852, extending the privileges of the company, construed to give that company the right to construct a road from Sunbury by the Susquehanna valley, to connect with the Pennsylvania road, only upon a failure of the Susquehanna railroad company to commence and build its line between Bridgeport and Sunbury in the time fixed by law. *Packer v. Sunbury & E. R. Co., 19 Pa. St.* 111.

179. Tennessee & A. R. Co.—By a Tennessee act of February 14, 1856, it was provided that the company should issue to the taxpayers of a certain county named stock, with interest paid on bonds, issued by the county to the company, with a pro-

vision if a majority of the stockholders agree thereto. The stockholders met and passed a resolution accepting such act, "provided its company shall not be bound to issue any stock to the taxpayers upon the presentation of tax receipts of any tax imposed after the declaration of a dividend which shall be made by its company." *Held*, that the acceptance to be valid must be unqualified, and the acceptance with the above proviso was no acceptance at all. *Mulloy v. Nashville & D. R. Co., 8 Lea (Tenn.)* 427.

180. Troy & G. R. & H. T. Co.—Under a Massachusetts act of 1881, ch. 230, § 1, empowering the manager of the company to make and enforce needful rules for the operation thereof, such manager is not authorized, merely for the purpose of saving expense to the state, to make an order which is in violation of contracts entered into, in pursuance of the former act of 1880, ch. 261, between the manager and another railroad company, by which it is provided that the company may charge the state for the number of miles run by the switching-engines of the company upon the first-named road. *Attorney-General v. Fitchburg R. Co., 26 Am. & Eng. R. Cas.* 540, 142 *Mass.* 40, 6 *N. E. Rep.* 854.

181. University R. Co.—The N. C. acts of January 30, 1869, and April 1, 1869, in regard to "the University Railroad Co." are invalid. Those acts did not create a corporation, and therefore there was no grantee. The question involved therein of an expenditure by the state has not been decided by a vote of the people. The proportions and limitations upon taxation, required by art. 5, § 1, of the state constitution, have not been observed. *University R. Co. v. Holden, 63 N. Car.* 410.

182. Vermont & C. R. Co.—The time for the completion of the road, as fixed by the legislature, not having expired, there is no such failure in the lease of or the requirements of its charter as would release the Vermont Central company, or the trustees and bondholders under the first mortgage of the road. *Vermont & C. R. Co. v. Vermont C. R. Co., 34 Vt.* 1.

183. Vermont Cent. R. Co.—Although the charter does not, in terms, empower the corporation to locate their road along the valley of White river, yet it must be taken, in the absence of evidence to show that there was any other practicable route to the proper point on Connect-

icut river, designated in the charter, or that the route adopted was unsuitable, that the road was properly located in the valley of White river. *White River Tel. Co. v. Vermont C. R. Co.*, 21 *Vt.* 590.

Under the tenth section of the statute incorporating the company, the corporation have power to enter upon and cross a turnpike road, as well as any other highway, making compensation to the turnpike corporation for the injury they should sustain. *White River Tel. Co. v. Vermont C. R. Co.*, 21 *Vt.* 590.—FOLLOWED IN *Brainard v. Missisquoi R. Co.*, 48 *Vt.* 107.

And the provisions of the charter prescribing a mode for making compensation by appraisal, for injuries to land entered upon by them, may be fairly construed to apply to the property and interest of a turnpike corporation in the land embraced by their road, and in a road itself as tangible property. *White River Tel. Co. v. Vermont C. R. Co.*, 21 *Vt.* 590.

184. Vicksburg, S. & T. R. Co.—The provision in § 16 of the act incorporating the company, to the effect "that no transfer of stock shall exempt the party transferring it from the obligation of paying instalments afterwards called for, until fifty per cent. on each share shall have been paid," exempts from liability to the company only those who have transferred their share of stock after the payment of fifty per cent. on each share, made before the instalments have matured and payment has been demanded. *Vicksburg, S. & T. R. Co. v. McKeen*, 14 *La. Ann.* 735.

185. West End & A. St. R. Co.—The company accepted its charter subject to a general law of the state existing at the time, that the state reserves the right to withdraw any franchises granted to a corporation, unless such right is expressly negatived in the charter. *West End & A. St. R. Co. v. Atlanta St. R. Co.*, 49 *Ga.* 151.—DISTINGUISHED IN *Western & A. R. Co. v. State*, 54 *Ga.* 428.

186. Western N. C. R. Co.—Under the charter, passed in 1855, and the amendment at the next session, the justices of any of the county courts of the several counties along the line of the road were authorized to determine on an amount to be subscribed by such county to the stock of such company, and to submit the same for the approval of the voters of such county, notwithstanding a former proposi-

tion to subscribe had been submitted to them and rejected. *Caldwell v. Justices of Burke County*, 4 *Jones Eq. (N. Car.)* 323.

Such subscriptions may be made, *toties quoties*, as the emergencies of the undertaking require. *Caldwell v. Justices of Burke County*, 4 *Jones Eq. (N. Car.)* 323.

187. Western Pac. R. Co.—The company, incorporated under Cal. act of May 20, 1861, is not restricted to any special mode and manner of exercising its corporate powers. *Pixley v. Western Pac. R. Co.*, 33 *Cal.* 183.

188. Wilmington & M. R. Co.—The charter does not authorize the company to take, without the consent of the owner, as a site for a warehouse, a parcel of land 400 yards from the line of their road, and build a narrow track from their road to such parcel of land, although the whole quantity required for the site of the warehouse and the road leading to it would not exceed five acres. *Bird v. Wilmington & M. R. Co.*, 8 *Rich. Eq. (So. Car.)* 46.

189. Wilmington & W. R. Co.—Under the charter, upon payment of damages assessed for right of way, the land covered by the road and sixty-five feet from the base of the road on each side become vested in the company in fee simple. *Haistip v. Wilmington & W. R. Co.*, 102 *N. Car.* 376, 8 *S. E. Rep.* 926.

190. Wilton R. Co.—The second section of the charter authorized the company to construct a railroad "beginning at any point on the Concord railroad, between Souhegan river and the junction of said Concord railroad and the Nashua and Lowell railroad; thence running to Amherst village and through Milford to some point in East Wilton, or at any point on the Nashua and Lowell railroad in the village of Nashville; thence to some point in East Wilton; thence to Greenfield, or to the centre village of Peterborough, and thence to Marlow; or, beginning at any point on the south line of the state, within one mile of Nissitissett river, thence running to some point in East Wilton, thence to Greenfield, or to the centre village of Peterborough, and thence to Marlow as aforesaid." *State v. Wilton R. Co.*, 19 *N. H.* 521.

The company applied to the railroad commissioners, who reported that the public good would be promoted by laying out the railroad upon the following route:

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"Commencing at the village of East Wilton, thence passing through the village in Milford to Amherst Plain, and thence through the southwesterly part of the town of Merrimack to the depot of the Nashua and Lowell railroad in Nashvile. ' Held, that the report was authorized by the charter; that any route with one terminus on the Concord railroad must go to Amherst village, because that was an intermediate bound, but that any route with one terminus in the village of Nashville and the other at East Wilton, having no intermediate bound, might or might not go to the Amherst village. *State v. Wilton R. Co.*, 19 N. H. 521.

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I. DUTIES AND LIABILITIES OF THE COMPANY.

1. *In General.*

1. Duty to protect children.—(1) *Rule stated.*—The duty rests upon a company to protect a child from being injured by it, when the child is wanting in discretion to protect itself. *Gulf, C. & S. F. R. Co. v. Evansich*, 61 Tex. 3.

The youth of a person injured may excuse him from concurring negligence, but it cannot supply the place of negligence on the part of the company, or extend the liability of the company for tortious acts of its servants. *Sherman v. Hannibal & St. J. R. Co.*, 4 Am. & Eng. R. Cas. 589, 72 Mo. 62, 37 Am. Rep. 423.

The tender age of the person injured can have no effect to raise a duty where none otherwise existed. Where certain duties exist, infants may require greater care than adults; but precautionary measures for the protection of the public must, as a rule, have reference to all classes alike. *Nolan v. New York, N. H. & H. R. Co.*, 25 Am. & Eng. R. Cas. 342, 53 Conn. 461, 4 Atl. Rep. 106.

(2) *Illustrations.*—A boy about seven years of age undertook to climb up on one of the cars, and, losing his hold, fell under the cars and was seriously hurt. *Held*, there was no negligence in the management of the train. *Chicago, B. & Q. R. Co. v. Stumps*, 55 Ill. 367, 2 Am. Ry. Rep. 385.—*REVIEWED IN Chicago & A. R. Co. v. Lamert*, 12 Ill. App. 408.

Where a company owns a switch-track constructed from the main track to a coal-shaft belonging to a mining company, and the railroad company furnishes cars to this mining company to be loaded with coal, and when loaded permits the mining company to loosen the brakes of the cars so that the cars will run down the steep grade of the switch-track to a point where the track is level, and the mining company, after loading a certain car, negligently loosens the brakes thereof and allows the car to run down the steep grade of the switch-track and over a child, and thereby injures it—*held*, that the company is responsible for the injury. *Smith v. Atchison, T. & S. F. R. Co.*, 4 Am. & Eng. R. Cas. 554, 25 Kan. 738.

2. Degree of care required.*—(1)

Rule stated.—The infancy of the plaintiff does not change either the degree of care or diligence to be used by the defendants in the management of their cars and engines, or enhance the measure of damages to be adopted by the jury. *Bannon v. Baltimore & O. R. Co.*, 24 Md. 102.—REVIEWING *Willets v. Buffalo & R. R. Co.*, 14 Barb. (N. Y.) 585.

When the question is one of simple negligence, there is no distinction between the case of a child unnecessarily exposed and that of a grown person; but where the question is one of gross neglect or wilful misconduct, the rules applicable to the two cases are different. *Lafayette & I. R. Co. v. Huffman*, 28 Ind. 287.

What might be ordinary neglect towards an adult might be gross negligence towards a child. *Mobile & M. R. Co. v. Crenshaw*, 8 Am. & Eng. R. Cas. 340, 65 Ala. 566.

The company must use greater care to prevent injury to a child trespassing upon a train than is required with respect to adults under similar circumstances. *Indianapolis, P. & C. R. Co. v. Pitzer*, 25 Am. & Eng. R. Cas. 313, 109 Ind. 179, 58 Am. Rep. 387, 6 N. E. Rep. 310, 10 N. E. Rep. 70.

Proof of a less degree of negligence will be necessary in order to charge a company for injuries in case of an infant than in that of an adult. *Isabel v. Hannibal & St. J. R. Co.*, 60 Mo. 475, 9 Am. Ry. Rep. 261.

And that which would be but ordinary negligence as to a grown person may be gross negligence as respects a child. *Schierhold v. North Beach & M. R. Co.*, 40 Cal. 447.

It is the duty of engineers to exercise greater care toward the young, as well as toward the aged and infirm, than toward persons of mature years or of more active bodily powers; and the same foresight and vigilance cannot be demanded of the former, in guarding against dangers, that would be of the latter. *O'Mara v. Hudson River R. Co.*, 38 N. Y. 445.—QUOTED IN *Costello v. Syracuse, B. & N. Y. R. Co.*, 65 Barb. (N. Y.) 92; *Pendril v. Second Ave. R. Co.*, 2 J. & S. (N. Y.) 481.

(2) *Illustrations.*—Where defendant, em-

* See also *post*, 27.

Care must be exercised to avoid injuries to children, see note, 8 L. R. A. 843.

Degree of care required to prevent injuries to children, see note, 4 L. R. A. 127.

ployed in grading and improving a public street under a contract with the municipal authorities, in the lawful occupation thereof for such purpose, was engaged in transporting earth a considerable distance along the street to make a fill, and the cars moved slowly, and were dangerous only to persons attempting to ride upon them, or accidentally falling upon the track in front of the wheels—*held*, the measure of his duty in respect to the risk of such accidents is reasonable care, and such duty does not extend to the employment of men specially to keep watch of the approach of children or others to prevent them from invading and riding upon the cars when in actual use, but when, in the use of ordinary care, their presence is discovered, to use due diligence to prevent any injury to them. *Emerson v. Peter*, 35 Minn. 481, 29 N. W. Rep. 311.—DISTINGUISHING *Keffe v. Milwaukee & St. P. R. Co.*, 21 Minn. 207.

Where a child about five years of age, in attempting to run across a railroad between a coal train and an engine and tender which were following close behind it, was struck by the engine and injured—*held*, that the company were not answerable in damages without proof of want of ordinary care in the engineer at the time when, and the place where, the injury was done. *Philadelphia & R. R. Co. v. Sparen*, 47 Pa. St. 300.

3. Duty to keep lookout and prevent injury to child seen on track.*—

(1) *Rule stated.*—Where a young child is seen upon the track by the persons in charge of a train, more care is required than in the case of one who has reached the age of discretion. There is no presumption that it will heed signals of danger, and the engineer is bound to stop the train, if he sees that the child makes no attempt to leave the track. *Indianapolis, P. & C. R. Co. v. Pitzer*, 25 Am. & Eng. R. Cas. 313, 109 Ind. 179, 58 Am. Rep. 387, 6 N. E. Rep. 310, 10 N. E. Rep. 70.—DISTINGUISHING *Hathaway v. Toledo, W. & W. R. Co.*, 46 Ind. 25; *St. Louis, I. M. & S. R. Co. v. Freeman*, 36 Ark. 41; *Prendegast v. New York C. & H. R. R. Co.*, 58 N. Y. 652. QUOTING *Lake Shore & M. S. R. Co. v. Miller*, 25 Mich. 274. RECONCILING *Lafayette & I. R. Co. v. Huffman*, 28 Ind. 287.

* See also *post*, 37-40, 62.

Liability for killing children on track, see 37 AM. & ENG. R. CAS. 329, *abstr.*

It seems the company is not responsible for an error of judgment on the part of the engineer as to the speed of his train or his ability to stop it in time. All the engineer is bound to do after discovery of the child's peril is to use reasonable diligence and care to avert it. *Chrystal v. Troy & B. R. Co.*, 31 *Am. & Eng. R. Cas.* 411, 105 *N. Y.* 164, 11 *N. E. Rep.* 380, 6 *N. Y. S. R.* 833, 7 *Cent. Rep.* 245; reversing 38 *Hun* 641, *mem.*

(2) *Illustrations.*—The evidence showed that a train that injured a child on the track could have been stopped within 100 feet by putting down brakes, reversing the engine, giving steam, and sanding the track; that the engine was from 140 to 160 feet away when the child came on the track. No sand was put on the track at all, and some of the other means to stop the train were not applied at once. *Held*, that there was sufficient evidence of negligence to justify a submission to the jury. *Little Rock & Ft. S. R. Co. v. Barker*, 19 *Am. & Eng. R. Cas.* 195, 39 *Ark.* 491.

Where a child some two years old is killed by a car which is turned loose at a coal-chute to run down an incline by its own weight, there is not sufficient evidence of negligence to hold the company liable, where it is left in doubt whether those starting the car looked to see if the track was clear, or, if they did look, whether they could have seen the child. *Atchison, T. & S. F. R. Co. v. Smith*, 8 *Am. & Eng. R. Cas.* 327, 28 *Kan.* 541.—*DISTINGUISHING* *Van Schaick v. Hudson River R. Co.*, 43 *N. Y.* 527; *Central Branch U. P. R. Co. v. Henigh*, 23 *Kan.* 347; *Lafayette & I. R. Co. v. Huffman*, 28 *Ind.* 287; *Kansas C. R. Co. v. Fitzsimmons*, 22 *Kan.* 686.

The engineer testified that he saw an object on the track some half a mile away, but supposed it was a pig, and ran on until too near it to stop the train before discovering that the object was a small boy, and then he did what he could to stop the train. The accident occurred where the track was not fenced as required by law. *Held*, sufficient evidence of negligence to support a verdict against the company. *Keyser v. Chicago & G. T. R. Co.*, 31 *Am. & Eng. R. Cas.* 399, 66 *Mich.* 390, 10 *West. Rep.* 646, 33 *N. W. Rep.* 867; former appeal, 56 *Mich.* 559.

An engineer testified that he did not see a boy who was lying on the track and was run over and killed, until within some 15 or

20 yards of him, and then it was impossible to stop the train. There was other evidence tending to show that the boy might have been seen from 150 to 300 yards distant. Then the engineer explained that just before seeing the boy he was engaged in necessary duties about the engine, and was not looking ahead. *Held*, that the company was not liable if the engineer could not see the boy in time to stop the train, or if he was prevented from seeing him in time by discharging a necessary duty as engineer. *Houston & T. C. R. Co. v. Smith*, 77 *Tex.* 179, 13 *S. W. Rep.* 972.

The failure of a company to permit a girl six years of age to alight at the station to which it had agreed to carry her, and its act in carrying her to another station beyond that at which she wished to get off, is not such negligence on the part of the company as to render it liable for an injury occasioned to her while walking back upon the track to the latter station, where it appears that the child was in the custody and control of her father, and when first seen by the engineer of the train causing the injury was in the act of stepping from the track upon which the train was running, toward the other parallel track, and did in fact reach a place of safety, but, becoming frightened, broke away from her father and ran in front of the engine, and where it appears that as soon as she was seen in peril every possible effort was made to prevent the injury. *Benson v. Central Pac. R. Co.*, 54 *Am. & Eng. R. Cas.* 126, 98 *Cal.* 45, 32 *Pac. Rep.* 809, 33 *Pac. Rep.* 206.

4. — or seen near the track.—(1) *Rule stated.*—Where a child is seen in close proximity to the track and approaching it in front of the train, the engineer should begin his precautions at once to avoid injury, and not wait until the child is on the track. *Little Rock & Ft. S. R. Co. v. Barker*, 19 *Am. & Eng. R. Cas.* 195, 39 *Ark.* 491.

It is not the duty of an engineer whenever he sees a child of tender years running towards his train to slacken his speed lest the child stop in front of the train and suffer injury. The relative positions of the child and the train are to be taken account of by the engineer, and he must exercise the judgment of a prudent person, having due regard to all the circumstances and to the safety of his passengers. *Meyer v. Midland Pac. R. Co.*, 2 *Neb.* 319.

In an action to recover for injuries to a boy of seven, it is correct to charge the jury that if the engineer, by the exercise of reasonable care and watchfulness, could have perceived that the boy, in view of his tender years, and his location and movements, was in danger of attempting to cross the track ahead of the engine, then he was under obligation to use every means in his power to prevent the injury, including the blowing of a whistle, if that would have tended to prevent the injury. *Heddes v. Chicago & N. W. R. Co.*, 39 Am. & Eng. R. Cas. 645, 74 Wis. 239, 42 N. W. Rep. 237.

(2) *Illustrations*.—A child less than four years old attempted to cross the railroad track in front of a backing engine, but was struck and thrown down just outside of the rail. The engine was moving slowly and could have been stopped within a space of two or three feet. The engineer saw the boy when he was opposite the space between the tender and the engine, but made no effort to stop. The boy was injured by the rear driving-wheel. There was no flagman at the crossing. The engineer was not called as a witness. *Held*, sufficient evidence to justify a finding of negligence. *Schwier v. New York C. & H. R. R. Co.*, 14 Am. & Eng. R. Cas. 656, 90 N. Y. 558; *affirming* 24 Hun 139.

Plaintiff, a little boy, standing on a snow-bank on the side of a track, saw a train approaching, and when it came opposite where he was it gave a jerk which frightened him and he slipped down onto the side-track and was run over by the train and injured. No whistle was sounded or bell rung. *Held*, that the omission to sound the whistle or ring the bell did not impose any liability on the defendants, as it in no way contributed to the accident, and that the injury was accidental and there could be no recovery. *Shoebrink v. Canada Atlantic R. Co.*, 37 Am. & Eng. R. Cas. 462, 16 Ont. 515. —*QUOTING* *Daniel v. Metropolitan R. Co.*, L. R. 3 C. P. 222.

5. Operation of trains in a city.*—A company running its cars through a populous street of a city, on which many children live, must omit nothing which can be done by the company and its agents to prevent injury to the children on the street. *Norfolk & P. R. Co. v. Ormsby*, 27 Gratt. (Va.) 455, 17 Am. Ry. Rep. 321.

The running of an engine in a street of a city, in daylight, at a speed of from eight to twenty miles an hour, where those in charge failed to see an infant on the track until within seven or eight feet of it, and until too late to stop the engine, is gross negligence. *Keilly v. Hannibal & St. J. R. Co.*, 34 Am. & Eng. R. Cas. 81, 94 Mo. 600, 13 West. Rep. 658, 7 S. W. Rep. 407.

Where a child is killed within the corporate limits of a town by a train of several cars on an up-grade, and it appears that the road was straight for some 60 yards to the place of the accident, and that no signals were given as required by law, there is sufficient evidence of negligence to hold the company liable, where it fails to furnish any evidence as to the distance in which the train might have been stopped. *Georgia Pac. R. Co. v. Blanton*, 84 Ala. 154, 4 So. Rep. 621.

A child not quite five years old, and of diseased intellect, strayed to the track near the residence of its parents and was injured by a train, which passed with great speed and without stopping. The mother of the child had left the house but a few minutes before the accident to perform a necessary household duty, leaving the child in the care of his sister, eight years of age, and on her return discovered that he had strayed to the track, and before she could recover him he was struck by the train. *Held*, there was no negligence on the part of either the mother or child, but that the company was chargeable with great negligence in permitting one of its fastest trains to run with unabated speed through the town, and should be held responsible. *Chicago & A. R. Co. v. Gregory*, 58 Ill. 226, 11 Am. Ry. Rep. 92.—*DISTINGUISHED IN* *Illinois C. R. Co. v. Slater*, 129 Ill. 91, 21 N. E. Rep. 575.

6. — or other populous neighborhood.—Where a roadbed is constructed in a populous neighborhood near a city, and children and others often go upon the track, and a portion of the track has a steep grade down which cars will run with great force when the brakes are loosened, and the persons operating the road loosen the brakes of a car loaded with coal, and let it run down this steep grade, without any person being on the car, or without any means of stopping it, and without first looking to see whether the track was clear or whether any person was on the track or

* See also *post*, 21. 56-66.

not, and a child who was on the track was run over and injured, and there is a conflict in the evidence as to whether the child could have been seen by the persons operating the road before they loosened the brakes—*held*, that the courts cannot say, as a matter of law, that the persons operating the road were not guilty of negligence. *Smith v. Atchison, T. & S. F. R. Co.*, 4 *Am. & Eng. R. Cas.* 554, 25 *Kan.* 738.—DISTINGUISHING *Ostertag v. Pacific R. Co.*, 64 *Mo.* 421; *Philadelphia & R. R. Co. v. Hummell*, 44 *Pa. St.* 375.

7. Duty to guard stationary cars.*

—It is no part of the duty of a company to maintain a guard over its cars left standing upon its track, in order to keep children, playing about them, from getting upon or under them, and thereby save them from injury. *Chicago & A. R. Co. v. McLaughlin*, 47 *Ill.* 265.

8. Leaving torpedo on track.†

Where a child picks up a torpedo from a railroad track and is injured by its explosion, the company is liable, though it appears that an employé placed it on the track contrary to the rules of the company and out of mere caprice. *Pittsburg, C. & St. L. R. Co. v. Shields*, 44 *Am. & Eng. R. Cas.* 647, 47 *Ohio St.* 387, 8 *L. R. A.* 464, 24 *N. E. Rep.* 658.—DISTINGUISHING *Little Miami R. Co. v. Wetmore*, 19 *Ohio St.* 110. REVIEWING *Weed v. Panama R. Co.*, 17 *N. Y.* 362.

A train of cars passing over some signal torpedoes left one unexploded, which was picked up by a boy nine years old, at a point on the track which he and other children, in common with the general public, had long been accustomed to use as a crossing, with the knowledge and without the disapproval of the company. He carried it into a crowd of boys near by, and, not knowing what it was, attempted to open it. It exploded and injured the plaintiff, a boy ten years of age. *Held*, that the act of the boy who picked up the torpedo was only a contributory condition, which the company's servants should have anticipated as a probable consequence of their negligence in

leaving the torpedo where they did, and that that negligence was the direct cause of the injury suffered by the plaintiff. *Harriman v. Pittsburg, C. & St. L. R. Co.*, 32 *Am. & Eng. R. Cas.* 37, 45 *Ohio St.* 11, 12 *N. E. Rep.* 451.—DISTINGUISHING *Cartier v. Columbia & G. R. Co.*, 19 *So. Car.* 20.

9. Dangerous structures—Bridge.

—Owners of private grounds are liable for injuries to children, although trespassing at the time, where from their peculiar nature and exposed condition the owner should reasonably anticipate such injury. So, a railroad company that maintains a draw-bridge in a populous city is liable where a child is injured while standing in a dangerous position while the draw is being turned, where the company's servants know of the child's position and make no effort to send it away, or to avoid injury. *Coppner v. Pennsylvania Co.*, 12 *Ill. App.* 600.

10. Failure to fence.*

—A company is liable for an injury to a child 18 months old that strays upon the track and is injured, where the jury finds that there is no contributory negligence on the part of its parents, and that the injury would not have occurred if the track had been properly fenced. *Schmidt v. Milwaukee & St. P. R. Co.*, 23 *Wis.* 186.—REVIEWED AND FOLLOWED IN *Isabel v. Hannibal & St. J. R. Co.*, 60 *Mo.* 475.

A company's neglect to fence is for the jury to consider as bearing on its liability for injury done to a child going upon the track in consequence. *Keyser v. Chicago & G. T. R. Co.*, 19 *Am. & Eng. R. Cas.* 91, 56 *Mich.* 559, 23 *N. W. Rep.* 311, 56 *Am. Rep.* 405.—FOLLOWING *Marcott v. Marquette, H. & O. R. Co.*, 47 *Mich.* 9.—And see also *Williams v. Great Western R. Co.*, *L. R.* 9 *Ex.* 157, 22 *W. R.* 531, 31 *L. T.* 124, 43 *L. J. Ex.* 105.

In case of an injury to a child by reason of a company failing to fence certain grounds in a city, as required by ordinance, the failure to fence is not conclusion of its liability, as in case of animals; yet an action will lie for the injury, and the failure will be evidence of negligence. *Hayes v. Michigan C. R. Co.*, 15 *Am. & Eng. R. Cas.* 394, 111 *U. S.* 228, 4 *Sup. Ct. Rep.* 369.—REFERRED TO IN *Northern Pac. R. Co. v. Sul-*

* Injury to child playing about cars left on gravity railroad, see 48 *AM. & ENG. R. CAS.* 538, *abstr.*

Injury to boy playing with hand-car left unguarded by the track, see 48 *AM. & ENG. R. CAS.* 537, *abstr.*

† See also EXPLOSIONS, 2; TRESPASSERS, INJURIES TO, 79.

* See also FENCES.

Failure to fence track as affecting trespassers, see note, 31 *AM. & ENG. R. CAS.* 423.

livan, 53 Fed. Rep. 219, 10 U. S. App. 473, 3 C. C. A. 506.

Where a statute requires railway companies to fence, a company is guilty of negligence where it operates a mine near one of its stations and deposits slack on an unfenced lot, which is burning continually, but in such a way as to show no signs of danger; and the company will be liable to a lad who goes upon the burning slack without knowledge of its condition and without warning and is injured. *Union Pac. R. Co. v. McDonald*, 152 U. S. 262, 14 Sup. Ct. Rep. 619.—QUOTING *Bennett v. Louisville & N. R. Co.*, 102 U. S. 577.

A young child strayed from its home to a track, crossed the track, and fell into an adjoining trench. The track was not fenced on the trench side. In an action against the company for damages, the plaintiff child claimed that its fall was caused by the company's negligence in not fencing the track on the side of the trench. *Held*, on demurrer to the declaration, that the company was, as to the plaintiff, under no obligations so to fence its tracks that the plaintiff could not get from them onto the adjoining land. *Held* further, that the action could not be maintained. *Morrissey v. Providence & W. R. Co.*, 15 R. I. 271, 3 Atl. Rep. 10.

A boy strayed from a street upon an adjacent track and was run over and injured at a point where it was customary to load freight from the cars onto teams standing in the street. At the trial, sixteen months later, of an action to recover for such injuries because of defendant's neglect to fence the track, the plaintiff's evidence did not show affirmatively that a fence at such point would not have obstructed the convenient use of the railroad. The presiding judge ruled that the plaintiff could not recover, and ordered a verdict for the defendant; and the plaintiff alleged exceptions which recited that the jury took "a view of the premises," without more. *Held*, that the plaintiff showed no ground on exception. *McCarty v. Fitchburg R. Co.*, 154 Mass. 17, 27 N. E. Rep. 773.—FOLLOWED IN *Daniels v. New York & N. E. R. Co.*, 154 Mass. 349.

11. Negligence of servant.—Where the company's servant, who pulled a trespassing boy from the ladder of a freight car, was also a city police officer, but did not intend to arrest the boy, and one of his duties as the company's servant was to keep the

boys off the cars, the fact that he was such policeman will not relieve the company from liability, since at the time of the act complained of he was acting in his capacity as the company's servant. *Brill v. Eddy*, 115 Mo. 596, 22 S. W. Rep. 488.

A boy of 11 got on a freight train to ride some six blocks. After the train had started the brakeman told him to get off and began to throw pieces of coal at him, and after rolling a large lump of coal against him, he fell off and was injured under the car wheels. The train was moving about 10 miles an hour. *Held*, that it was not necessary to show specific orders to the brakemen by the company to drive off boys who were stealing rides, in order to hold it liable. The brakeman was engaged in the company's business and acting within the general scope of his authority. *Lang v. New York, L. E. & W. R. Co.*, 22 N. Y. S. R. 110.—APPLYING *Rounds v. Delaware, L. & W. R. Co.*, 64 N. Y. 129.

12. Company's negligence is a question of fact.*—A little girl in attempting to cross a side-track caught her foot and was injured by a backing freight train. There was some conflict of evidence as to whether she was on the track when the switch was opened to let cars onto the side-track, or at the time that a signal was given to back. *Held*, that the questions of whether she was on the track at the time of opening the switch, or of giving the signal, or whether the switchman ought to have seen her before giving the signal, or immediately after, and then have given the alarm sooner than he did, or have rescued her by his own efforts; or whether the yard-master should have gone to her relief after it appeared that he saw that she was in danger; or whether the brakeman acted with all circumspection which his duty required, were all proper for the jury. *Townley v. Chicago, M. & St. P. R. Co.*, 4 Am. & Eng. R. Cas. 562, 53 Wis. 626, 11 N. W. Rep. 55.—REVIEWED IN *Johnson v. Chicago & N. W. R. Co.*, 56 Wis. 274.

Plaintiff, an infant about seventeen months old, escaped from his mother's house, near a street-railroad crossing, went upon the track, and was struck by a train and injured. The only negligence complained of was that the engineer ought sooner to have discovered the plaintiff on

* See also *post*, 33, 48, 55, 66.

the track and stopped the train. It appeared that the child reached the track but a very brief time before the accident; that the engineer immediately upon seeing the plaintiff gave the signal for applying the brakes and reversed his engine, and that everything was then done that could be done to arrest the speed of the train, but before it was entirely stopped two of the small wheels passed over plaintiff's leg. *Held*, that the evidence failed to show any negligence on the part of defendant; and that a submission of the question to the jury was error. *Chrystal v. Troy & B. R. Co.*, 31 Am. & Eng. R. Cas. 411, 105 N. Y. 164, 11 N. E. Rep. 380, 6 N. Y. S. R. 833, 7 Cent. Rep. 245; reversing 38 Hun 641, *mem.*

The following questions were held to be for the determination of the jury in cases where children received personal injuries:

Whether or not the failure to stop a train, when the engineer saw an infant playing in the vicinity of a track, constituted negligence. *Walters v. Chicago, R. I. & P. R. Co.*, 41 Iowa 71.

Whether the company was guilty of negligence in letting a loaded car run down grade without any person thereon or without means to stop it, in a populous neighborhood, the evidence being conflicting as to whether a child could have been seen by the persons operating the road. *Smith v. Atchison, T. & S. F. R. Co.*, 4 Am. & Eng. R. Cas. 554, 25 Kan. 738.

The question of the company's negligence where children playing upon a trestle are run over and killed, and defendant's engineer testified that they were not seen until he was within 50 or 60 yards of them, that the whistle was sounded and every effort made to stop the train. *Watley v. Mobile & O. R. Co.*, (Miss.) 9 So. Rep. 445.

The question of the company's negligence where, in an action by a boy to recover for personal injuries, it appeared that an employé had only one arm, that the boy was clinging to the ladder of the car, that when the car reached the employé he pulled plaintiff off, when he fell and was injured. *Brill v. Eddy*, 115 Mo. 596, 22 S. W. Rep. 488.

Whether the driver of a street car, who sees a child under two years of age playing in the street within six feet of the track, and keeps a fast trot until he is within seven feet of the child, is guilty of negligence. *Farris v. Cass Ave. & F. G. R.*

Co., 80 Mo. 325; affirming 8 Mo. App. 538.

Where a child on a track was fleeing, and there was reason to believe it would escape before an approaching train reached it, but its escape was prevented by catching its foot, and then everything possible was done to prevent an accident, but without success, whether the company was negligent in not stopping the train when the child was first seen. *Pennsylvania R. Co. v. Morgan*, 82 Pa. St. 134, 16 Am. Ry. Rep. 89.—DISTINGUISHING *Philadelphia & R. R. Co. v. Spearen*, 47 Pa. St. 300.

Whether the porter was negligent in violently closing the door of a carriage, thereby crushing a child's fingers. *Coleman v. South Eastern R. Co.*, 4 H. & C. 699, 12 Jur. N. S. 944.

2. With Respect to Children on Trains.

13. Generally.—Where an infant enters a freight car, which is not allowed to carry passengers, and is injured while attempting to perform a dangerous service at the request of the brakeman, the company is not liable where he has paid no fare, and has entered without consent of the conductor, though he has been discovered and permitted by the conductor to continue the ride. *Sherman v. Hannibal & St. J. R. Co.*, 4 Am. & Eng. R. Cas. 589, 72 Mo. 62, 37 Am. Rep. 423.—DISTINGUISHED IN *Sloan v. Central Iowa R. Co.*, 11 Am. & Eng. R. Cas. 145, 62 Iowa 728. QUOTED IN *Whitehead v. St. Louis, I. M. & S. R. Co.*, 39 Am. & Eng. R. Cas. 410, 99 Mo. 263, 11 S. W. Rep. 751.

Quare, whether the law imposes upon a company the duty of having a brakeman on the platform of the cars as the train approaches a depot in the city, to keep off trespassing children, or save them from accident if they attempt to get on. *Sommers v. Mississippi & T. R. Co.*, 7 Lea (Tenn.) 201.

14. Riding on trains as passengers.*—(1) *Generally.*—The mere fact that a child of tender years is permitted by the persons in charge of a passenger train to enter it at a regular station, is not in itself sufficient to charge the company with negligence. *Indianapolis, P. & C. R. Co. v.*

* Rights of children on train in charge of parents, see note, 27 AM. & ENG. R. CAS. 103.

Care required from carrier towards children, see CARRIAGE OF PASSENGERS, 144.

Pitzer, 25 *Am. & Eng. R. Cas.* 313, 109 *Ind.* 179, 58 *Am. Rep.* 387, 6 *N. E. Rep.* 310, 10 *N. E. Rep.* 70.—**DISTINGUISHING** *Binford v. Johnston*, 82 *Ind.* 426, 42 *Am. Rep.* 508; *Dixon v. Bell*, 5 *M. & S.* 198; *Lynch v. Nurdin*, 1 *Q. B.* 29; *Carter v. Towne*, 98 *Mass.* 567; *Sioux City & P. R. Co. v. Stout*, 17 *Wall. (U. S.)* 657; *Bird v. Holbrook*, 4 *Bing.* 628; *Birge v. Gardner*, 19 *Conn.* 507; *Keffe v. Milwaukee & St. P. R. Co.*, 21 *Minn.* 207, 18 *Am. Rep.* 393; *Nagel v. Missouri Pac. R. Co.*, 75 *Mo.* 653, 42 *Am. Rep.* 418; *Evansich v. Gulf, C. & S. F. R. Co.*, 57 *Tex.* 126, 44 *Am. Rep.* 586; *Townley v. Chicago, M. & St. P. R. Co.*, 53 *Wis.* 626; *Bransom v. Labrot*, 81 *Ky.* 638, 50 *Am. Rep.* 193; *Kansas C. R. Co. v. Fitzsimmons*, 22 *Kan.* 686, 31 *Am. Rep.* 203.

While the tender years of a child may excuse him, if he had occupied the relation of a passenger, from the effect of his own contributory negligence, it cannot create that relation. *Gulf, C. & S. F. R. Co. v. Dawkins*, 77 *Tex.* 228, 13 *S. W. Rep.* 982.

A child nine years of age who enters a passenger train with her mother, who has provided herself with a ticket, is not entitled to be carried unless paid for. *Beckwith v. Cheshire R. Co.*, 27 *Am. & Eng. R. Cas.* 192, 143 *Mass.* 68, 8 *N. E. Rep.* 875.

A mother carried in her arms a child three years and two months old into one of the trains boarded by law to carry children under three years of age free of charge, having purchased a ticket only for herself. The child having been injured in the course of the journey, and no questions having been asked as to the age of the child—*held*, that the child could recover. *Austin v. Great Western R. Co.*, *L. R.* 2 *Q. B.* 442, 8 *B. & S.* 327, 36 *L. J. Q. B.* 201, 15 *W. R.* 863, 16 *L. T.* 320.—**FOLLOWED** in *Foulkes v. Metropolitan Dist. R. Co.*, 41 *L. T.* 95, 48 *L. J. C. P.* 555.

(2) *Fingers crushed by shutting door.**—A boy under 12 years of age, who has just entered a railway carriage and is about to seat himself, is not guilty of contributory negligence in placing his fingers on a part of the door, so that when the porter closes it violently his fingers are crushed. The negligence of the porter in such case is for the jury. *Coleman v. South Eastern R. Co.*, 4 *H. & C.* 699, 12 *Jur. N. S.* 944.

A girl seven years old, traveling with her

mother, was at a water-cooler which the conductor had just passed, when the train suddenly stopped, and falling forward, she placed one hand against the door-facing to save herself, and the conductor suddenly closed the door, catching her fingers and causing the injury complained of. The court instructed the jury that if the conductor saw the child at the cooler, or with reasonable diligence could have seen her there, and, knowing that the train was about to stop, closed the door negligently or carelessly, and thereby caused the injury, the defendant company was liable. *Held*, that the instruction was erroneous in failing to state that the conductor had a right to rely on the mother's care of the child, and in requiring him to use reasonable diligence in seeing that she was not exposed to danger at the time she was injured. *St. Louis, I. M. & S. R. Co. v. Rexroad, (Ark.)* 58 *Am. & Eng. R. Cas.* 615, 26 *S. W. Rep.* 1037.

15. Injuries while getting on train.*—A company is not liable for injuries to a boy 12 years old, received while attempting to get on a moving train, though he had been invited to do so by a brakeman, where it further appears that the brakeman was not in charge of the train and had no authority to invite the boy to get on. *Cotter v. Frankford & S. R. Co.*, 15 *Phila. (Pa.)* 255.—**REVIEWING** *Flower v. Pennsylvania R. Co.*, 69 *Pa. St.* 210.

16. Injuries while getting off train.†—One who forces a child to jump off a train while it is in motion is guilty of negligence. The fact that the child had no right to be upon such carriage is no defense to an action for an injury resulting from such negligence. *Martin v. Queen*, 2 *Can. Exch.* 328.

But it is not negligence for those in charge of a train to order a boy seven years old to get off a low, slowly moving sand-car. *Cauley v. Pittsburgh, C. & St. L. R. Co.*, 4 *Am. & Eng. R. Cas.* 533, 98 *Pa. St.* 498.—**APPLIED** in *O'Connor v. Illinois C. R. Co.*, 44 *La. Ann.* 339. **RECONCILED** in *Carter v. Louisville, N. A. & C. R. Co.*, 98

*See also *post*, 45, 84, 86, 110.

Liability to children who are injured in jumping on moving trains, see note, 21 *L. R. A.* 355.

Liability for killing a child while climbing on a moving car, see 25 *AM. & ENG. R. CAS.* 321, *abstr.*

†See also *post*, 46, 85, 87, 110.

Liability to children who are injured in jumping off moving trains, see note, 21 *L. R. A.* 355.

* See also **CARRIAGE OF PASSENGERS, 200.**

Ind. 552. REVIEWED IN *Murray v. Richmond & D. R. Co.*, 93 N. Car. 92.

If a boy 15 years old, who is upon a freight train wrongfully and as a trespasser, for the purpose of riding without paying his fare, is commanded by the brakeman to jump off the train while in dangerous motion, in the night-time, and in obedience to that command, and in fear of being thrown off, jumps off the train and is run over and injured, the company is liable. *Kansas City, Ft. S. & G. R. Co. v. Kelly*, 34 Am. & Eng. R. Cas. 281, 36 Kan. 655, 14 Pac. Rep. 172.

Plaintiff, a girl of five, and another child, but a little older, were placed on a train by an aunt to ride some distance. No fare was paid, neither were the children left in charge of the conductor or any one else. Plaintiff was injured in alighting from the car at the place of destination. Held, that the company was not liable. *Atchison & N. R. Co. v. Flinn*, 1 Am. & Eng. R. Cas. 240, 24 Kan. 627.—FOLLOWED IN *Atchison, T. & S. F. R. Co. v. Plaskett*, 47 Kan. 107.

17. Injuries to children trespassing upon train.*—(1) *General principles.*—A company is not bound to keep a lookout to prevent boys from swinging on the ladders of its slowly moving trains, and its failure to do so is not negligence rendering it liable for injuries to a small boy who attempts to steal a ride in that manner. *Catlett v. St. Louis, I. M. & S. R. Co.*, 54 Am. & Eng. R. Cas. 113, 57 Ark. 461, 21 S. W. Rep. 1062.

The doctrine of the "turntable cases" does not apply to such cases. *Catlett v. St. Louis, I. M. & S. R. Co.*, 54 Am. & Eng. R. Cas. 113, 57 Ark. 461, 21 S. W. Rep. 1062.—DISAPPROVING *Sioux City & P. R. Co. v. Stout*, 17 Wall. (U. S.) 657.

The conductor of a train upon which a child seven years old has become an intruder is bound to use greater care in dealing with such child than is required respecting older persons. *Indianapolis, P. & C. R. Co. v. Pitzer*, 25 Am. & Eng. R. Cas. 313, 109 Ind. 179, 58 Am. Rep. 387, 6 N. E. Rep. 310, 10 N. E. Rep. 70.

A servant of a company in the performance of his duty in removing a trespassing boy from the company's train is bound to exercise ordinary care. *Brill v. Eddy*, 115 Mo. 596, 22 S. W. Rep. 488.

* Liability for injury to children trespassing on cars, see 54 AM. & ENG. R. CAS. 116, *abstr.*

Where the boy in such case receives injury occasioned by the lack of ordinary care on the part of the servant, the company will be liable. *Brill v. Eddy*, 115 Mo. 596, 22 S. W. Rep. 488.

(2) *Illustrations.*—There is no casual connection between a breach of duty by a company in running its train at a greater speed than that allowed by ordinance, and an injury to a boy who lost his footing and fell while attempting to climb up the ladder of a box-car attached to such train, and no action will lie against the company for an injury so caused. *Western R. Co. v. Mutch*, 54 Am. & Eng. R. Cas. 107, 97 Ala. 194, 11 So. Rep. 894.

A company is liable for injuries to a boy caused by an employé throwing water in his face while riding on the end of a caboose, causing him to fall and be injured if the employé knew or had reason to suspect that the boy was there when he threw the water. *Clark v. New York, L. E. & W. R. Co.*, 20 N. Y. S. R. 681, 51 Hun 637, 3 N. Y. S. R. 607.

An eight-year-old boy, trespassing upon the premises of a company, got on the step of the engine and was ordered off by the fireman, and as he jumped off he fell. The locomotive was started at the moment and the tender passed over his arm. He was a boy of more than average intelligence, and had been warned against going on the premises or riding on the engine. Held, that the company could not be held liable for the injury without showing that the engineer or other servants of the company in charge of the locomotive knew that the child was in the way, or that they had been reckless or negligent in the management of the engine, or could have anticipated the injury. *Chicago & N. W. R. Co. v. Smith*, 4 Am. & Eng. R. Cas. 535, 46 Mich. 504, 9 N. W. Rep. 830.—DISTINGUISHED IN *Schindler v. Milwaukee & St. P. R. Co.*, 87 Mich. 400.

18. Injuries while stealing a ride.*—It is not negligence on the part of a company for its employés to fail to ascertain that a boy of tender years is stealing a ride, unknown to them and out of their sight, on the back foot-board of a switch-engine, when they have made a practice of prevent-

* See also *post*, 51, 90.

Liability for injuries to a boy stealing a ride on a freight car, see 28 AM. & ENG. R. CAS. 594, *abstr.*

ing such acts by driving boys away when they saw them about the cars. *Oregon R. & N. Co. v. Egley*, 2 Wash. 409, 26 Pac. Rep. 973. And see also *Callitt v. St. Louis, I. M. & S. R. Co.*, 54 Am. & Eng. R. Cas. 113, 57 Ark. 461, 21 S. W. Rep. 1062.

To entitle a boy injured while riding on the foot-board of an engine to recover against the company, the engineer must have been guilty of gross negligence and the boy free from contributory negligence. *Hughes v. Detroit, G. H. & M. R. Co.*, 78 Mich. 399, 44 N. W. Rep. 396.

10. Injuries while riding on hand-cars.—No damages can be recovered for injury to a child, at the suit of the parent, inflicted while riding on a hand-car furnished by the company for the exclusive use of its hands, when the child went upon the car to make the trip during which it was injured with the consent of the parent, no negligence or cause of injury being shown except that of permitting so young and inexperienced a child to ride on such a car. *Dawkins v. Gulf, C. & S. F. R. Co.*, 77 Tex. 232, 13 S. W. Rep. 984.

In an action by a father for the death of his child, where it appeared that section-men of a railway had left a hand-car by the side of the railway track, of such weight that it would require four or five men to lift it on the track, and at a distance of a mile from the thickly settled portions of the city, and in swampy grounds, and the deceased was attracted by the fact that some boys had placed the hand-car on the track and were riding up and down the track upon it, and he got on the car to ride, and came to his death from jumping or falling from it while it was running at a high rate of speed—*held*, that there was no negligence on the company's part shown by the evidence, even though the "boss," when the men were present, had given the boys permission to ride upon the car at other times. *Robinson v. Oregon S. L. & U. N. R. Co.*, 7 Utah 493, 27 Pac. Rep. 689.—REVIEWING *Sioux City & P. R. Co. v. Stout*, 17 Wall. (U. S.) 637.

3. Injuries at Crossings* and Stations.

20. At crossings of highways.—(1) *Generally.*—Proof that a child six or seven

* Negligence in killing a child of tender years at a crossing. Child not capable of contributory negligence, see 26 Am. & Eng. R. Cas. 376, *abstr.*

years old was seen lying on the track near a highway crossing in time to have stopped the train before reaching him, but that those in charge ran on without any effort to stop and without giving any signal, mistaking him for a bunch of grass or weeds, is sufficient evidence of negligence to warrant a recovery. *Meeks v. Southern Pac. R. Co.*, 8 Am. & Eng. R. Cas. 314, 56 Cal. 513, 38 Am. Rep. 67. And compare *Schindler v. Milwaukee, L. S. & W. R. Co.*, 87 Mich. 400, 49 N. W. Rep. 670.

Where a child four years and a half old is found lying on a crossing, having been injured by a passing train, and it is shown that the company had not complied with the statute by erecting a gate or stile at the footway, there is evidence that the accident was caused by the neglect of the company to fence. *Williams v. Great Western R. Co.*, L. R. 9 Ex. 157, 22 W. R. 531, 31 L. T. 124, 43 L. J. Ex. 105.

(2) *Illustrations.*—Failure to provide a flagman cannot be assigned as negligence on behalf of a child injured while attempting to climb upon a moving train. *Chicago & W. I. R. Co. v. Roath*, 35 Ill. App. 349.—QUOTING *Chicago, R. I. & P. R. Co. v. Eninger*, 114 Ill. 79.

A father sued for the loss of five children, the eldest sixteen and the youngest five years of age. The accident was caused by a train colliding with a wagon. *Held*, there was evidence going to show negligence on the part of defendant; the train was behind time, running at an unusual rate of speed; the bell was not rung nor the whistle blown; eucalyptus trees, planted by defendant along its track, prevented—in connection with some neighboring orchards—trains from being seen by those approaching the crossing; a wind was blowing which caused the trees to rustle. *Nehrbas v. Central Pac. R. Co.*, 14 Am. & Eng. R. Cas. 670, 62 Cal. 320.

In an action for running over and killing children, eleven and ten years old, respectively, at a grade crossing without gates or sign-boards, there was evidence that the crossing had been planked between the tracks used by the public openly and continuously for more than twenty years; that the children looked when near the track, but the train, running at the rate of forty miles an hour, was concealed from sight by a nearer train going the other way, and that a flagman on the crossing stood facing

the children, and, without waving his flag, was talking to some girls. One witness testified that he heard no noise made by the engine before the children were struck; and another, that he heard three sharp whistles just as they were struck, but heard no whistle before this. *Held*, that there was evidence that the crossing was a highway by prescription; that neither was the bell rung nor the whistle sounded within the Pub. St. ch. 112, § 163, and that the children were invited upon the track; and that the case was for the jury. *Johanson v. Boston & M. R. Co.*, 153 Mass. 57, 26 N. E. Rep. 426.

A boy was killed by a moving train. When first seen he was under the wheels of a car about the middle of the train, some distance from a crossing, where people did not usually cross. From the facts it seemed quite probable he was attempting to get on the cars. *Held*, not sufficient evidence that he was struck at a crossing, nor that the company was negligent. *Ogden v. Pennsylvania R. Co.*, (Pa.) 16 All. Rep. 353.

21. At crossings of streets.*—(1) Generally.—If due diligence be exercised in running a train across a street in a city the company is not liable, simply because it was running there, for an injury to a child which suddenly placed itself on the track in front of the cars. *Meyer v. Midland Pac. R. Co.*, 2 Neb. 319.

Where an engine is moving on a track through a street at not more than two miles an hour, it is not negligence on the part of the engineer to fail to stop because a small child is seen running toward the engine; nor because the child turns and runs alongside of and past it. He is not bound to anticipate that it will suddenly turn and run on the track in front of his engine; and if it does so, his full duty is discharged by then doing all he can to stop the engine. *Schwier v. New York C. & H. R. R. Co.*, 15 Hun (N. Y.) 573.—APPLYING *Bulger v. Albany R. Co.*, 42 N. Y. 459.

(2) *Company liable.*—Where a child of tender years attempted to pass under a train of cars, negligently left standing on the crossing of a public street, by which he was injured—*held*, that the owners of the cars were liable. *Rauch v. Lloyd*, 31 Pa. St. 358.—REVIEWED IN *Wright v. Malden & M. R. Co.*, 4 Allen (Mass.) 283; *Bellevontaine & I. R. Co. v. Snyder*, 18 Ohio St. 399.

A boy of ten in a large city attempted to cross a track at a street crossing, in front of a closely approaching train, but caught his foot in a hole, fell, and was killed. The train was not exceeding the prescribed rate of speed. It was the duty of the company to keep the track safe. It appeared that he might have crossed safely had he not caught his foot. *Held*, that the company was liable. *Louisville, N. A. & C. R. Co. v. Red*, 47 Ill. App. 662.

Where a child of tender years, in this case six or seven years, tried to cross a street covered by a train of cars about to start, by passing between two cars coupled by a pole twelve to fourteen feet in length, it was the duty of the company to give him notice of the starting of the train. *Philadelphia, B. & W. R. Co. v. Loyer*, 112 Pa. St. 414, 3 All. Rep. 874.

(3) *Company not liable.*—A small child, less than two years old, was injured by a train near a crossing not much frequented; but there was no direct evidence as to how it was injured. There was evidence that no bell was rung or whistle sounded, but there was nothing to show that this contributed to the injury, except such as could be inferred from the presence of the child at or near the crossing. There was no evidence that the child was precocious, or that it had been warned that a railway whistle or bell was a signal of danger. *Held*, not sufficient evidence of negligence to warrant a verdict for the plaintiff. *Vallance v. Boston & A. R. Co.*, 55 Fed. Rep. 364.

Where a company stops its train, not to exceed a minute, as it approaches a crossing within the limits of an incorporated city, and while its cars are standing over a street crossing a child of seven years of age, on his way home from school, attempts to take hold of the brake-ladder on a freight car in the train, for the purpose of climbing over the car, and the train starts just as he makes the effort to get onto the car and jerks him off so that he falls under the wheels and is run over and injured, and the trainmen have no knowledge of the attempt upon the part of the boy to board the train, the company is not guilty of such negligence toward the boy as to render it liable for damages on account of such injury. *Atchison, T. & S. F. R. Co. v. Plaskett*, 47 Kan. 107, 36 Pac. Rep. 401; *motion for rehearing denied*, 47 Kan. 112, 26 Pac. Rep. 403, 27 Pac. Rep. 824.—DISTINGUISH-

* See also *post*, 56-66.

ING Chicago City R. Co. v. Wilcox, 138 Ill. 370, 27 N. E. Rep. 899; Avey v. Galveston, H. & S. A. R. Co., (Tex.) 17 S. W. Rep. 31. FOLLOWING Central Branch U. P. R. Co. v. Henigh, 23 Kan. 347; Atchison & N. R. Co. v. Flinn, 24 Kan. 627.

Plaintiff, an infant about seventeen months old, escaped from his mother's house near a street-railroad crossing by crawling under a gate which was fastened, went upon the track, was struck by a train, and injured. In an action to recover damages for the injury, it appeared that the bell on the locomotive was not rung or the whistle sounded eighty rods from the crossing as required by the statute. There was no evidence authorizing a finding that had the statute relating to signals at railroad crossings been complied with, the mother's attention would have been called in time to have enabled her to rescue the child, or that the injury might otherwise have been prevented. *Held*, that the testimony did not authorize a recovery. *Chrystal v. Troy & B. R. Co.*, 124 N. Y. 519, 26 N. E. Rep. 1103, 36 N. Y. S. R. 699; reversing 52 Hun 55, 22 N. Y. S. R. 384; former appeal, 31 Am. & Eng. R. Cas. 411, 105 N. Y. 164, 11 N. E. Rep. 380, 6 N. Y. S. R. 833, 7 Cent. Rep. 245; reversing 38 Hun 641, *mem.*

22. At private crossings.—It appeared that the person injured was a child about four years of age, living with his parents, in a house situated in close proximity to the track of the defendant; that the mother had left the child with his sister, a girl fourteen years of age, to attend while she went to a neighbor's house, and during her absence the child strayed from the house, and while on a private road, used by the public, which crossed the track, and within the right of way of defendants, the accident complained of occurred, and was occasioned by a train of defendant's coming in collision with a push-car which had been left on its track, shattering the car into pieces, a fragment of which struck the child and produced the injuries charged. *Held*: (1) that the child could not be considered as a trespasser on the right of way of defendants, nor his parents guilty of negligence in suffering him to stray there, as the injury was received while he was on a road used by the public, and where he had a right to be, in common with the rest of the public, until its use was prohibited by the company; (2) nor was the mother of the child

guilty of negligence in leaving him in charge of his sister, a girl of the age of fourteen years, during her absence at a neighbor's house, the evidence showing her to be fully competent for the charge. *Pittsburg, Ft. W. & C. R. Co. v. Bamstead*, 48 Ill. 221.

A boy nearly eleven years old, and smart and intelligent for his age, was killed by an east-bound passenger train, running on a down-grade at the rate of thirty or thirty-five miles an hour. He had been sent on an errand to the house of a neighbor some three or four hundred yards distant, and when he started he attempted to go up the tracks, and his mistress, observing his course, forbade his going on the railroad, and cautioned him to avoid the danger of the cars. She testified that when she heard the rush of the train she ran to the front door to see what it was, and caught sight of the boy and engine at the same time that he was on the front of the engine, being tossed up, and scrambling with his hands, the engine being at that moment on the private crossing below the house. The engineer of the defendant testified that he did not blow the whistle for the crossing on that day, and never did so, to his recollection; there was no whistling-post requiring it; that when he first saw the boy running toward the house between the north and south tracks of the railroad, he was forty or fifty yards west of the crossing, and appeared to be running as rapidly as he could—at full speed; he could have stepped off at any point, and gotten out of the way of the train without any trouble; he was not on witness's track at any point where he could see him, and if he had remained between the tracks he would not have been injured. The fireman who saw the accident as it actually occurred testified that the boy was not on the track at any time until he got hit; that when the engine got within three feet of him the little fellow stumbled and fell right out on the pilot, and it threw him up, and he came down and struck on the flag-staff; the flag-staff broke off with him, and he fell to the ground. If he had not stumbled and fallen over he would not have been hit. *Held*, that there was not such legally sufficient evidence of negligence on the part of the defendant as to warrant the submission of the case to the jury. *Baltimore & O. R. Co. v. State*, 71 Md. 590, 18 All. Rep. 969.

23. At stations.—A girl nine years of age caught her foot in a rail laid down on

the station as she was about to take passage on a train. She fell, breaking her arm. The rail was not defective, and the girl, if she had looked down, could have avoided the injury. *Held*, that the company was not liable. *Potter v. Wilmington & W. R. Co.*, 21 *Am. & Eng. R. Cas.* 328, 92 *N. Car.* 541.

Where a child is upon the platform of a station, not as a passenger or upon any business connected with the company, but merely loitering there for his own purposes or for personal enjoyment, the company owes him no duty. Hence if he be injured by a passing train he cannot recover against the company, upon the theory that they have failed to discharge toward him a legal duty and hence have been guilty of negligence. The age of the child is immaterial. *Baltimore & O. R. Co. v. Schwindling*, 8 *Am. & Eng. R. Cas.* 544, 101 *Pa. St.* 258.—FOLLOWING *Gillis v. Pennsylvania R. Co.*, 59 *Pa. St.* 141.—FOLLOWED IN *Lake Shore & M. S. R. Co. v. Rosenzweig*, 113 *Pa. St.* 519.

4. Injuries at Turntables.*

24. Generally.—The owner of dangerous machinery, such as a turntable, who leaves it in an open place, though on his own land, where he has reason to believe that young children will be attracted to play with it and be injured, is bound to use reasonable care to protect such children from the danger to which they are thus exposed. *Keffe v. Milwaukee & St. P. R. Co.*, 21 *Minn.* 207, 19 *Am. Ry. Rep.* 231.—APPROVING *Kay v. Pennsylvania R. Co.*, 65 *Pa. St.* 269; *Pittsburg, A. & M. Pass. R. Co. v. Caldwell*, 74 *Pa. St.* 421. DISTINGUISHING *Philadelphia & R. R. Co. v. Hummell*, 44 *Pa. St.* 375; *Gillis v. Pennsylvania R. Co.*, 59 *Pa. St.* 129. QUOTING *Sweeney v. Old Colony & N. R. Co.*, 10 *Allen (Mass.)* 368.—APPROVED IN *Evansich v. Gulf, C. & S. F. R. Co.*, 6 *Am. & Eng. R. Cas.* 182, 57 *Tex.* 126. DISAPPROVED IN *Battishill v. Humphreys*, 28 *Am. & Eng. R. Cas.* 597, 64 *Mich.* 494. DISTINGUISHED IN *Daniels v. New York & N. E. R. Co.*, 154 *Mass.* 349; *Emerson v. Peteler*, 35 *Minn.* 481. FOLLOWED IN PART AND DISTINGUISHED IN PART IN *O'Malley v. St. Paul, M. & M. R. Co.*, 45 *Am. & Eng. R. Cas.* 62, 43 *Minn.* 289. REVIEWED AND MODIFIED IN *Twist v. Winona & St. P. R. Co.*, 37 *Am. & Eng. R. Cas.* 336, 39 *Minn.* 164, 39 *N. W. Rep.* 402. REVIEWED IN *Harriman v. Pittsburg, C. & St. L. R. Co.*, 32 *Am. & Eng. R. Cas.* 37, 45 *Ohio St.* 11.

The fact that the turntable on which a child of tender years was injured through the negligence of the company's agents was located on the premises of the company cannot affect the right of the child to recover for the damage inflicted. *Evansich v. Gulf, C. & S. F. R. Co.*, 6 *Am. & Eng. R. Cas.* 182, 57 *Tex.* 126.

Nor the fact that the turntable was set in motion by the negligent act of other children. *Barrett v. Southern Pac. Co.*, 48 *Am. & Eng. R. Cas.* 532, 91 *Cal.* 296, 27 *Pac. Rep.* 666.—FOLLOWING *Pastene v. Adams*, 49 *Cal.* 87.

A landowner is under no duty to a mere trespasser in keeping his premises in a safe condition; and the mere fact that a trespasser is an infant does not raise the duty where none otherwise existed. So *held*, where the defendants were claimed to have been guilty of negligence in maintaining a turntable insecurely guarded upon their premises, so that it was set in motion by children, one of whom was injured thereby. *Frost v. Eastern R. Co.*, 64 *N. H.* 220.—NOT FOLLOWING *Sioux City & P. R. Co. v. Stout*, 17 *Wall. (U. S.)* 657.

25. Duty to inclose and guard turntables.*—Under certain circumstances a company may be liable on the ground of negligence for a personal injury to a child of tender years in a town or city, caused by a turntable, built by the company upon its own uninclosed land, and which is left unguarded and unlocked in a situation which renders it likely to cause injury to children. *Stout v. Sioux City & P. R. Co.*, 2 *Dill. (U. S.)* 294.—DISTINGUISHED IN *Daniels v. New York & N. E. R. Co.*, 154 *Mass.* 349.

* See also *post*, 30, 77, 91, 115 (3), 130, 158.

Turntables; injuries to children playing upon, see note, 45 *AM. & ENG. R. CAS.* 67.

Liability for injuries to children playing upon turntables, see 48 *AM. & ENG. R. CAS.* 535, *abstr.*

Injuries to a boy of thirteen playing on turntable. Contributory negligence, see 54 *AM. & ENG. R. CAS.* 117, *abstr.*

* Liability for injury to children while playing on or about unguarded turntables and at other dangerous places, see notes, 31 *AM. REP.* 206; 40 *id.* 667.

Liability for injuries to children by leaving dangerous premises, such as turntables, unguarded, see note, 59 *AM. REP.* 23.

Where the company maintained a turntable upon its premises near a public street of a town, and not far from where several families with small children resided, and it was neither protected by an inclosure nor guarded by any employé of the company, the company is liable for injuries received by a child eight years old through playing upon it with other children while it was revolving. *Barrett v. Southern Pac. Co.*, 48 Am. & Eng. R. Cas. 532, 91 Cal. 296, 27 Pac. Rep. 666.—FOLLOWED IN *Callahan v. Eel River & E. R. Co.*, 92 Cal. 89.

And the company's liability is not affected by the fact that the table was latched by the customary fastening of an iron latch dropped in a slot, or by the fact that the table was set in motion by the negligent act of other boys. *Callahan v. Eel River & E. R. Co.*, 92 Cal. 89, 26 Pac. Rep. 104.—FOLLOWING *Barrett v. Southern Pac. R. Co.*, 91 Cal. 296.

Where a company leaves a turntable unfastened, in a city, on a lot which is not securely inclosed, and where people and children are wont to visit and pass through, and where an infant of ten or twelve years of age is injured in riding upon the turntable, the company is liable. *Ferguson v. Columbus & R. R. Co.*, 77 Ga. 102. *Westerfield v. Levi*, 43 La. Ann. 63, 9 So. Rep. 52.—DISTINGUISHED IN *O'Connor v. Illinois C. R. Co.*, 44 La. Ann. 339.

And this is so notwithstanding the father of the infant permitted her to go near the turntable to carry breakfast to a minor brother, who had been left by the father to protect other property of the company than the turntable. The fault of the father, if any, is not attributed to the infant, the action being brought by the infant herself. *Ferguson v. Columbus & R. R. Co.*, 77 Ga. 102.

If a minor, not having sufficient judgment and discretion to know her danger, is injured while riding upon the turntable, the company is liable if it was guilty of negligence in not inclosing or securing the turntable. It is not necessary to prove a wilful intention to inflict the injury. *Gulf, C. & S. F. R. Co. v. Styron*, 66 Tex. 421, 1 S. W. Rep. 161.—DISTINGUISHED IN *Daniels v. New York & N. E. R. Co.*, 154 Mass. 349.

A company is guilty of negligence for leaving a turntable unfastened and unguarded, located in a public place where children are likely to go, where it is so con-

structed as to be a dangerous piece of machinery, if the company or its servants knew, or might have known by reasonable diligence, that it was dangerous and that children were in the habit of resorting there for amusement. *Fl. Worth & D. C. R. Co. v. Robertson*, (Tex.) 16 S. W. Rep. 1093.

20. Duty to fasten and secure turntables.—It is negligence to omit to secure turntables so that children cannot revolve them. If a child is injured in consequence of such an omission the company will be liable, and the fact that the turntable was being revolved by other children at the time will make no difference. *Nagel v. Missouri Pac. R. Co.*, 10 Am. & Eng. R. Cas. 702, 75 Mo. 653, 42 Am. Rep. 418.—DISTINGUISHED IN *Daniels v. New York & N. E. R. Co.*, 154 Mass. 349. QUOTED IN *Morrison v. Kansas City, St. J. & C. B. R. Co.*, 27 Mo. App. 418; *Boggs v. Missouri Pac. R. Co.*, 18 Mo. App. 274. REVIEWED IN *Schmidt v. Kansas City Distilling Co.*, 90 Mo. 284.

A company is not relieved from liability for injuries to a child five years old, received while playing on a turntable, because the child itself is unable to turn the table, but where it played with others older who were able to turn it. *Gulf, C. & S. F. R. Co. v. McWhirter*, 77 Tex. 356, 14 S. W. Rep. 26.—DISTINGUISHING *Evansich v. Gulf, C. & S. F. R. Co.*, 61 Tex. 24.—DISTINGUISHED IN *Daniels v. New York & N. E. R. Co.*, 154 Mass. 349.

In an action for negligence in not properly securing a turntable, whereby a child six years of age received injuries causing death, the fact that, prior to the accident, an agent of the company tied the turntable with a rope so that it could not be revolved unless the rope was cut or untied, does not relieve the company from liability for its negligence in not adopting securer fastenings, where it is shown that the agent knew children were attracted to the machine, and were in the habit of playing upon it, and that the method of securing it had in the past proved insufficient. *Thwaco R. & N. Co. v. Hedrick*, 1 Wash. 446, 25 Pac. Rep. 335.

The proof showed that defendant maintained a turntable near a town, and in a place, away from the public road, frequented by boys and others for sport and recreation; that it was securely fastened by a wooden bolt which prevented its turning, but that this bolt could be removed by a boy of plain-

tiff's age; that on a Sunday, when the turntable was not guarded, the plaintiff, with some companions, removed said bolt, and the plaintiff, endeavoring to leap upon the turntable while his companions revolved it, had his leg crushed, necessitating amputation. *Held*, that the court should have charged: (1) "That the defendant was not required to so fasten or secure the turntable that boys like the injured boy could not displace such fastening and put the table in motion;" (2) "That the defendant was not required to fasten the turntable any more securely than necessary to keep it securely in place;" and it was error for the court to qualify said propositions by the statement that the jury might consider "the amount of force or strength required to unfasten the turntable," or by the statement that even if the turntable were securely fastened, the company would be guilty of negligence if, by the exercise of ordinary care, it could have provided against injury to boys interfering with its turntable. This qualification renders the charge contradictory and confusing. *Bates v. Nashville, C. & St. L. R. Co.*, 90 Tenn. 36, 15 S. W. Rep. 1069.

27. Degree of care required of company.—The owner of any machine such as a turntable, which he knows to be dangerous to children too young to know the danger, and of too immature judgment or discretion to control their natural instinct to amuse themselves with anything that may attract them as a plaything, and which he knows or ought to know may attract them, and who knows it is so placed that it does attract them to play with it, is under a duty, as to such children, to exercise the degree of care which an ordinarily prudent person would use to prevent its injuring them. What that degree of care requires him to do is ordinarily a question for the jury. *O'Malley v. St. Paul, M. & M. R. Co.*, 45 Am. & Eng. R. Cas. 62, 43 Minn. 289, 45 N. W. Rep. 440.—FOLLOWING IN PART AND DISTINGUISHING IN PART *Keffe v. Milwaukee & St. P. R. Co.*, 21 Minn. 207.—DISTINGUISHED IN *Daniels v. New York & N. E. R. Co.*, 154 Mass. 349.

The judge declined to charge that "the degree of care required of defendant is only such as is exercised by well-regulated railroads over their turntables, and that if defendant exercised such care in this case, there was no negligence," saying that other railroads' negligence could not excuse neg-

ligence by this defendant, and that it was for the jury to say whether there was negligence here. In this there was no error. *Bridger v. Asheville & S. R. Co.*, 25 So. Car. 24.—QUOTED IN *Quinn v. South Carolina R. Co.*, 37 Am. & Eng. R. Cas. 166, 29 So. Car. 381, 7 S. E. Rep. 614, 1 L. R. A. 682.

28. Proximate cause.—In an action by the father for an injury done his little son, by the company's negligence in leaving unfastened a turntable, in playing on which the child was hurt, there was evidence tending to show that the table was well fastened; that it could not have been unfastened by a child of tender age; and that it was unfastened by those old enough to be responsible for their negligence. *Held*, that a charge of the court was proper and sufficient to the effect that, if the evidence showed that defendant's employes had fastened the turntable so that a boy of the age and strength of the child injured could not have removed it from its fastenings, or put it in motion, and that the turntable had been moved and put in motion by other persons, and that the child was injured in consequence of the neglect of such third persons, then the negligence of the company, if any, would not be the proximate cause of the injury, and the jury should find for the defendant. *Gulf, C. & S. F. R. Co. v. Evansich*, 63 Tex. 54.—FOLLOWING *Gulf, C. & S. F. R. Co. v. Evansich*, 61 Tex. 5.

29. Rule where child is trespassing.*—It is such negligence on the part of a company to erect a turntable at a place where boys often play, and to leave it without lock or fastenings, and without being watched or guarded, or fenced in, as to justify a jury in finding the company liable for injuries to a boy trespasser of 12 while playing on it. *Kansas C. R. Co. v. Fitzsimmons*, 22 Kan. 686.—APPROVED IN *Evansich v. Gulf, C. & S. F. R. Co.*, 6 Am. & Eng. R. Cas. 182, 57 Tex. 126. DISTINGUISHED IN *Atchison, T. & S. F. R. Co. v. Smith*, 28 Kan. 541; *Daniels v. New York & N. E. R. Co.*, 154 Mass. 349.

If the company ought reasonably to have anticipated that because of the leaving of its turntable unguarded and exposed an injury to a child of immature years was likely

* Liability for injuries to children trespassing on turntables, see note, 14 L. R. A. 781.

to occur, it will be held to have anticipated it, and was guilty of negligence in maintaining it in its exposed condition; and the fact that a child injured thereby was a trespasser, and would not have been hurt if it had not intermeddled with the machinery, does not absolve the owner from liability therefor. *Barrett v. Southern Pac. Co.*, 48 *Am. & Eng. R. Cas.* 532, 91 *Cal.* 296, 27 *Pac. Rep.* 666.—DISAPPROVING *Frost v. Eastern R. Co.*, 64 *N. H.* 220, 10 *Am. St. Rep.* 396.

30. Proof of company's negligence, generally.—Where the issue is negligence in the care and manner of guarding a turntable, for the purpose of preventing children of tender years, having access to it, being injured, it is competent to prove that the fastenings to it were similar to those in general use on such turntables. *Kolsti v. Minneapolis & St. L. R. Co.*, 19 *Am. & Eng. R. Cas.* 140, 32 *Minn.* 133, 19 *N. W. Rep.* 655.—FOLLOWING *Kelly v. Southern Minn. R. Co.*, 6 *Am. & Eng. R. Cas.* 264, 28 *Minn.* 98.—APPLIED IN *Chicago, M. & St. P. R. Co. v. Carpenter*, 56 *Fed. Rep.* 451.

In an action by the parents of a young child for injuries sustained by it from a turntable situated in a public place, unguarded and unfastened, which had before attracted children, it was proper to show by the testimony of a boy that eighteen months before the accident he himself had been injured at the same place by the same turntable, and that he had sued for damages. *Fl. Worth & D. C. R. Co. v. Measles*, 81 *Tex.* 474.

And in such an action the record of a suit against the company by another child who had been injured at the same place and under similar circumstances is competent as evidence of notice to the company of the dangerous condition of the turntable. *Fl. Worth & D. C. R. Co. v. Measles*, 81 *Tex.* 474.

31. — showing custom of railroad companies.—While, in the case of its turntables and trucks standing on its tracks, by playing with which children are injured, it is competent for a company, in order to show that it exercised due care, to prove that it secured the turntables and trucks in the way customary with all railroad companies, such proof is not conclusive that due care was exercised. *O'Malley v. St. Paul, M. & M. R. Co.*, 45 *Am. & Eng. R. Cas.* 62, 43 *Minn.* 289, 45 *N. W. Rep.* 440. *Barrett v. Southern Pac. Co.*, 48

Am. & Eng. R. Cas. 532, 91 *Cal.* 296, 27 *Pac. Rep.* 666.

Where a company is charged with negligence in failing to keep a turntable locked, whereby a child is injured while playing on it, the question of negligence must be determined by the facts of the case; therefore the custom of other companies in not locking or guarding their turntables is immaterial. *Gulf, C. & S. F. R. Co. v. Evansich*, 61 *Tex.* 3.

So the custom of other railroads, as to keeping their turntables locked, is immaterial upon the issue whether or not the defendant railroad was guilty of negligence in not doing so. *Koons v. St. Louis & I. M. R. Co.*, 65 *Mo.* 592.

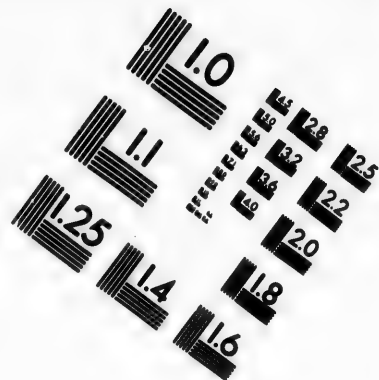
Evidence of the custom of railways to keep turntables unfastened at all times, whether in actual use or not, and whether inclosed or in an open public place, is inadmissible in an action against a company to recover for the death of a child of tender years, injured by reason of the company's unlocked turntable. *Ithaco R. & N. Co. v. Hedrick*, 1 *Wash.* 446, 25 *Pac. Rep.* 335.

32. Sufficiency of proof.—To hold a company liable for the consequences of its negligence in leaving a turntable unfastened and unguarded, it is not necessary to show that the company was the owner of the turntable. It is sufficient if it appears that it was in the charge or under the control of the company. *Nagel v. Missouri Pac. R. Co.*, 10 *Am. & Eng. R. Cas.* 702, 75 *Mo.* 653, 42 *Am. Rep.* 418.

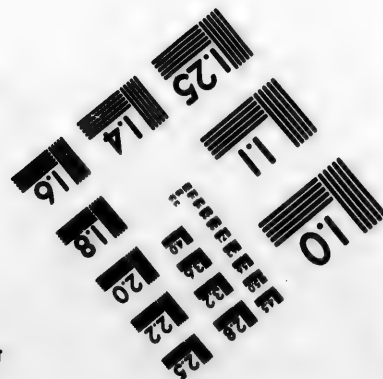
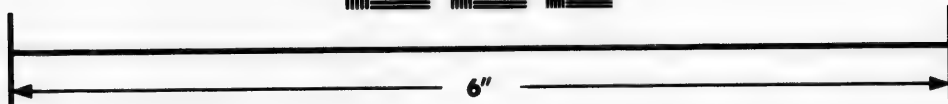
There being testimony that the turntable was dangerous, was located in an exposed place, easily accessible, unfenced, unguarded, and unlocked; that the plaintiff was at an age when he could not understand that the turntable was dangerous and that he had no right to intermeddle with it—there was some pertinent testimony upon the issue of negligence, and a nonsuit was properly refused. *Bridger v. Asheville & S. R. Co.*, 25 *So. Car.* 24.—DISTINGUISHED IN *Daniels v. New York & N. E. R. Co.*, 154 *Mass.* 349.

33. Company's negligence is a question of fact.—Where there is a conflict in the testimony as to the situation of a turntable in reference to its nearness to a populous neighborhood of the city, it should be left to the jury to determine from all the

* See also *ante*, 12; *post*, 48, 55, 66.



A resolution test chart featuring several groups of horizontal and vertical lines of varying thicknesses. Each group is accompanied by a numerical value indicating the resolution. The values are: 1.0, 1.1, 1.25, 1.4, 1.6, 1.8, 2.0, 2.2, 2.5, 2.8, 3.2, 3.6, 4.0, 4.5, 5.0, 5.6, 6.3, 7.1, 8.0, 9.0, 10.0, 11.2, 12.5, 14.0, 16.0, 18.0, 20.0, 22.5, 25.0, 28.0, 32.0, 36.0, 40.0, 45.0, 50.0, 56.0, 63.0, 71.0, 80.0, 90.0, 100.0, 112.0, 125.0, 140.0, 160.0, 180.0, 200.0, 225.0, 250.0, 280.0, 320.0, 360.0, 400.0, 450.0, 500.0, 560.0, 630.0, 710.0, 800.0, 900.0, 1000.0, 1120.0, 1250.0, 1400.0, 1600.0, 1800.0, 2000.0, 2250.0, 2500.0, 2800.0, 3200.0, 3600.0, 4000.0, 4500.0, 5000.0, 5600.0, 6300.0, 7100.0, 8000.0, 9000.0, 10000.0.



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circumstances whether the company was guilty of negligence in its erection and in not maintaining it in a properly guarded condition. *Atchison & N. R. Co. v. Bailey*, 11 Neb. 332, 9 N. W. Rep. 50.—APPROVING *Sioux City & P. R. Co. v. Stout*, 17 Wall. (U. S.) 657.

In an action by a small boy to recover for an injury received while playing on a turntable, the question of the company's negligence is for the jury, where it appears that the table was unfenced, unlocked, and unguarded, and left so that small boys could easily turn it, though it was situate in a small village and not in the immediate neighborhood of any houses, and three fourths of a mile from the company's home. *Sioux City & P. R. Co. v. Stout*, 17 Wall. (U. S.) 657.

And although the facts were undisputed—held, that this did not make the question of the company's negligence one of law, to be determined by the court, but it was a question of fact for the jury. *Sioux City & P. R. Co. v. Stout*, 17 Wall. (U. S.) 657.—FOLLOWING *Quimby v. Vermont C. R. Co.*, 23 Vt. 387; *Mangum v. Brooklyn R. Co.*, 38 N. Y. 455; *Detroit & M. R. Co. v. Van Steinburg*, 17 Mich. 99; *Langhoff v. Milwaukee & P. du C. R. Co.*, 19 Wis. 497; *Macon & W. R. Co. v. Davis*, 13 Ga. 68; *Renwick v. New York C. R. Co.*, 36 N. Y. 132.—FOLLOWED IN *Omaha, N. & B. H. R. Co. v. O'Donnell*, 35 Am. & Eng. R. Cas. 346, 22 Neb. 475. QUOTED IN *Illinois C. R. Co. v. Foley*, 53 Fed. Rep. 459, 10 U. S. App. 537, 3 C. C. A. 589; *Ohio & M. R. Co. v. Collarn*, 5 Am. & Eng. R. Cas. 554, 73 Ind. 261, 38 Am. Rep. 134; *Solen v. Virginia & T. R. Co.*, 13 Nev. 106. REVIEWED IN *Baltimore, O. & C. R. Co. v. Walborn*, 127 Ind. 142; *Davis v. Utah Southern R. Co.*, 3 Utah 218.

A company erected a turntable in a populous neighborhood on its own land, which was only partially inclosed, and was used by the public for many of the purposes of a highway. It was a place where children might naturally go for amusement; the table was easily handled, and children came from time to time to play on it. Held, in an action for an injury to a child, that it was proper to submit to the jury whether the company "had invited, allured, or enticed the plaintiff upon its premises, and to play with the turntable; and if it had, whether such turntable was left in such a condition as to charge the company with any resulting

injury." (Putnam, J., dissents.) *Walsh v. Fitchburg R. Co.*, 51 N. Y. S. R. 240, 67 Hun 604, 22 N. Y. Supp. 441.—REVIEWING *Barry v. New York C. & H. R. R. Co.*, 92 N. Y. 289.

In an action for injury done a little child by the company's negligence in leaving unfastened a turntable, whereby the child playing on it was hurt, there was evidence tending to show that the table was well fastened, that it could not have been unfastened by a child of tender age, and that it was unfastened by those old enough to be responsible for their negligence. Held, it was the duty of the court to give an instruction fairly submitting to the jury whether the servants of the corporation had so fastened its turntable that children *non sui juris* could not have unfastened it and used it. *Evansich v. Gulf, C. & S. F. R. Co.*, 61 Tex. 24.—DISTINGUISHED IN *Gulf, C. & S. F. R. Co. v. McWhirter*, 77 Tex. 356, 14 S. W. Rep. 26.

5. With Respect to Children Trespassing on Track or Grounds.*

34. Duty and liability of company, generally.—(1) *Generally.*—Where water is thrown from an engine on a child and scalds her, while she is standing fifteen feet from the track, and within plain view of those in charge of the engine, the law relating to a clear track and trespassers thereon does not apply. *Texas & P. R. Co. v. Woodall*, 2 Tex. App. (Civ. Cas.) 413.

A company is not liable for killing a boy of nine while crossing its track, where there was neither a public crossing nor a place where persons usually crossed, though within the limits of an unincorporated village, where the evidence showed that a freight train had just passed when the boy attempted to cross without seeing an engine and tender which were backing in the same direction that the train was going, but not moving faster than a man could walk, and where those in charge of the engine did not see the boy. *Givens v. Kentucky C. R. Co.*, (Ky.) 15 S. W. Rep. 1057.

A company, maintaining what is known

* Children trespassing on the track. Duty and liability of company, see note, 31 AM. & ENG. R. CAS. 415.

Liability for injuries to children trespassing on track, see note, 38 AM. REP. 637.

Injuries to children by section of train, see FLYING SWITCH, 4.

as a "gravity" yard or side-track, has undoubtedly performed its duty as to a trespassing child of tender years strictly *non sui juris* when it securely fastens, by means of the ordinary appliance or brake, such cars as it may have occasion to place upon the grade of its track. *Haesley v. Winona & St. P. R. Co.*, 46 Minn. 233, 48 N. W. Rep. 1023.

(2) *Pennsylvania rule*.—If plaintiff, though an infant, was unlawfully on the track, the company is not liable. *Crawford v. Railroad Co.*, 5 Phila. (Pa.) 359.

A boy ten years of age, who was lying on his back on a track, crosswise the track, with his feet reaching over the rails and his head between the rails, was a trespasser, and no recovery can be had for his death, although he could not, on account of his youth, be held accountable for his own negligence. *McMullen v. Pennsylvania R. Co.*, 41 Am. & Eng. R. Cas. 505, 132 Pa. St. 107, 19 Atl. Rep. 27. Compare *Hyde v. Union Pac. R. Co.*, 7 Utah 356, 26 Pac. Rep. 979.

A boy ten years old, bright, intelligent, strong, healthy, and of exceptional capacity, was sent by his parents upon an errand along a street in a populous suburb of a city, on which there was a railroad track. He was killed by a passing train, moving at a very rapid rate, without whistle or signal, while walking upon the ends of the sleepers, from a matter of choice, as there were ample sidewalks. *Held*, that the boy was a trespasser, and his parents could not recover for his death. *Moore v. Pennsylvania R. Co.*, 4 Am. & Eng. R. Cas. 569, 99 Pa. St. 301, 44 Am. Rep. 106, 11 W. N. C. 310.

A boy, between nine and ten years of age, walking along a railroad, not at a public crossing or any place where he had a right to be, was injured by being struck by an unloaded and unattached car immediately after stepping upon the track; being a mere trespasser, he was not entitled to recover damages therefor. *Mitchell v. Philadelphia, W. & B. R. Co.*, 132 Pa. St. 226, 19 Atl. Rep. 28.

35. Liability for injuries inflicted wilfully.—A company is not liable for running over a child using the track of the corporation as a playground, if the act is not done maliciously or with gross and cruel recklessness. *Morrissey v. Eastern R. Co.*, 126 Mass. 377.—FOLLOWED IN *Daniels v. New York & N. E. R. Co.*, 154 Mass. 349. QUOTED IN *Williams v. Kansas City,*

S. & M. R. Co., 37 Am. & Eng. R. Cas. 329, 96 Mo. 275, 9 S. W. Rep. 573.

A child seven years old, of precocious judgment, who lies down to sleep on a railroad track, is a trespasser, and, in running its trains, the company owes to it, in that situation, no duty except to avoid the infliction of injury wilfully or wantonly. *Louisville, N. O. & T. R. Co. v. Williams*, 69 Miss. 631, 12 So. Rep. 957.

In such case the engineer of a running train is only required to abstain from wilful or wanton negligence. He is not bound to do everything possible to avoid injury until after he sees the child in peril. *Louisville, N. O. & T. R. Co. v. Williams*, 69 Miss. 631, 12 So. Rep. 957.

36. Duty to anticipate the presence of children.—A company is not liable for backing cars onto a child while switching them in its yard, where there is no reason to apprehend that a child would go unattended upon the tracks. *Malone v. Boston & A. R. Co.*, 51 Hun (N. Y.) 532, 21 N. Y. S. R. 656, 4 N. Y. Supp. 590.—FOLLOWING *Searles v. Manhattan R. Co.*, 101 N. Y. 661.

The youth of a child injured while playing on a turntable may be considered upon the question of contributory negligence, but it adds nothing to the duty of the railroad company. The company is under no greater obligation to anticipate the presence of children upon its track than of adults. *Lake Shore & M. S. R. Co. v. Clark*, 41 Ill. App. 343.

One is bound to exercise reasonable care to anticipate and prevent injury to a child of such tender years as to have little or no discretion, although the child be a trespasser. *Kentucky C. R. Co. v. Gastineau*, 83 Ky. 119.

If a boy fourteen years old, who is a trespasser, has discretion sufficient to recognize danger and guard against it, the company is not bound to anticipate and provide against peril to him. *Kentucky C. R. Co. v. Gastineau*, 83 Ky. 119.

37. Duty to keep lookout.*—A company is responsible for an injury to a child trespassing on its track, where the injury might have been prevented had the employes of the company used ordinary care in keeping an outlook. *Texas & P. R. Co. v. O'Donnell*, 10 Am. & Eng. R. Cas.

* See also *ante*, 3; *post*, 62.

712, 58 Tex. 27.—DISTINGUISHED IN *Williams v. Texas & P. R. Co.*, 15 Am. & Eng. R. Cas. 403, 60 Tex. 205. REVIEWED IN *Galveston, H. & S. A. R. Co. v. Ryon*, 34 Am. & Eng. R. Cas. 30, 70 Tex. 56.

A boy seven years old, without the fault of his parents, wandered to a station, entered a passenger train, and was carried to a distant station, where the conductor put him off, leaving him in charge of no one, and giving no instructions concerning him. The child, left to himself, went upon the track at a place near a highway crossing, where he could be seen for three fourths of a mile by persons in charge of a train coming from the south. A light train moving northward, in the daytime, on an ascending grade, where it could easily have been stopped had an effort been made to do so, ran upon and killed the child. *Held*, that the company is liable. *Indianapolis, P. & C. R. Co. v. Pitzer*, 25 Am. & Eng. R. Cas. 313, 109 Ind. 179, 58 Am. Rep. 387, 6 N. E. Rep. 310, 10 N. E. Rep. 70.—DISTINGUISHING *McClelland v. Louisville, N. A. & C. R. Co.*, 94 Ind. 276; *Scheffer v. Minneapolis & St. L. R. Co.*, 32 Minn. 518. LIMITING *Louisville, C. & L. R. Co. v. Sullivan*, 81 Ky. 624, 50 Am. Rep. 186. QUOTING *Atchison, T. & S. F. R. Co. v. Weber*, 33 Kan. 543, 52 Am. Rep. 543; *Railway Co. v. Valleley*, 32 Ohio St. 345, 30 Am. Rep. 601.

The plaintiff, an infant of tender years, was run over and injured by a gravel train of the defendant, midway between Grand avenue and Theresa street, in the city of St. Louis. The evidence was conflicting as to the length of time she was on the track before the injury, but the track was level, the view between the streets was unobstructed, the road was unfenced, and there were dwellings on either side; there was a pathway leading across the track, and the train was approaching a crossing, and, according to the testimony of some, a woman who saw the child ran and signaled to the trainmen in time for them to stop the train. *Held*, that if the servants of the defendant saw, or, by the exercise of ordinary care, under the circumstances stated, could have seen, the plaintiff in time to have avoided injuring her, and failed to do so, the defendant is liable; and whether the servants of the defendant were, about the time of the injury, using such care was a question of fact for the jury. *Frick v. St. Louis, K. C. & N. R. Co.*, 8 Am. & Eng. R. Cas. 280,

75 Mo. 595.—DISTINGUISHED IN *Rine v. Chicago & A. R. Co.*, 88 Mo. 392. QUOTED IN *Donahoe v. Wabash, St. L. & P. R. Co.*, 83 Mo. 543. REVIEWED IN *Williams v. Kansas City, S. & M. R. Co.*, 37 Am. & Eng. R. Cas. 329, 96 Mo. 275, 9 S. W. Rep. 573.

38. Duty after discovering child in danger.—(1) *Company liable.*—Where the persons in charge of a train discover a child on the track, liable to be run over, it is their duty to use all the means in their power to prevent injury to the child, and a failure so to do is negligence for which the company will be liable. *Payne v. Humeston & S. R. Co.*, 70 Iowa 584, 31 N. W. Rep. 886.

Where the engineer of a train, running through the country, observes children on or near the track, it becomes his duty to use the same care and precaution as when running through a city. In such case he cannot act upon the presumption that the track is clear without being responsible for the consequences. *Donahoe v. Wabash, St. L. & P. R. Co.*, 83 Mo. 543.—QUOTING *Frick v. St. Louis, K. C. & N. R. Co.*, 75 Mo. 610. REVIEWING *Harlan v. St. Louis, K. C. & N. R. Co.*, 64 Mo. 480.

Where a boy of nine is seen on a track, the liability of the company will be measured by the conduct of its employes after they become aware of the boy's presence on the track. If the engineer recklessly or wantonly runs on him after his presence is discovered, without doing what he reasonably could to stop the train and avoid an injury, the company is liable. *Kansas Pac. R. Co. v. Whipple*, 37 Am. & Eng. R. Cas. 320, 39 Kan. 531, 18 Pac. Rep. 730.—QUOTING *Missouri, K. & T. R. Co. v. Weaver*, 16 Kan. 456; *Kansas Pac. R. Co. v. Kessler*, 18 Kan. 523. REVIEWING *Bouwmeester v. Grand Rapids & I. R. Co.*, 67 Mich. 87, 34 N. W. Rep. 414.

A company is liable where its engineer, who has received warning which gave notice of danger ahead and demanded the checking or stopping of the train, disregards such warnings and runs over and kills a child on the track, when by regarding the warnings he could have checked the train and averted the accident. And this is the case although the parents of the child were negligent in permitting it to be on the track. *Donahoe v. Wabash, St. L. & P. R. Co.*, 83 Mo. 543.

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while walking on a track at a point where there was no thoroughfare, by accident stepped between the guard and main rail at a switch, and was unable to extricate his foot, and a switch-engine being turned on to that line, ran over and crushed his foot. *Held*, that if the employés of the company, after becoming aware of the perilous condition of the plaintiff, by the exercise of a reasonable degree of care could have prevented the injury, the company was liable. *Burnett v. Burlington & M. R. R. Co.*, 19 *Am. & Eng. R. Cas.* 25, 16 *Neb.* 332, 20 *N. W. Rep.* 280.

(2) *Company not liable.*—The company owes a child trespassing under a standing car no duty until after it becomes aware of its peril. *Rushenberg v. St. Louis, I. M. & S. R. Co.*, 54 *Am. & Eng. R. Cas.* 118, 109 *Mo.* 112, 19 *S. W. Rep.* 216.

Although an engineer sees the object on the track a sufficient distance ahead to stop the train, yet he is not bound to do so if he believes it to be a bundle or a dog, and only discovers that it is a child on a nearer approach. If he then promptly reverses the engine, puts on brakes, and does everything possible to avoid injury, and the child is nevertheless hurt, the company is not liable. *Louisville, N. O. & T. R. Co. v. Williams*, 69 *Miss.* 631, 12 *So. Rep.* 957.

A child was seen on the track some 450 feet in front of a moving train, and after it was seen every effort was made to stop the train before reaching it, but without effect. The train was provided with common hand-brakes, and it appeared that other brakes were being introduced and were in use on some roads that would stop a train in a shorter distance. *Held*, not sufficient proof of negligence to justify a submission of the case to the jury. *Case of Atlantic, M. & O. R. Co.*, 4 *Hughes (U. S.)* 157.—QUOTING *Trow v. Vermont C. R. Co.*, 24 *Vt.* 487; *Herring v. Wilmington & R. R. Co.*, 10 *Ired. (N. Car.)* 402; *Baltimore & P. R. Co. v. Jones*, 95 *U. S.* 443. REVIEWING AND QUOTING *Richmond & D. R. Co. v. Anderson*, 31 *Gratt. (Va.)* 812.—REVIEWED IN *Miles v. Atlantic, M. & O. R. Co.*, 4 *Hughes (U. S.)* 172.

39. Right to assume that child will leave the track.*—The engineer is not bound to stop his train the moment he sees some living object on the track.

* See also *post*, 64.

He has the right, when running in the daytime, so that his train is perfectly visible and its approach must be heard and known, at least in the first instance, to assume that the object will leave the track in time to escape injury, and without the imputation of negligence may run on until he discovers that it is heedless of the danger. He is not bound to expect helpless infants on the track, without sufficient knowledge or ability to escape when warned of danger. *Chrystal v. Troy & B. R. Co.*, 31 *Am. & Eng. R. Cas.* 411, 105 *N. Y.* 164, 11 *N. E. Rep.* 380, 6 *N. Y. S. R.* 833, 7 *Cent. Rep.* 245; *reversing* 38 *Hun* 641, *mem.*

The court charged that the engineer might prudently assume that persons on the track will step off as the train approaches, except when they are "persons apparently incapable of taking care of themselves, such as young children and persons lying helpless on the track." *Held*, that the instruction was not objectionable, as the plaintiff was *sui juris*, and capable of avoiding danger, although she was a child towards whom more watchful care was due, and in a helpless position, of which her conduct gave warning. *Spooner v. Delaware, L. & W. R. Co.*, 39 *Am. & Eng. R. Cas.* 599, 115 *N. Y.* 22, 21 *N. E. Rep.* 696, 23 *N. Y. S. R.* 554; *affirming* 41 *Hun* 643, 1 *N. Y. S. R.* 558.—APPROVED IN *Retan v. Lake Shore & M. S. R. Co.*, 94 *Mich.* 146. REVIEWED IN *Cornell v. Skaneateles R. Co.*, 40 *N. Y. S. R.* 1.

40. Duty to children who are blind or deaf.—When a child or person deprived of sight or hearing, which is known to those operating a train, is by them seen on the track, or known to be there, or about going on the same, then a greater degree of prudence is required than if it was a person of full age and possessed of all his faculties. *Houston & T. C. R. Co. v. Booser*, 2 *Tex. Unrep. Cas.* 452.

41. Injuries while trespassing in company's yards.—In moving an engine to and fro in its yard a company is not obliged to specially look out for trespassers on the track, and it is not negligence to fail to give a warning signal at every movement of an engine, or to fail to have an employé placed upon every backing engine to warn or look out for trespassers; and the fact that the trespasser is an infant does not affect the legal rights of the company.

McDermott v. Kentucky C. R. Co., (Ky.) 54 *Am. & Eng. R. Cas.* 121, 20 *S. W. Rep.* 380.—APPLYING *Shelby v. Cincinnati, N. O. & T. P. R. Co.*, 85 *Ky.* 224; *Conley v. Cincinnati, N. O. & T. P. R. Co.*, 41 *Am. & Eng. R. Cas.* 537, 89 *Ky.* 402.

Only express consent would serve to license a thoroughfare under stationary cars. Mere knowledge by a company or its servants that numerous persons, including children, without any public or private right of way, passed daily and hourly through its yard, situate in or near a populous part of the city, and crawled under stationary cars occupying its tracks, will not render it liable for an injury occurring to a child by a sudden and involuntary movement of a long line of such cars resulting from the negligence of the company's servants in handling other cars several hundred yards distant from the scene of the accident, such other cars rolling against the standing cars and setting them in motion whilst the child was passing under one of them. *Central R. & B. Co. v. Rylee*, 87 *Ga.* 491, 13 *S. E. Rep.* 584.

A boy who goes upon the roof of a shed of a railroad corporation to recover a ball batted thereon from a public street, and is killed by coming in contact with two naked copper wires attached to the shed and used in the ordinary lawful business of the corporation for conducting electricity, and not designed as a trap, is at most a mere licensee, and his administrator cannot recover from the corporation under Mass. Pub. St. ch. 112, § 212. *Sullivan v. Boston & A. R. Co.*, 156 *Mass.* 378, 31 *N. E. Rep.* 128.

II. NEGLIGENCE OF STREET-RAILWAY COMPANIES.*

1. Injuries on Cars; Getting on or off Cars.

a. While Riding as Passengers.

42. When child is deemed to be a passenger.—A child nine years of age carried several blocks on a street-car, the driver being also conductor, knowing the child to be on board, is a passenger whether he intended to pay fare or not, so as to render the company liable for the negligence of the driver. *Metropolitan St. R. Co. v. Moore*, 41 *Am. & Eng. R. Cas.* 240, 83 *Ga.* 453, 10 *S. E. Rep.* 730.

* Liability of street railways for torts of drivers resulting in injury to children, see note, 59 *AM. REP.* 601.

43. Care demanded of company.

In the case of a passenger obviously incompetent, from extreme youth or other cause, to exercise proper judgment or discretion for his own safety, it is the conductor's duty to exercise the highest degree of vigilance for the passenger's safety consistent with the discharge of his ordinary duties. *Sandford v. Hestonville, M. & F. Pass. R. Co.*, 136 *Pa. St.* 84, 20 *Atl. Rep.* 799.

A small boy became a free passenger on defendant's street-cars by consent of the driver in charge. Held, that defendant became bound to exercise toward him the same care as toward other passengers. *Buck v. People's St. R., E. L. & P. Co.*, 52 *Am. & Eng. R. Cas.* 512, 108 *Mo.* 179, 18 *S. W. Rep.* 11.

The omission of the driver to demand or collect fare could not affect the boy's status as a passenger, or his right to the exercise of the highest possible degree of care and vigilance in the conduct and management of the car; and defendant would be liable for the slightest negligence. *Buck v. People's St. R., E. L. & P. Co.*, 46 *Mo. App.* 555.—APPLYING *Muehlhausen v. St. Louis R. Co.*, 91 *Mo.* 332; *Sherman v. Hannibal & St. J. R. Co.*, 72 *Mo.* 63; *Wagner v. Missouri Pac. R. Co.*, 97 *Mo.* 512; *St. Joseph & W. R. Co. v. Wheeler*, 35 *Kan.* 185; *Ohio & M. R. Co. v. Muhling*, 30 *Ill.* 9.

If the plaintiff consented to his son accepting the invitation of the defendant's driver to ride upon the car, the former had the right to presume that the driver would assign his son to some safe place in the car, instead of needlessly exposing him to the risk and peril of riding on and getting off the front platform. *Buck v. People's St. R., E. L. & P. Co.*, 46 *Mo. App.* 555.—QUOTING *East Saginaw City R. Co. v. Bohn*, 27 *Mich.* 503.

44. Duty to provide safe cars.—It is the duty of a street-railway company to provide cars which insure security to passengers, and not suffer them to occupy unsafe places upon them. If this duty is neglected and a passenger is injured, he cannot recover damages of the company if his own neglect of the duty of self-preservation contributed to the injury; but duty can only be predicated of one who has capacity to understand and ability to perform it; and therefore a child not of an age or discretion to understand the danger in riding upon the front platform of a street-

car cannot be charged with negligence in so doing. *East Saginaw City R. Co. v. Bohn*, 27 Mich. 503, 10 Am. Ry. Rep. 309.—QUOTED IN *Buck v. People's St. R., E. L. & P. Co.*, 46 Mo. App. 555.

An instruction to the effect that, under the pleadings and evidence, the plaintiff could not recover, was properly refused, when it appears from the evidence that the boy stated that he "fell off the front platform" of defendant's car, and it further appears that evidence tended to show that there was no gate to keep him from falling off, as required by law, and that the car was going round a curve at a rate of about five miles an hour. *Muehlhausen v. St. Louis R. Co.*, 28 Am. & Eng. R. Cas. 159, 91 Mo. 332, 2 S. W. Rep. 315.—REVIEWED IN *Henson v. St. Louis, I. M. & S. R. Co.*, 34 Mo. App. 636.

45. Injuries received while getting on cars.*—In an action to recover damages sustained by plaintiff by reason of an injury to his son, a child about five years old, while attempting to get on one of defendant's cars, the following facts appeared: Said infant was in charge of K., a female of mature years. The car was an open summer-car, having steps on the side. K. testified that the car stopped, and after she had stepped into it with the boy, holding him by the hand, before she could sit down the conductor gave the signal to go ahead and the car started with a jerk, throwing her on a seat and the boy into the street, causing the injury complained of. *Held*, that the evidence was sufficient to warrant the submission of the question of defendant's negligence to the jury; that it was the duty of the conductor to see that a passenger lawfully entering the car was in a place of safety before giving the driver a signal to proceed. *Akerslout v. Second Ave. R. Co.*, 52 Am. & Eng. R. Cas. 553, 131 N. Y. 599, 30 N. E. Rep. 195, 43 N. Y. S. R. 290, affirming 56 Hun 640, 30 N. Y. S. R. 146, 8 N. Y. Supp. 926.—FOLLOWED IN *Pleffer v. Buffalo R. Co.*, 4 Misc. (N. Y.) 465.

Plaintiff, a boy of thirteen years, hailed a street-car and started toward the front platform, which was full of passengers. Some one (he thought the driver) told him to get on at the rear. As he stepped upon the step some person told him in an authoritative tone to go to the front and get on. He

started again for the front and ran along the side of the car, the horses trotting slowly at the time, when he slipped and fell upon snow that had been shoveled from the track so as to form a descent to the rails, and his leg was crushed under the car-wheel. There was no conductor on the car. *Held*, that the defendant was guilty of negligence; that there was no negligence imputable to plaintiff, the cause of his falling being the dangerous embankment of snow created by defendant without his knowledge. *Mowrey v. Central City R. Co.*, 66 Barb. (N. Y.) 43; affirmed in 51 N. Y. 666, mem.—REVIEWING *Drew v. Sixth Ave. R. Co.*, 26 N. Y. 49; *Mangam v. Brooklyn City R. Co.*, 36 Barb. 230; *McIntyre v. New York C. R. Co.*, 43 Barb. 532; *Buel v. New York C. R. Co.*, 31 N. Y. 314.

It was unlawful for defendant to create such embankment in the street, and, in order to charge negligence upon plaintiff, defendant must show that he knew of it and failed to use proper care. *Mowrey v. Central City R. Co.*, 66 Barb. (N. Y.) 43; affirmed in 51 N. Y. 666, mem.

Where a child between seven and eight years of age attempted to get upon the front platform of a street-car when the car has stopped to let off a passenger, but neglects to signal to the driver or conductor, or in any way announce his intention to become a passenger, and he is injured by the starting of the car in its ordinary course, there can be no recovery of damages from the railway company where the evidence fails to show that the driver or conductor saw him. *Pitcher v. People's St. R. Co.*, 154 Pa. St. 560, 26 Atl. Rep. 559.—FOLLOWING *Stager v. Ridge Ave. Pass. R. Co.*, 119 Pa. St. 70.

46. Injuries received while getting off cars.*—The act of the general assembly of March 3, 1869 (Acts, p. 207, § 9), relating to street-railroad companies in the city of St. Louis, which provides that "No passenger shall be permitted to go on or off any car by the front platform while the car is in motion, and each car shall be furnished with such adjustable gate or guard as shall effectually prevent it," was passed to secure safety to life and limb, and should not be narrowly construed. In view of this fact, and the further one that children of an age too young to comprehend the

* See also ante, 15; post, 84, 86, 110.

2 D. R. D.—48.

* See also ante, 16; post, 85, 87, 110.

danger of getting off the front end of the car in motion are liable to become passengers, as well as adults, it was doubtless within the purpose of the act to provide against danger to said former class, by not only requiring the companies to furnish an adjustable gate for the front end of the car, but such a one as would effectually prevent them from getting off at that end. *Muehlhausen v. St. Louis R. Co.*, 28 *Am. & Eng. R. Cas.* 157, 91 *Mo.* 332, 2 *S. W. Rep.* 315.—QUOTED IN *Seymour v. Citizens' R. Co.*, 114 *Mo.* 266.

In an action against a street-railway company for personal injuries to a boy eight years old, the case is properly submitted to a jury where there is evidence that the boy was upon the front platform of a car, and while there a dispute arose between him and the conductor about a transfer ticket; that the conductor approached the boy in such a manner as to frighten him, and that he jumped off the car by reason thereof and was injured. *Sandford v. Hestonville, M. & F. Pass. R. Co.*, 153 *Pa. St.* 300, 25 *Atl. Rep.* 833.

Plaintiff, about ten years of age, entered a street-car with a brother and sister, both younger, who got seats at the rear end of the car, and he stood, but afterwards got a seat at the other end. The younger children got off without his knowledge, and after the car started he, seeing they were out, tried to get off by the rear platform, but could not on account of the crowd of passengers; he went to the front platform and asked the driver to stop; he slacked up but did not stop; plaintiff jumped off and was injured. *Held*, that the question of negligence both in the defendant's servants and plaintiff was for the jury. *Philadelphia City Pass. R. Co. v. Hassard*, 75 *Pa. St.* 367.

The fact that the front platform was not inclosed with a fender was a fact, with others, to be considered as to whether there was negligence in leaving the front door open when the car was filled with passengers. *Philadelphia City Pass. R. Co. v. Hassard*, 75 *Pa. St.* 367.

Plaintiff, a child of five years, with another of eleven, got on the front platform of a street-railway car; the driver allowed them to continue there, and in attempting, against the remonstrance of the driver, to get off whilst the car was in motion plaintiff was hurt. *Held*, that it was negligence in

the driver to allow children so young to ride on the platform, and the company were liable. *Pittsburg, A. & M. Pass. R. Co. v. Caldwell*, 74 *Pa. St.* 421, 6 *Am. Ry. Rep.* 100.—APPROVED IN *Keffe v. Milwaukee & St. P. R. Co.*, 21 *Minn.* 207. DISTINGUISHED IN *Lott v. New Orleans, C. & L. R. Co.*, 37 *La. Ann.* 337; *Wrasse v. Citizens' Traction Co.*, 146 *Pa. St.* 417. FOLLOWED IN *Biddle v. Hestonville, M. & F. Pass. R. Co.*, 26 *Am. & Eng. R. Cas.* 208, 112 *Pa. St.* 551.

B., a boy ten years old, was riding free on the front platform of a horse-railroad car, with the knowledge of the conductor and driver, the latter having requested him to hand in a package at a place they were to pass. Before quite reaching the place B. jumped off the platform, fell under the car, and was badly hurt. A printed notice was posted conspicuously in the car, forbidding passengers to stand upon, or get on or off at, the front platform, or to get on or off the car when in motion, and declaring that the company would not be responsible for any accident happening thereby. On appeal from a judgment against the company for the injury—*held*: (1) that the conclusion of the court upon the question of negligence was one of fact, which could not be reviewed by the appellate court; (2) that it was within the scope of the authority of the conductor and driver to receive and let off B. as a passenger, and that it did not alter the case that the conductor did not require him to pay fare; (3) that even if the driver was not authorized to deliver the package, nor to employ B. to do it, yet evidence that he requested him to carry it in was admissible, on the question of negligence, to show that he knew that B. was on the car and was intending to get off at the place in question; (4) that the allegation that "the defendants so negligently managed the car as to run it upon and over the plaintiff," was sufficient to admit proof that the negligence consisted in not stopping the car at the proper time; (5) that even if B. was to be regarded as a trespasser in the car, that fact would not necessarily defeat his right of action; (6) that a special duty devolved upon the conductor and driver, in view of the fact that B. was so young, to see that the rule forbidding him to stand on the front platform, or get off from it, was observed by him. *Brennan v. Fair Haven & W. R. Co.*, 45 *Conn.* 284, 17 *Am. Ry. Rep.* 263, 29 *Am. Rep.* 679.

47. Effect of the negligence or wrongful act of a fellow-passenger.

—Where a street-car conductor compels a child, against objections, to stand on a crowded car platform, the company is not relieved from liability where he is thrown off and injured by the hasty or careless act of another passenger in leaving the car. *Sheridan v. Brooklyn & N. R. Co.*, 36 N. Y. 39, 34 *How. Pr.* 217.—APPLIED IN *Busch v. Buffalo Creek R. Co.*, 29 Hun (N. Y.) 112; *Ward v. Central Park, N. & E. R. R. Co.*, 11 Abb. Pr. N. S. (N. Y.) 411. FOLLOWED IN *Webster v. Hudson River R. Co.*, 38 N. Y. 260. QUOTED IN *Costello v. Syracuse, B. & N. Y. R. Co.*, 65 Barb. (N. Y.) 92. REVIEWED IN *Ward v. Central Park, N. & E. R. R. Co.*, 1 J. & S. (N. Y.) 392; *Macer v. Third Ave. R. Co.*, 15 J. & S. (N. Y.) 461.

It was negligence for the driver needlessly to withdraw from the front platform, leaving the plaintiff and another boy thereon, and it was negligence not to be there ready to stop the team when the plaintiff fell or was thrown by the other boy off the platform upon the track in front of the car, the two boys engaging in a scramble to drive the horse, the reins having been left within their reach. *Metropolitan St. R. Co. v. Moore*, 41 *Am. & Eng. R. Cas.* 240, 63 *Ga.* 453, 10 *S. E. Rep.* 730.

Plaintiff, over fourteen years of age, stood upon the platform of a street-car, crowded within, having his foot upon the step and leaning upon the dasher. As the car approached a transfer station, passengers in the car rushed out and pushed plaintiff, so that he fell and was thrown beneath the wheels and injured. *Held*, that the court properly instructed that the company was not liable for the conduct of the passengers, unless it was unusual and disorderly and could have been prevented by the persons in charge, and properly submitted that question and the question of contributory negligence to the jury. *Randall v. Frankford, S. & P. C. Pass. R. Co.*, 139 *Pa. St.* 464, 22 *Atl. Rep.* 639.

48. Company's negligence, when a question of fact.*—A six-year-old boy was permitted by the driver and conductor of a street-car to ride on the front platform of the car, and to undertake to alight from said platform, and, while in the act of so alighting, by a sudden lurch forward he was

thrown off and under the car and injured. *Held*, a sufficient statement of fact to go to the jury on the question of negligence in an action by the father for the loss of service. *Buck v. People's St. R., E. L. & P. Co.*, 46 *Mo. App.* 555. And see also *Philadelphia City Pass. R. Co. v. Hassard*, 75 *Pa. St.* 367. *Sandford v. Hestonville, M. & F. Pass. R. Co.*, 153 *Pa. St.* 300, 25 *Atl. Rep.* 833.

A boy under fourteen got upon the lower step of the front platform of a crowded street-car and rode for a long distance as a passenger, holding on with but one hand, without objection from the conductor. He was finally knocked off by the jolting of the car, run over, and injured. In an action against the street-car company to recover damages—*held*, that the questions of negligence and contributory negligence, taking into consideration the age and capacity of the lad, were both for the jury. *West Philadelphia Pass. R. Co. v. Gallagher*, 27 *Am. & Eng. R. Cas.* 201, 108 *Pa. St.* 524.

The absence of a guard or fender on the front platform of a street-car is a fact which may be taken into consideration with other facts in determining the question of the company's negligence. The court will not, however, say, as a matter of law, that it is negligence on the part of the company not to furnish such a guard. *West Philadelphia Pass. R. Co. v. Gallagher*, 27 *Am. & Eng. R. Cas.* 201, 108 *Pa. St.* 524.

49. — and when not.—Where a boy of eight years, without the knowledge of the conductor, pushed through a crowded car to the front platform, where he was found by the conductor when taking up fares, and was immediately thereafter injured without fault on the part of the company's employes, it was error to submit the question of defendant company's negligence to the jury. *Sandford v. Hestonville, M. & F. Pass. R. Co.*, 136 *Pa. St.* 84, 20 *Atl. Rep.* 799.

b. While Riding on Car, But Not as Passengers.

50. Injuries while trespassing upon street-cars, generally.*—In an action for the killing of plaintiff's intestate by one of defendant's street-cars, which was run without a conductor, where it appears that the deceased, a boy over 11 years of age, got on the front platform, and,

* See also ante, 12, 33; post, 55, 66.

* Liability for injury to a boy trespassing upon street-car, see 52 *AM. & ENG. R. CAS.* 519, *abstr.*

after riding a short distance on the platform or the steps, let go or fell, and was run over by the car, the complaint is rightly dismissed, in the absence of evidence of any conversation between deceased and the driver, or of any negligence on the part of the latter. *Chave v. New York & H. R. Co.*, 15 N. Y. S. R. 966, 48 Hun 620, 1 N. Y. Supp. 264.

In an action for negligence in permitting plaintiff, a boy of ten years, who was trespassing upon a street-car, to ride upon the platform, the testimony of plaintiff, as to the permissive character of such riding, amounted at most to a scintilla, and was contradicted by all the other, including his own, witnesses. He testified that a passenger was jostled against him and knocked him off the platform; but the testimony of the only other eye-witness of the accident, called by himself, and also his own declarations made immediately after the accident, were to the effect that he fell under the wheels of the moving car while voluntarily attempting to jump off backwards. *Held*, that the court should have affirmed points praying for instructions that there was not sufficient evidence that the injury to plaintiff was caused by defendant's negligence, and that the verdict must be for the defendant. *Wrasse v. Citizens' Traction Co.*, 146 Pa. St. 417, 23 Atl. Rep. 345.—DISTINGUISHING *Pittsburg, A. & M. Pass. R. Co. v. Caldwell*, 74 Pa. St. 421.

Two boys, the younger of whom was seven years of age, were about to jump on the back platform of a street-car when the driver called to the elder one and asked him to turn a switch some distance ahead. Both boys then jumped on the front platform, and the elder, passing behind the driver, jumped off, ran ahead, and turned the switch. Some thirty seconds elapsed before the car passed the switch, during which time the driver remained bent over the dasher, as was his duty, watching to see that the switch was properly turned. The younger boy remained during this time on the front platform unnoticed by the driver. Just as the car passed the switch the driver straightened up, and at the same moment, the younger boy, whose hat had been blown off by the wind, jumped after it from the platform. In so doing he fell under the wheels and was killed. There was no evidence to show that the driver knew that the boy had remained on the car until he

felt the wheels passing over the boy's body. In an action by the parents against the company—*held*, that there was no evidence of negligence on the part of the company, and that defendant was entitled to judgment. *Hestonville, M. & F. Pass. R. Co. v. Kelly*, 11 Am. & Eng. R. Cas. 123, 102 Pa. St. 115.

51. Injury while stealing a ride.*

—A city ordinance provided that "cars driven in the same direction shall not approach each other within a distance of three hundred feet, except in case of accident, when it may be necessary to connect two cars together, and also except at stations." *Held*, that the ordinance applied only to cars going in the same direction and driven separately, and was inapplicable to a case where two cars were attached to be run in for repairs. *Bishop v. Union R. Co.*, 14 R. I. 314, 51 Am. Rep. 386.

While two horse-cars attached, and in charge of a driver on the front platform of the leading car and drawn by a single horse, were driving over a public highway in a city to the repair-shops, a lad six years old, to outstrip a playmate with whom he was racing, jumped on the rear platform of the leading car and soon afterwards fell off, or jumped off, and was seriously injured. The lad's mother testified that he told her that he fell off, but in cross-examination, when asked if he did not say that he was afraid the driver would see him and therefore jumped off, replied, "Yes, sir, I think probably he did, but am not quite sure he told me he fell off." The driver testified that he did not see the boys and knew nothing of the accident. *Held*: (1) that the company was not chargeable with negligence; (2) that the company was not bound to employ a second man to guard the cars from intrusion during their transit; (3) that the company was under no duty or obligation of care to the boy. *Bishop v. Union R. Co.*, 14 R. I. 314, 51 Am. Rep. 386.—REVIEWING *Hestonville Pass. R. Co. v. Connell*, 88 Pa. St. 520.

52. Trespasser rudely ejected from or knocked off a car.—A street-railway company is liable for injuries to a child between eleven and twelve years of age, who jumps upon the front platform

* See also *ante*, 18.

† Liability of street railways for torts of drivers resulting in injury to children, see note, 59 AM. REP. 601.

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of a slowly moving car, resulting from the driver striking her upon the hands and violently thrusting her off the step, so that she falls under the car and is run over, although she is a trespasser in getting upon the car. *Barre v. Reading City Pass. R. Co.*, 155 Pa. St. 170, 26 Atl. Rep. 99.

A child riding upon the platform of a railroad car without payment of fare is a trespasser; but this fact will not exempt the company from payment of damages if its driver ejects him in a manner which endangers life or limb; as here, by compelling him to jump backward from the platform while the car was in motion. *Biddle v. Hestonville, M. & F. Pass. R. Co.*, 26 Am. & Eng. R. Cas. 208, 112 Pa. St. 551, 4 Atl. Rep. 485.—FOLLOWING *Pittsburg, A. & M. Pass. R. Co. v. Caldwell*, 74 Pa. St. 421; *Pittsburg, A. & M. Pass. R. Co. v. Donahue*, 70 Pa. St. 119.

A boy wrongfully riding on a car was wantonly struck by the driver and thereby thrown off the car; the car-wheel passed over him. *Held*, in a suit against the car-owners, that they were not liable for the act of the driver in striking the boy, but they were liable for negligently driving over him. *Pittsburg, A. & M. Pass. R. Co. v. Donahue*, 70 Pa. St. 119.—FOLLOWED IN *Biddle v. Hestonville, M. & F. Pass. R. Co.*, 26 Am. & Eng. R. Cas. 208, 112 Pa. St. 551.

53. Leaving moving car in obedience to driver's order.—Where a street-car driver permits a seven-year-old boy who was upon the front platform with him when the car started to remain there and ride for some distance, he has no right to order the boy to get off without giving him an opportunity to obey the order with safety. *McCahill v. Detroit City R. Co.*, 96 Mich. 156, 55 N. W. Rep. 668.—QUOTING *Powers v. Harlow*, 53 Mich. 507.

A street-car company is liable for the death of a trespassing boy on its car, the death being caused by the driver forcibly compelling the boy to attempt to get off the car while it is in motion. *Hestonville, M. & F. Pass. R. Co. v. Biddle, (Pa.)* 16 Atl. Rep. 488.—DISTINGUISHING *Cauley v. Pittsburg, C. & St. L. R. Co.*, 98 Pa. St. 498.—And substantially to the same effect, see *Lovett v. Salem & S. D. R. Co.*, 9 Allen (Mass.) 557.

54. Injuries to children lawfully on cars but not passengers.*—(1) Gen-

* Invited to ride by motorman, see ELECTRIC RAILWAYS, 29.

erally.—Whatever injury boys who jump on street-cars might do to the driver in charge of one, when put off, or whatever reason the driver may have had for not putting off the deceased, a boy eight years old, cannot relieve the company from liability for death inflicted by its negligence, while the deceased was on the car by the permission and consent of the person in charge of it, and under circumstances entitling him to the same care which it was the duty of the company to bestow or observe in carrying passengers. *Muehlhausen v. St. Louis R. Co.*, 28 Am. & Eng. R. Cas. 157, 91 Mo. 332, 2 S. W. Rep. 315.—REVIEWED IN *Whitehead v. St. Louis, I. M. & S. R. Co.*, 39 Am. & Eng. R. Cas. 410, 99 Mo. 263, 11 S. W. Rep. 751.

A newsboy, who is only a mere licensee on a street-car, cannot recover for an injury received caused by the car running off the track, in the absence of proof of gross carelessness on the part of the company. *North Chicago St. R. Co. v. Thurston*, 43 Ill. App. 587.

(2) *Illustrations.*—The driver of a feed-car running on a street railway allowed boys to ride free on the platform at his side. They becoming troublesome, he ordered them to get off, slackening the mule to a walk, but not touching or threatening them. Thereupon one pushed the other, eleven years old, and he fell under the car and was killed. *Held*, that the company was not liable. *Lott v. New Orleans City & L. R. Co.*, 37 La. Ann. 337, 55 Am. Rep. 500.—DISTINGUISHING *Wilton v. Middlesex R. Co.*, 107 Mass. 108; *Pennsylvania R. Co. v. Kelly*, 31 Pa. St. 372; *Pittsburg, A. & M. Pass. R. Co. v. Caldwell*, 74 Pa. St. 421.—APPLIED IN *O'Connor v. Illinois C. R. Co.*, 44 La. Ann. 339. DISTINGUISHED IN *Ketchum v. Texas & P. R. Co.*, 38 La. Ann. 777.

A street-car driver called to plaintiff, a lad of 14, to bring him a drink of water. He stepped on the platform while the horses were moving slowly, gave the driver the drink, and asked him to stop the car to let him off, but instead the driver told him to get off, and whipped the horses into a trot. In stepping off the boy was injured. *Held*, that the act of the driver was within the scope of his authority, and that the company was liable. *Day v. Brooklyn City R. Co.*, 12 Hun (N. Y.) 435; *reversed in 76 N. Y. 593, mens.*

The deceased, a boy selling newspapers,

got on a street-railway car at the rear end and passed through the car to the front platform, where the driver was standing. He stepped to one side behind the driver, and fell off or disappeared from the car, there being no step on that side, and was killed by the car running over him. He had said just before that he was going on some distance further in the car, and the conductor at the time stated that he had reported the want of a deep step to the owners of the railway, but it had not been attended to. There was plenty of room in the car, but it was proved that passengers were always allowed to stand on the platform. It was not shown that the deceased had either paid or been asked for his fare, but it appeared that newsboys were allowed to enter the cars to sell newspapers without being charged. *Held*, that the deceased was lawfully on the car, and being so was entitled to be carried safely, whether he was a passenger for reward or not. *Held* also, that there was evidence for the jury of negligence on the part of the defendants in the absence of the step, and no such contributory negligence on the part of the deceased as should, as a matter of law, prevent the plaintiff's recovery. *Blackmore v. Toronto St. R. Co.*, 38 U. C. Q. B. 172.—QUOTING *Philadelphia & R. R. Co. v. Derby*, 14 How. (U. S.) 468; *Gee v. Metropolitan R. Co.*, L. R. 8 Q. B. 161; *Spooner v. Brooklyn City R. Co.*, 54 N. Y. 230, 13 Am. Rep. 572; *Marietta & C. R. Co. v. Picksley*, 24 Ohio St. 654; *Cleveland, C. & C. R. Co. v. Crawford*, 24 Ohio St. 631, 15 Am. Rep. 633. REVIEWING *Skinner v. London, B. & S. C. R. Co.*, 5 Ex. 787; *Collett v. London & N. W. R. Co.*, 16 Q. B. 984; *Marshall v. York, N. & B. R. Co.*, 11 C. B. 655; *Torpy v. Grand Trunk R. Co.*, 20 U. C. Q. B. 446.—DISTINGUISHED IN *Jennings v. Grand Trunk R. Co.*, 15 Ont. App. 477.

55. Company's negligence a question of fact.*—It is a question for the jury whether a car driver was negligent in ordering a boy to get off while the car was in motion, or whether he should have first stopped the car and then given the order. *McCahill v. Detroit City R. Co.*, 96 Mich. 156, 55 N. W. Rep. 668.

Plaintiff, a boy of 13, stepped upon a down-town car which was standing upon a crossing, not intending to travel upon it,

but to escape a truck which seemed to be coming down upon him. The conductor of the car stepped towards him in a threatening manner and kicked at him. To avoid the kick plaintiff jumped from the platform. He did not see an up-town car approaching, nor did he look for it. He alighted in the middle of the up-town track and was run over. *Held*, that the questions of negligence and contributory negligence should have been sent to the jury. *McCann v. Sixth Ave. R. Co.*, 43 Am. & Eng. R. Cas. 297, 117 N. Y. 505, 23 N. E. Rep. 164, 27 N. Y. S. R. 834; *reversing* 24 J. & S. 282, 21 N. Y. S. R. 482, 3 N. Y. Supp. 418.—APPLIED IN *Hogan v. Central Park, N. & E. R. Co.*, 33 N. Y. S. R. 702, 11 N. Y. Supp. 588.

2. Injuries to Children in the Street.*

56. Company's liability for negligence.—A street-railroad company is responsible in damages if, through the negligence or carelessness of the driver of the street-car, a boy is run over and injured. The measure of the damages in such cases is to be determined by the extent of the injury done. If the finding of the jury is supported by the evidence in the record, both as to the facts of the infliction of the injury through the carelessness and negligence of the driver of the car and the extent of the injury done, their verdict fixing the amount for which the company is liable will not be disturbed on appeal. *Barksdull v. New Orleans & C. R. Co.*, 23 La. Ann. 180.

57. Necessity for negligence on part of company.—Street-car companies are not liable for accidental injuries to children by running cars over them. In order to recover there must be proof of negligence on the part of the car-driver. *Klein v. Crescent City R. Co.*, 23 La. Ann. 729.

Where the child killed ran in front of the car, and the gripman was free from negligence, there ought to be no recovery. *Winters v. Kansas City Cable R. Co.*, 40 Am. & Eng. R. Cas. 261, 99 Mo. 509, 12 S. W. Rep. 652, 6 L. R. A. 536.

A child about four years old was injured while playing on a street-car track in the month of January. The car was going at the usual speed, and the accident occurred

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between street crossings, and the evidence tended to show that the child ran against the car which caused the injury. There was no evidence to show either negligence or incompetency on the part of the driver. *Held*, that a nonsuit was properly granted. *Jaquinto v. Broadway & S. A. R. Co.*, 49 N. Y. S. R. 627, 21 N. Y. Supp. 639, 2 Misc. 174.

58. What amounts to negligence on the company's part, generally.—The horses in a street-car became frightened and ran away and injured a boy. It seemed that the car might have been stopped by applying proper brakes, but they had been rendered useless by other boys, out of a spirit of mischievousness, having thrown them out of order; but there was evidence tending to show that this could have been prevented by tying down the brake, which was well known to the officers of the company, and that on other occasions the brake had been tied down. *Held*, sufficient negligence to charge the company with liability. *Dintruff v. Rochester City & B. R. Co.*, 32 N. Y. S. R. 730, 57 Hun 585, 10 N. Y. Supp. 402.

A child seventeen months old left the sidewalk and went on the street-car track thirteen feet away, in plain view of the driver of an approaching car, if he had been looking. When the child started the car was from fifty to sixty feet distant and could have been stopped with ease within one third of that distance, but the driver was looking to one side and to the rear of the car, and did not see the child in time to avoid the accident. *Held*, such proof of negligence as to justify a jury in finding for the plaintiff. *Weissner v. St. Paul City R. Co.*, 47 Minn. 468, 50 N. W. Rep. 606.—**APPLYING** *Anderson v. Minnesota St. R. Co.*, 42 Minn. 490, 44 N. W. Rep. 518.

A child two and a half years old escaped from her house and was injured by a horse-car. The car was being pulled up a grade by the two regular horses and a helper, or "tow-horse," in front. The car was in charge of a conductor and driver, with a boy leading the tow-horse. One witness testified that he saw the child entering the track while the car was some ten feet away, and heard people shouting to the driver to stop, and a moment later saw the child knocked down by one of the horses. Both the driver and the boy testified that they were looking ahead and did not see the

child, and knew nothing of the accident until the conductor gave the signal to stop, which was after the injury. *Held*, that a verdict against the company would not be set aside on the ground that it was not supported by the evidence. *Giraldo v. Coney Island & B. R. Co.*, 16 N. Y. Supp. 774, 62 Hun 620, 42 N. Y. S. R. 915; *affirmed in* 135 N. Y. 648, *mem.*, 48 N. Y. S. R. 931.

59. Driving at an unusual or unlawful rate of speed.—Proof of a horse-car being driven at a trot over a principal street-crossing in a city, past another car from which passengers were alighting, the former car being so driven that, after running over a child, it went the width of the street before stopping, shows negligence. *Reed v. Minneapolis St. R. Co.*, 34 Minn. 557, 27 N. W. Rep. 77.

In an action for the death of a child five years old, by negligence, evidence that the car was running at twice the rate allowed by law, that the driver saw the child thirty-five feet away and neither slackened speed nor applied the brake, and that if he had applied the brake the car would have stopped before striking the child, is sufficient evidence of negligence. *Huerzeler v. Central, etc., R. Co.*, 1 Misc. (N. Y.) 136.

The child, while passing over the street, not at a crossing, heard the driver's cry and started to run, but the car came so fast that the horse and car struck her a second and a half or two seconds from the time the driver called. *Held*, that the jury were justified in not imputing negligence to the child, and a verdict of \$2000 was authorized by the evidence, and not excessive. *Huerzeler v. Central, etc., R. Co.*, 1 Misc. (N. Y.) 136.

If the evidence shows that the boy who was run over by the car was physically and mentally able to take care of himself on the street, and that he was in the habit of traveling the public streets alone, the driver of the car or the company owning the road will not be permitted to set up in defense to the action for damages that the accident occurred through the negligence or want of consideration in the father in allowing the child to go on the streets alone; nor will the fact that the child failed to get out of the way be allowed to weigh in favor of the company in mitigation of damages, if the evidence shows, as in this case, that the driver was driving the car at the time of the accident at an unusual if not an unlaw-

ful rate of speed. But in such case the company will be held liable to the full extent of the damages caused by the injuries which the boy had sustained. *Barksdull v. New Orleans & C. R. Co.*, 23 La. Ann. 180.—DISTINGUISHED IN *Johnson v. Canal & C. R. Co.*, 27 La. Ann. 53.

60. What does not amount to negligence on the company's part, generally.—Where a little child runs against a car and is run over by the hind wheel, after the mule and the front part of the car have passed, it is not negligence in the driver if he did not see it, when he had no reason to expect it would be there. *Gallaher v. Crescent City R. Co.*, 37 La. Ann. 288.—ADHERING TO *Hearn v. St. Charles St. R. Co.*, 34 La. Ann. 163.

There can be no recovery at common law from a street-car company 'or injuries to a boy ten years old, received while playing with other children, caused by an unfastened brake on a car left in a street. *Gay v. Essex Elec. St. R. Co.*, 159 Mass. 238.—NOT FOLLOWING *Sioux City & P. R. Co. v. Stout*, 17 Wall. (U. S.) 657; *Keffe v. Milwaukee & St. P. R. Co.*, 21 Minn. 207; *Kansas C. R. Co. v. Fitzsimmons*, 22 Kan. 686.—*Gay v. Essex Elec. St. R. Co.*, 159 Mass. 242.

A street-car company is not liable for injuries to a child where it is standing near the track when the horses and front part of the car pass, but without anything to indicate danger, and then suddenly approaches and is run over by the hind wheels. *Bulger v. Albany R. Co.*, 42 N. Y. 459.—REVIEWED IN *Chicago & A. R. Co. v. Lammert*, 12 Ill. App. 408; *Lawrence v. Pendleton St. R. Co.*, 1 Cin. Super. Ct. 180.

There was not sufficient proof of negligence to charge the street-car company with negligence in the following cases:

Where a mother with her child, about eighteen months old, was crossing a street leading the child, but stopped about two feet from the defendant's street-car track to let a car pass, which was moving very rapidly, though on an up-grade, and in some way unexplained the child escaped from her and was injured under the car, but it appeared that the mother was frightened at the rapid approach of the car and was confused. *Wolf v. Houston, W. S. & P. F. R. Co.*, 19 N. Y. S. R. 763, 50 *Hur.* 603, 2 N. Y. *Supp.* 787; *affirmed in* 130 N. Y. 638, *mem.*, 29 N. E. *Rep.* 151, 40 N. Y. S. R. 982.

Where a child eight years old attempted

to cross a street where there was no crossing, and passed immediately in the rear of a car going one way and stopped very near the next track, and was immediately struck by one of the horses hauling a car in the opposite direction, there being evidence that the horse striking the child was a little outside of the rail, and that she was struck by some portion of the horse's body between the shoulder and hip, and that the driver pulled the horses in the opposite direction just before the accident, plaintiff contending that this caused the hind portion of the horse to be thrown further out and against the child. *Baker v. Eighth Ave. R. Co.*, 41 N. Y. S. R. 353, 62 *Hun* 39, 16 N. Y. *Supp.* 319.—QUOTING *Fenton v. Second Ave. R. Co.*, 126 N. Y. 627, 36 N. Y. S. R. 385.

Where a street-car approached a number of children who were playing about the track, with the mules in a walk, and they began to throw up their hands and scream in an attempt to frighten the mules, whereupon the driver applied the brakes and pulled on the reins, but one of the children was knocked down by the mules in attempting to cross the track. *Dallas City R. Co. v. Beeman*, 74 *Tex.* 291, 11 S. W. *Rep.* 1102.—QUOTING *International & G. N. R. Co. v. Cocke*, 64 *Tex.* 156.

61. Unavoidable accidents.—If the child runs on the track so suddenly that the driver has no such notice of danger as to give him an opportunity to avoid the injury by the exercise of ordinary care, the child cannot recover of the company. *Chicago W. D. R. Co. v. Ryan*, 43 *Am. & Eng. R. Cas.* 396, 131 *Ill.* 474, 23 N. E. *Rep.* 385; *affirming* 31 *Ill. App.* 621.

As where a child suddenly comes upon the track immediately in front of the car horses, from behind a wagon that had obstructed the driver's view, and the latter does everything possible to avoid an injury after the child is discovered. *Kennedy v. St. Louis R. Co.*, 43 *Mo. App.* 1.—REVIEWING *Boland v. Missouri R. Co.*, 36 *Mo.* 484; *Mascheck v. St. Louis R. Co.*, 3 *Mo. App.* 600.

In an action against a street-railway company to recover damages for the killing of plaintiff's child by defendant's car, the facts appeared, by the testimony of plaintiff's witness, to be as follows: The car was moving at a moderate rate of speed on a slightly down grade, and witness was stand-

ing beside the driver, when he heard the driver shout, "look out," "hold on," or "stop." Turning, he saw plaintiff's child (a boy three years old) about six feet ahead of the car mules and four feet from the track, and running toward the track. The driver, with his right hand on the brakes and his left pulling on the lines with such force that the tongue went up over the heads of the mules, was doing his best to stop the car. The child ran to the middle of the track, where he was overtaken and crushed by the car. The whole transaction seemed to the witness to have occurred "in a moment." There was no positive proof that the driver saw the boy at all before he hallooed. *Held*, that on this state of facts the plaintiff was not entitled to recover. *Maschek v. St. Louis R. Co.*, 2 Am. & Eng. R. Cas. 38, 71 Mo. 276.

A child three and a half years old was injured by running between the wheels of an express wagon. It seemed that the injury was caused by the haste of the child in crossing just in front of a moving street-car. *Held*, that the express company was not liable for the injury because there was evidence to show that the wagon just before had been driven too rapidly, where there was other evidence to show that the driver could not have avoided the accident by the exercise of ordinary care, and that it would have happened if the wagon had been driven slower. *Dudley v. Westcott*, 18 N. Y. Supp. 130; *reversing* 15 N. Y. Supp. 952. —REVIEWING *Fenton v. Second Ave. R. Co.*, 126 N. Y. 625, 26 N. E. Rep. 967; *Barry v. Second Ave. R. Co.*, 16 N. Y. Supp. 518.

62. Duty to keep a lookout and stop car.—The duty of watchfulness rests upon the driver of a street-car approaching a street-crossing where he has reason to suppose that young children may be engaged in coasting or sliding down a neighboring hill, and across the car track, although such conduct on the part of the children is unlawful. *Strutzel v. St. Paul City R. Co.*, 47 Minn. 543, 50 N. W. Rep. 690.

In an action against a street-car company for an injury to a child, the court charged that if the driver saw the child in the street approaching the car, and in such close proximity that it might reach the track before the car passed, it was negligence on his part not to stop. *Held*, that this was error; that

the standard of duty in such a case was a shifting one and for the jury. *Philadelphia City Pass. R. Co. v. Henrice*, 4 Am. & Eng. R. Cas. 544, 92 Pa. St. 431, 37 Am. Rep. 699.

A child three years old was permitted to go on the street in company with a little sister only, but at the time of the accident was riding on a wagon in charge of an adult, from which he was jostled off and fell some twenty-five feet in front of a street-car. Several persons shouted to the driver, and there was nothing to prevent him seeing the child. The car could have been stopped in ten or twelve feet. *Held*, that the negligence in permitting the child to go out in charge of his sister was too remote to affect the right of recovery against the company, and that the question of negligence in permitting him to ride on the wagon, where he might be jostled off, was for the jury. *Bahrenburgh v. Brooklyn City, H. P. & P. R. Co.*, 56 N. Y. 652.

63. — failure of driver to see child and stop car.—(1) *Generally.*—When a street-car is approaching a public crossing, it is the duty of the driver to look forward. Proof that the driver was looking backward at a car which had just passed, and ran over a boy, is evidence of such negligence as to make the company liable. *Collins v. South Boston Horse R. Co.*, 26 Am. & Eng. R. Cas. 371, 142 Mass. 301, 7 N. E. Rep. 856.

Proof that a child is run over by a horse-car, and that the driver was not paying any attention to things outside, or in front of him, but was giving his attention to something inside the car, and did not turn to look forward until he heard the people screaming on the street, is sufficient proof of negligence to warrant a jury in finding for the plaintiff. *Levy v. Dry Dock, E. B. & B. R. Co.*, 35 N. Y. S. R. 769, 58 Hun 610, 12 N. Y. Supp. 485. —REVIEWED IN *Elze v. Baumann*, 2 Misc. (N. Y.) 72.

A child two years old, unattended, was crossing one of the most public thoroughfares of the city of St. Louis, and was seen approaching a track in front of a moving car. The bystanders, seeing her danger, shouted to the driver to stop, but, his attention being turned in another direction where he anticipated danger, he did not stop till the child was run over and killed. *Held*, that the company was not liable. *Boland v. Missouri R. Co.*, 36 Mo. 484. —DISAPPROVED IN *Battishill v. Humphreys*, 28 Am. & Eng. R. Cas. 597, 64 Mich. 494.

* See also *ante*, 3, 37-40.

QUOTED IN *Murray v. Richmond & D. R. Co.*, 93 N. Car. 92. REVIEWED IN *Kennedy v. St. Louis R. Co.*, 43 Mo. App. 1.

In an action against a street-car company for an injury to a child about six and a half years old, it was conceded that the car had no conductor, and there was evidence tending to show that the driver at the time was directing his attention to the rear of the car and was not on the lookout for foot-travelers crossing the street, but such evidence was contradicted by witnesses for the defense. *Held*, that it was the right of the jury to discredit the evidence for the defendant and to render a verdict for the plaintiff. *Agnew v. Brooklyn City R. Co.*, 24 N. Y. S. R. 744.

A child about three and a half years old escaped from his mother, who was engaged in a bakery, and ran across the street with another boy about ten years old, but immediately upon crossing the street some one called to him and he started to recross the street, and was injured by a car which was being driven with the horses in a gallop, with the driver looking backward. *Held*, under the circumstances, that the mother was not negligent in allowing the child to go to the sidewalk, from which it escaped to the street; and there was such proof of negligence on the part of the driver as to justify a verdict for the plaintiff. *Ehrman v. Brooklyn City R. Co.*, 38 N. Y. S. R. 990, 60 Hun 580, 14 N. Y. Supp. 336; *affirmed in* 131 N. Y. 576, *mem.*, 42 N. Y. S. R. 948.

(2) *While in the performance of other duties.*—Where a municipal ordinance requires drivers of street-cars to keep children off them, a driver is not guilty of such negligence as to make the company liable for a boy two and a half years old who gets immediately in front of the car-mule, or between its fore legs, while the driver is at the rear of the car driving boys away, and is injured when the car is started up, it appearing that he could not have been seen by the driver standing in his usual position. (Levy, J., dissenting.) *Hearn v. St. Charles St. R. Co.*, 34 La. Ann. 160.—ADHERED TO IN *Gallaher v. Crescent City R. Co.*, 37 La. Ann. 288. APPLIED IN *O'Connor v. Illinois C. R. Co.*, 44 La. Ann. 339.

A child two and a half years old was first seen by a car driver between the rails and under the whiffetrees, and before he could then stop the car she was injured. It appeared that immediately before discovering

the child the driver had turned his back to give change to a passenger, but it appeared, under the whole circumstances of the case, that by proper care the accident might have been averted. *Held*, sufficient evidence of negligence to sustain a verdict for the plaintiff. *Hyland v. Yonkers R. Co.*, 22 N. Y. S. R. 100, 51 Hun 643, *mem.*, 4 N. Y. Supp. 305; *affirmed in* 119 N. Y. 612, *mem.*, 23 N. E. Rep. 1143, 28 N. Y. S. R. 977, *mem.*

A car driver, while driving at a proper rate of speed, saw a child standing near the track some 60 feet away, and again when about 20 feet distant, when his attention was directed to children on the other side of the track for a moment, and in looking again when his horse was within three to five feet of the crossing where the child stood, it was seen approaching the track in front of the horse, and then it was impossible to stop the horse in time to avoid injury. *Held*, that it was not the duty of the driver to have stopped the car either the first or second time that he noticed the child; that the company was not bound to move its cars at a walking pace, and that no negligence was shown. *Citizens' St. R. Co. v. Carey*, 56 Ind. 396, 18 Am. Ry. Rep. 126.

64. Right to assume that child will leave track.*—If a child nineteen months old is on a street-railway track, in advance of a moving car, the person operating it is not at liberty to act on the assumption that it will see the danger and avert it. *Galveston C. R. Co. v. Hewitt*, 67 Tex. 473, 3 S. W. Rep. 705.—APPLIED IN *Artusy v. Missouri Pac. R. Co.*, 37 Am. & Eng. R. Cas. 288, 73 Tex. 191, 11 S. W. Rep. 177.

65. Liability for acts of driver outside scope of his employment.—The driver of a street-car struck at a boy, who was running alongside the car, and accidentally wound the lines with which he was driving around the boy's arm so that he was drawn under the wheels of the car and his leg crushed. *Held*, that the company was not liable. To render the master responsible for the act of his servant the act complained of must have been committed *bona fide* by the servant, as such, and in the line of his employment, and in this case the driver was not acting in the line of his employment. *Chicago City R. Co. v. Mogk*, 44 Ill. App. 17.

* See also *ante*, 39.

66. Company's negligence is a question of fact.*—(1) *Generally*.—Contributory negligence of a child killed by a street-car being shown, and there being substantial evidence of want of care on the part of the driver, the case is properly submitted to the jury. *Pearson v. Union R. Co.*, 14 Mo. App. 579.

(2) *Illustrations*.—A child four years of age started to run across a street at about the middle of the block, fell about four feet in front of a horse drawing defendant's street-car, moving at a slow trot, and was run over. There was evidence that it was dark at the time, but sufficiently light to enable one to distinctly see the child half way across the street; that to the driver's knowledge the street at this point was much frequented by children; that the car could have been stopped within a distance of two feet; that the driver was giving no attention to the track in front of him and did not see the child before the car passed over him. *Held*, that the question of negligence was properly submitted to the jury. *Rosenkrantz v. Lindell R. Co.*, 108 Mo. 9, 18 S. W. Rep. 890.

Where it appeared that decedent was a child six years of age, about four feet in height, and possessed of the ordinary intelligence of his years; that he had been in the habit of going on errands for his mother for a period of six months prior to the date of the accident; that on the afternoon of September 3, 1892, deceased was sent by his mother on an errand, and started to cross Flatbush avenue from the west curb, and when about twelve or fifteen feet from the curb he stooped to pick up something, then proceeded across the avenue, and was struck by the horses of one of defendant's cars; and it also appeared that, at and just before the accident, the car was going very fast, the driver was not looking ahead of him, but was engaged in conversation with a passenger and had his head turned to one side; that he did not see the boy, or even know that he had run over him until the conductor whistled for him to stop the car, and when the driver looked around to the conductor, the latter pointed back to the body of the boy then lying on the track to the rear of the car; that the car went about seventy-five feet from where the boy was lying before it stopped; that there was no

obstruction to prevent the driver from seeing the boy, if he had been looking ahead and attending to his duties—*held*, that this evidence clearly made out a case of negligence on the part of the driver, and established a state of facts which made it proper to submit to a jury the question of the driver's negligence. *Mason v. Atlantic Ave. R. Co.*, 4 Misc. (N. Y.) 291, 24 N. Y. Supp. 139, 53 N. Y. S. R. 454.

Plaintiff, a boy of five, started to cross Second avenue, New York city, in charge of another boy about twelve. The older boy just passed in front of the horses of a street-car, but plaintiff was struck and injured. It was about noon, and the driver was urging his horses at an unusual rate of speed. It appeared that the boys could have been seen approaching the track when 90 or 100 feet distant, and that the car could have been stopped, when going at a proper speed, in from 16 to 22 feet. *Held*, that the case should have been submitted to a jury, and a judgment of nonsuit was error. *Pendril v. Second Ave. R. Co.*, 43 How. Pr. (N. Y.) 399.—QUOTING *Mangam v. Brooklyn R. Co.*, 38 N. Y. 461; *O'Mara v. Hudson River R. Co.*, 38 N. Y. 449.

A boy seven years old had crossed a street to a point between two railroad tracks, where cars, moving in opposite directions on each track, were in full sight, when he undertook to retrace his steps, but fell on the track and was killed. Though bystanders called to the driver he made no effort to stop his car. *Held*, that the question of negligence should have been submitted to the jury. *Block v. Harlem Bridge, M. & F. R. Co.*, 28 N. Y. S. R. 495, 9 N. Y. Supp. 164, 55 Hun 607, *mem.*

In an action for an injury caused by a street-car running over a child four years of age, where there is testimony on behalf of plaintiff which alone, if believed, would warrant a jury in inferring negligence on the part of the company, the case must be submitted to the jury, notwithstanding the whole testimony as to the facts alleged to constitute negligence be conflicting, and no matter how strong or persuasive be the countervailing proof. In such case the credibility of the witnesses and the weight of the evidence are matters exclusively for the jury. The single preliminary question for the court is: Is there any evidence which, taken alone, would fairly justify the

* See also *ante*, 12, 33, 48, 55.

jury in inferring negligence? *Citizens' Pass. R. Co. v. Foxley*, 107 Pa. St. 537.

In an action for the death of a boy six years old who was run over by a cable-car, it is proper to submit the case to the jury where there is evidence that at the time of the accident the gripman was standing on the side of the cab with one hand out of the window, and looking towards the houses he was passing; that he did not have hold of his grip or brake; and that when halloosed to by persons who saw the child on the track when the car was two and one half lengths away, he paid no attention to the warning. *Schnur v. Citizens' Traction Co.*, 153 Pa. St. 29, 25 Atl. Rep. 650.

Upon examination of the evidence in this case—held, that it was not conclusively shown, either that the driver of the street-car which ran over and killed plaintiff's child was not guilty of negligence, or that the mother of the child was guilty of contributory negligence in leaving it in charge of its brother, 13 years old, while she went out to obtain family supplies, and that the court erred in not submitting these questions to the jury, and in directing a nonsuit. *Dahl v. Milwaukee City R. Co.*, 19 Am. & Eng. R. Cas. 121, 62 Wis. 652, 22 N. W. Rep. 755.

III. CONTRIBUTORY NEGLIGENCE OF CHILDREN.*

1. In General.

67. At what age not responsible, generally.†—The rule respecting contributory negligence presupposes sufficient intelligence to know the existence of danger. *Walters v. Chicago, R. I. & P. R. Co.*, 41 Iowa 71.

The law fixes no certain age at which children are of sufficient intelligence to have imposed upon them the full degree of

care incumbent upon persons of mature age. *Houston & T. C. R. Co. v. Simpson*, 60 Tex. 103.

Contributory negligence cannot be imputed to a child when of such tender years that it is, by legal presumption, incapable of judgment or discretion. *Pratt C. & I. Co. v. Brawley*, 83 Ala. 371, 3 Am. St. Rep. 751, 3 So. Rep. 555. *Little Rock & Ft. S. R. Co. v. Barker*, 33 Ark. 350.—QUOTING *Sioux City & P. R. Co. v. Stout*, 17 Wall. (U. S.) 660.—*Twist v. Winona & St. P. R. Co.*, 37 Am. & Eng. R. Cas. 336, 39 Minn. 164, 39 N. W. Rep. 402.

But where a child has attained such an age as to be capable of exercising his judgment and discretion, he is responsible for the exercise of such a degree of care and vigilance as might reasonably be expected of one of his age and mental capacity. *Twist v. Winona & St. P. R. Co.*, 37 Am. & Eng. R. Cas. 336, 39 Minn. 164, 39 N. W. Rep. 402.

And evidence may be received to rebut the presumption of incapacity to exercise discretion. *Vicksburg v. McLain*, 67 Miss. 4, 6 So. Rep. 774.—FOLLOWING *Westbrook v. Mobile & O. R. Co.*, 66 Miss. 560.

Contributory negligence cannot be imputed to a small boy who was injured while playing with other boys on a turntable. *Sioux City & P. R. Co. v. Stout*, 17 Wall. (U. S.) 657.—DISTINGUISHED IN *McDonald v. Union Pac. R. Co.*, 35 Fed. Rep. 38; *O'Connor v. Illinois C. R. Co.*, 44 La. Ann. 339. NOT FOLLOWED IN *Daniels v. New York & N. E. R. Co.*, 154 Mass. 349. QUOTED IN *Lusby v. Atchison, T. & S. F. R. Co.*, 41 Am. & Eng. R. Cas. 93, 41 Fed. Rep. 181; *Little Rock & Ft. S. R. Co. v. Barker*, 33 Ark. 350; *Hobson v. New Mexico & A. R. Co.*, (Ariz.) 28 Am. & Eng. R. Cas. 360, 11 Pac. Rep. 545. REVIEWED IN *Robinson v. Oregon S. L. & U. N. R. Co.*, 7 Utah 493.

Though the analogies of criminal law touching presumptions as to the age of discretion are properly regarded by a court in ruling upon a demurrer where contributory negligence by an infant is involved (as was decided by this court in *Rhodes v. Georgia Railroad*, 84 Ga. 320), it is doubtful whether these analogies have any relevancy on the trial of the case before the jury. The better rule would be for the jury to deal with each case on its own facts, unhampered by presumptions of law either for or against the competency of the child. *Central R.*

* Contributory negligence of infants, see notes, 35 AM. & ENG. R. CAS. 394; 6 Id. 63; 10 L. R. A. 654.

Infancy as affecting question of contributory negligence, see note, 55 AM. DEC. 676.

Contributory negligence of child not a bar to recovery, see notes, 17 L. R. A. 78; 6 Id. 536.

† Children, when *sui juris*, see note, 10 L. R. A. 655.

Infants of tender years cannot be contributorily negligent, see notes, 31 AM. & ENG. R. CAS. 410; 3 L. R. A. 385.

Application of doctrine of comparative negligence where children are injured, see COMPARATIVE NEGLIGENCE, 6.

See B. Co. v. Rylee, 87 Ga. 491, 13 S. E. Rep. 584.

Up to a certain age, the precise limit of which cannot be well defined, a child is incapable of contributory negligence, and the court may so hold as a matter of law. It has been held that children of eighteen months, of two years, of two years and ten months, of four years, under five years, of five years, of six years, under seven years, and even seven years of age, are incapable of such negligence, and this rule seems to have been recognized in this state in several cases. *Chicago City R. Co. v. Wilcox*, 50 Am. & Eng. R. Cas. 464, 138 Ill. 370, 27 N. E. Rep. 899; *affirming* 33 Ill. App. 450.

68. Children two years of age or under.—Contributory negligence cannot be attributed to an infant two years of age. *Walters v. Chicago, R. I. & P. R. Co.*, 41 Iowa 71.

Nor to a child nineteen months old. *Kay v. Pennsylvania R. Co.*, 65 Pa. St. 269.

Nor to an infant only eighteen months old. *Schmidt v. Milwaukee & St. P. R. Co.*, 23 Wis. 186.

Nor to an infant seventeen months old. *Chicago W. D. R. Co. v. Ryan*, 43 Am. & Eng. R. Cas. 396, 131 Ill. 474, 23 N. E. Rep. 385; *affirming* 31 Ill. App. 621.

Nor to a child sixteen months old. *Fiselsmayer v. Third Ave. R. Co.*, 2 N. Y. S. R. 75.

Nor to a child under two years of age. *Farris v. Cass Ave. & F. G. R. Co.*, 80 Mo. 325; *affirming* 8 Mo. App. 589.

For as matter of law, it is incapable of judgment and discretion. *Georgia Pac. R. Co. v. Blanton*, 84 Ala. 154, 4 So. Rep. 621.

If a child nineteen months of age is injured through the negligence of a company or its servants its incapacity will shield it from responsibility for its own acts. *Kay v. Pennsylvania R. Co.*, 65 Pa. St. 269.—APPROVED IN *Keffe v. Milwaukee & St. P. R. Co.*, 21 Minn. 207. DISAPPROVED IN *Battishill v. Humphreys*, 28 Am. & Eng. R. Cas. 597, 64 Mich. 494. DISTINGUISHED IN *Flower v. Pennsylvania R. Co.*, 69 Pa. St. 210. REVIEWED IN *Ohio & M. R. Co. v. McDanel*, 5 Ind. App. 108; *Atchison, T. & S. F. R. Co. v. Priest*, 50 Kan. 16.

69. Children more than two and less than seven years of age.—In an action for injuries, contributory negligence cannot be attributed, so as to relieve the company from liability for its own negli-

gence, to a child two years and ten months of age. *Norfolk & P. R. Co. v. Ormsby*, 27 Gratt. (Va.) 455, 17 Am. Ry. Rep. 321.

Nor to a child two and one half years of age. *Keyser v. Chicago & G. T. R. Co.*, 19 Am. & Eng. R. Cas. 91, 56 Mich. 559, 56 Am. Rep. 405, 23 N. W. Rep. 311.

Nor to a child three years old. *Mascheck v. St. Louis R. Co.*, 3 Mo. App. 600; *see also* 71 Mo. 276.

Nor to an infant three or four years of age. *Mangam v. Brooklyn R. Co.*, 38 N. Y. 455; *affirming* 36 Barb. 230.—FOLLOWING *Hartfield v. Roper*, 21 Wend. (N. Y.) 615. REVIEWING *Daley v. Norwich & W. R. Co.*, 26 Conn. 591; *Robinson v. Cone*, 22 Vt. 213; *Lynch v. Murdin*, 1 Q. B. 29, 41 E. C. L. 422; *Honegsberger v. Second Ave. R. Co.*, 33 How. Pr. (N. Y.) 195.

Nor a child four years of age. *Erie City Pass. R. Co. v. Schuster*, 113 Pa. St. 412, 57 Am. Rep. 471, 6 Atl. Rep. 269. *Fink v. Missouri Furnace Co.*, 10 Mo. App. 61; *reversed on other grounds* in 82 Mo. 276.

Nor to a child under five years of age, especially when it is of less than ordinary mental capacity. *Chicago & A. R. Co. v. Gregory*, 58 Ill. 226, 11 Am. Ry. Rep. 92.

Nor ordinarily to a child of the age of five years and seven months. *Westerfield v. Lewis*, 43 La. Ann. 63, 9 So. Rep. 52.

Nor to a six-year-old child. *Buck v. People's St. R., E. L. & P. Co.*, 46 Mo. App. 555.—APPLYING *Pittsburg, A. & M. Pass. R. Co. v. Caldwell*, 74 Pa. St. 421.—*Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 31 Fed. Rep. 246.

Nor to a child under six years of age. *Bay Shore R. Co. v. Harris*, 67 Ala. 6.—FOLLOWING *Government St. R. Co. v. Hanlon*, 53 Ala. 70.

A child of three years is of such a tender age as to be incapable of negligence, and could not be considered a trespasser. *Battishill v. Humphreys*, 28 Am. & Eng. R. Cas. 597, 64 Mich. 494, 31 N. W. Rep. 894.—FOLLOWING *Keyser v. Chicago & G. T. R. Co.*, 56 Mich. 559.

While contributory negligence cannot be imputed to a child five and one half years old, where such child unexpectedly and without warning runs from the pavement against a moving traction car, such fact is not evidence of negligence on the part of the railway company so as to render them liable. *Chilton v. Central Traction Co.*, 152 Pa. St. 425, 25 Atl. Rep. 606.

A child of six years cannot be declared negligent, as a matter of law, in not avoiding a collision with a moving locomotive. It is only bound to use the care of which it is capable, considering its age and capacity. *Tobin v. Missouri Pac. R. Co.*, (Mo.) 18 S. W. Rep. 996.—FOLLOWING *Adams v. Wiggins Ferry Co.*, 27 Mo. 95; *Isabel v. Hannibal & St. J. R. Co.*, 60 Mo. 475; *Farris v. Cass Ave. & F. G. R. Co.*, 80 Mo. 325; *Werner v. Citizens' R. Co.*, 81 Mo. 368.

Where there is any doubt as to a child being of such age and capacity that, in law, he should be held *sui juris*, it should be left to the jury to say by their verdict whether he is so or not. *Mangam v. Brooklyn R. Co.*, 38 N. Y. 455; *affirming 36 Barb.* 230.—FOLLOWED IN *Sioux City & P. R. Co. v. Stout*, 17 Wall. (U. S.) 657. REVIEWED IN *Williams v. Northern Pac. R. Co.*, 11 Am. & Eng. R. Cas. 421, 3 Dak. 168.

70. Children seven years of age or more.—(1) *Rule stated.*—The law fixes no arbitrary age at which the child becomes capable of contributory negligence; but between the ages of seven and fourteen, the presumption is that he is *non sui juris*. *Trumbo v. City St. Car Co.*, 89 Va. 780.

Between the ages of seven and fourteen years, though *prima facie* an infant is incapable of exercising judgment and discretion, evidence of capacity may be received and contributory negligence shown as a defense to an action for personal injuries. *Pratt C. & I. Co. v. Brawley*, 83 Ala. 371, 3 Am. St. Rep. 751, 3 So. Rep. 555.

A child between the ages of 7 and 14 years, must be reasonably expected to exercise some degree of care, but the measure of it must depend upon his capacity and intelligence. *Hepfel v. St. Paul, M. & M. R. Co.*, 49 Minn. 263, 51 N. W. Rep. 1049.—REVIEWING *Gunderson v. Northwestern Elevator Co.*, 47 Minn. 161.

After an infant has attained the age of fourteen years, the presumption is indulged that he is capable of exercising judgment and discretion; but before that age the contrary presumption prevails. *Lovell v. De Bardelaben C. & I. Co.*, 90 Ala. 13, 7 So. Rep. 756.

The presumption that an infant at the age of fourteen years has sufficient capacity to be sensible of danger and to have the power to avoid it will stand until overthrown by clear proof of the absence of such discretion

as is usual with infants of that age. *Nagle v. Allegheny Valley R. Co.*, 88 Pa. St. 35.—DISTINGUISHED IN *Pennsylvania R. Co. v. White*, 88 Pa. St. 327. EXPLAINED IN *Kehler v. Schwenk*, 144 Pa. St. 348. FOLLOWED IN *Rhodes v. Georgia R. & B. Co.*, 84 Ga. 320.

The increase of responsibility makes no sudden leap at the age of fourteen. That is simply the convenient point at which the law, founded on experience, changes the presumption of capacity, and puts upon the infant the burden of showing his personal want of the intelligence, prudence, foresight, or strength usual in those of that age. *Kehler v. Schwenk*, 144 Pa. St. 348, 22 Atl. Rep. 910.—EXPLAINING *Nagle v. Allegheny Valley R. Co.*, 88 Pa. St. 35.

(2) *Its applications.*—A child eight years old will not be held to be guilty of contributory negligence. *Taylor v. Delaware & H. Canal Co.*, 28 Am. & Eng. R. Cas. 656, 113 Pa. St. 162, 8 Atl. Rep. 43.

But a boy eleven years of age is not of such tender years as not to be chargeable with negligence in playing and lounging upon the right of way and track of a railroad. *Masser v. Chicago, R. I. & P. R. Co.*, 68 Iowa 602, 27 N. W. Rep. 776.

In the absence of evidence tending to show that a boy twelve years of age was not qualified to understand the danger and appreciate the necessity for observing that degree of caution in crossing a railroad track an adult would, he must be deemed *sui juris* and chargeable with the same measure of caution as an adult. *Tucker v. New York C. & H. R. Co.*, 124 N. Y. 308, 26 N. E. Rep. 916, 35 N. Y. S. R. 272; *reversing 33 N. Y. S. R. 863*, 11 N. Y. Supp. 692.

Where a boy of 13 sues for being injured by a street-car and the question of his contributory negligence is raised, it is error to instruct the jury as to the law relating to the care a child of five or six should exercise, as in such case a child is *non sui juris*, and the law applicable to his case does not apply to a boy of 13. *Holmes v. Atlantic Ave. R. Co.*, 16 N. Y. S. R. 743.—DISTINGUISHING *Kunz v. Troy*, 104 N. Y. 344, 5 N. Y. S. R. 642.—APPLIED IN *Dorman v. Broadway R. Co.*, 16 N. Y. S. R. 753.

71. Conflict of laws as to the age of responsibility.—The injury complained of having been received in North Carolina, the law of that state as to the age

at which a boy may be guilty of contributory negligence (as shown by a decision of her court of last resort, introduced in evidence in this case) must govern an action brought in this state upon this cause of action. *Bridger v. Asheville & S. R. Co.*, 27 So. Car. 456, 13 Am. St. Rep. 653, 3 S. E. Rep. 860.

The boy being between the ages of 10 and 11 when the injuries were received, the trial judge could not properly charge that the boy could contribute to the injury nor that he could not, but properly charged the jury that the test of the boy's capacity for contributory negligence was his age, his intelligence, his ability to know and appreciate the danger of his surroundings, provided North Carolina law did not fix the age. *Bridger v. Asheville & S. R. Co.*, 27 So. Car. 456, 13 Am. St. Rep. 653, 3 S. E. Rep. 860.

72. Degree of care required of child, generally.*—A child, to the extent that it has knowledge and understanding of a danger, or where it is of such nature as to be obvious even to one of his years, is under a legal duty to avoid it. *Ridenhour v. Kansas City Cable R. Co.*, 102 Mo. 270, 13 S. W. Rep. 889, 14 S. W. Rep. 760.

Ordinary care for his own safety is not necessarily the measure of diligence incumbent upon a child under fourteen years of age; nor is such child bound, as matter of law, to anticipate negligence by others. *Georgia Midland & G. R. Co. v. Evans*, 87 Ga. 673, 13 S. E. Rep. 580.

The mother of a child two and a half years old, who lived on a second floor, dressed the child and sent her down stairs to play with other children in the rear of the house while she cleaned her rooms; but the child went on the street in front of the house and was injured by a street-car. *Held*, in an action to recover for the injuries, that it was proper to charge the jury that, after determining whether the company was negligent, then they were to decide whether the child did what was prudent in the circumstances in which it was placed, considering its age, and also whether there was any omission of care and prudence on the part of the child or its mother

* Care required of children, see note, 4 AM. & ENG. R. CAS. 559.

Degree of care required of children, see note, 1 L. R. A. 127.

which occasioned the injury in whole or in part, and that if they were not free from negligence contributing to the injury plaintiff had no cause of action. *Hyland v. Yonkers R. Co.*, 4 N. Y. Supp. 305, 22 N. Y. S. R. 100, 51 Hun 643, *mem.*; *affirmed* in 119 N. Y. 612, *mem.*, 23 N. E. Rep. 1143, 28 N. Y. S. R. 977.

Children are not bound to use the utmost care in crossing a track at a public crossing, for adults are not even required to use such a degree of care under like circumstances. *Nehrbas v. Central Pac. R. Co.*, 14 Am. & Eng. R. Cas. 670, 62 Cal. 320.

73. Degree of care measured by the age and capacity of injured child.*—Due care according to age and capacity is all the law exacts of a child of tender years. Ordinary care, which is that of every prudent man, is not the standard for a child. *Western & A. R. Co. v. Young*, 42 Am. & Eng. R. Cas. 135, 83 Ga. 512, 10 S. E. Rep. 197; *former appeal*, 81 Ga. 397.

An infant eighteen months old must not be judged by the same rules which are applied to adults when he is sought to be charged with negligence. *Schmidt v. Milwaukee & St. P. R. Co.*, 23 Wis. 186.

A child of tender years is not expected or required to exercise the same degree of care or circumspection as an adult, and in cases of personal injury the degree of care required of such a child is to be determined by reference to its age and intelligence. *Cooper v. Lake Shore & M. S. R. Co.*, 66 Mich. 261, 10 West. Rep. 184, 33 N. W. Rep. 306.

All that is demanded in such cases is a degree of care or diligence equal to the capacity of the child. He is incapable of exercising any judgment or forethought, and can neither apprehend the danger of remaining on a railroad track when a train is approaching nor take suitable means to protect himself against it. *Schmidt v. Milwaukee & St. P. R. Co.*, 23 Wis. 186.

Due care for its own safety in a child nine years of age is such care as its capacity, mental and physical, fits it for exercising in the actual circumstances of the occasion and situation. Neither the average child of its own age nor the prudent man is a standard by which to measure its diligence with legal exactness. Such care as the capacity of the particular child enables it to use, naturally and reasonably, is what

* See also *post*, 75.

the law requires. *Western & A. R. Co. v. Young*, 37 *Am. & Eng. R. Cas.* 489, 81 *Ga.* 397, 7 *S. E. Rep.* 912; *further appeal in 42 Am. & Eng. R. Cas.* 135, 83 *Ga.* 512, 10 *S. E. Rep.* 197.—*EXPLAINING Vickers v. Atlanta & W. P. R. Co.*, 64 *Ga.* 306.

A child is to be held to the exercise of care for its personal safety according to its age, experience, and intelligence, and the circumstances by which it was surrounded at the time of the injury, and it cannot be held as matter of law that negligence cannot be imputed to a child 6 or 7 years of age. The question is one of fact for the jury. *Chicago City R. Co. v. Wilcox*, (Ill.) 43 *Am. & Eng. R. Cas.* 299, 24 *N. E. Rep.* 419.

The degree of care required of an infant, the omission of which will constitute negligence on his part, is to be measured in each case by the maturity and capacity of the individual. *Thurber v. Harlem Bridge, M. & F. R. Co.*, 60 *N. Y.* 326, 10 *Am. Ry. Rep.* 126.—*DISAPPROVING Honegsberger v. Second Ave. R. Co.*, 33 *How. Pr. (N. Y.)* 193, 1 *Keyes* 570. *REVIEWING Lynch v. Nurdin*, 1 *Q. B.* 29; *Sheridan v. Brooklyn City & N. R. Co.*, 36 *N. Y.* 39.—*APPLIED IN Finklestein v. New York C. & H. R. R. Co.*, 41 *Hun (N. Y.)* 34, 2 *N. Y. S. R.* 680. *FOLLOWED IN Maher v. Central Park, N. & E. R. R. Co.*, 67 *N. Y.* 52. *QUOTED IN Wendell v. New York C. & H. R. R. Co.*, 14 *Am. & Eng. R. Cas.* 663, 91 *N. Y.* 420; *Block v. Harlem Bridge, M. & F. R. Co.*, 28 *N. Y. S. R.* 495, 55 *Hun* 607, 9 *N. Y. Supp.* 164.—*Chicago & A. R. Co. v. Murray*, 71 *Ill.* 601. *Washington & G. R. Co. v. Gladmon*, 15 *Wall. (U. S.)* 401, 4 *Am. Ry. Rep.* 500. *Moore v. Metropolitan R. Co.*, 2 *Mackey (D. C.)* 437. *Kansas Pac. R. Co. v. Whippie*, 37 *Am. & Eng. R. Cas.* 320, 39 *Kan.* 531, 18 *Pac. Rep.* 730. *Duffy v. Missouri Pac. R. Co.*, 19 *Mo. App.* 380. *Boland v. Missouri R. Co.*, 36 *Mo.* 484.

In determining the contributory negligence of a child its intelligence must be considered, for a child's care must be measured by its intelligence whether it be actor or sufferer. *Gulf, C. & S. F. R. Co. v. McWhirter*, 77 *Tex.* 356, 14 *S. W. Rep.* 26.

74. Such care as expected of children of like age and capacity.—(1) *General rules.*—A child, so far as he is personally concerned, is to be held only to such degree of care as ought to be reasonably expected from children of his age and in-

telligence. *Baltimore City Pass. R. Co. v. McDonnell*, 43 *Md.* 534, 14 *Am. Ry. Rep.* 272. *Chicago City R. Co. v. Wilcox*, 50 *Am. & Eng. R. Cas.* 464, 138 *Ill.* 370, 27 *N. E. Rep.* 899. *Mobile & M. R. Co. v. Crenshaw*, 8 *Am. & Eng. R. Cas.* 340, 65 *Ala.* 566. *McMillan v. Burlington & M. R. Co.*, 46 *Iowa* 231, 16 *Am. Ry. Rep.* 239. *Murray v. Richmond & D. R. Co.*, 93 *N. Car.* 92. *Eswin v. St. Louis, I. M. & S. R. Co.*, 35 *Am. & Eng. R. Cas.* 390, 96 *Mo.* 290, 9 *S. W. Rep.* 577. *Collins v. South Boston R. Co.*, 26 *Am. & Eng. R. Cas.* 371, 142 *Mass.* 301, 7 *N. E. Rep.* 856. *Ridenhour v. Kansas City Cable R. Co.*, 102 *Mo.* 270, 13 *S. W. Rep.* 889, 14 *S. W. Rep.* 760. *Williams v. Kansas City, S. & M. R. Co.*, 37 *Am. & Eng. R. Cas.* 329, 96 *Mo.* 275, 9 *S. W. Rep.* 573. *Burger v. Missouri Pac. R. Co.*, 112 *Mo.* 238, 20 *S. W. Rep.* 439.—*QUOTING Spillane v. Missouri Pac. R. Co.*, 111 *Mo.* 555.—*Byrne v. New York C. & H. R. R. Co.*, 83 *N. Y.* 620; *reversing 14 Hun* 322.—*APPLIED IN Finklestein v. New York C. & H. R. R. Co.*, 41 *Hun (N. Y.)* 34, 2 *N. Y. S. R.* 680. *FOLLOWED IN Collis v. New York C. & H. R. R. Co.*, 71 *Hun (N. Y.)* 504.—*Houston & T. C. R. Co. v. Booser*, 34 *Am. & Eng. R. Cas.* 63, 70 *Tex.* 530, 8 *S. W. Rep.* 119.

If he uses such care as this, then he uses what is, as to him, "due care." If he is wholly devoid of power to appreciate danger or exercise any degree of care whatever, then he is *non sui juris*, and of such nothing is required; and mere proof that he is such is proof of "due care." *Chicago & A. R. Co. v. Lammert*, 12 *Ill. App.* 408.

The law of negligence applicable to children is, that they are required to exercise only that degree of care and caution which persons of like age, capacity, and experience may reasonably be expected to naturally or ordinarily use in the same situation and under the like circumstances, provided the parents or persons having their control are not guilty of a want of ordinary care in allowing them to be placed in such circumstances of danger. This rule will not apply to minors or children possessing the knowledge and capacity of adults. *Illinois C. R. Co. v. Slater*, 129 *Ill.* 91, 21 *N. E. Rep.* 575; *affirming 28 Ill. App.* 73.—*QUOTING Chicago & A. R. Co. v. Becker*, 76 *Ill.* 25.

It seems that an infant, to avoid the imputation of negligence, is bound only to exercise that degree of care which can

reasonably be expected of one of its age; and when an infant is injured by alleged negligence, in passing upon the question of contributory negligence the age of the infant is to be considered by the jury with the other circumstances of the case. *Dowling v. New York C. & H. R. R. Co.*, 12 *Am. & Eng. R. Cas.* 73, 90 *N. Y.* 670.—APPLIED IN *Finklestein v. New York C. & H. R. R. Co.*, 41 *Hun* (N. Y.) 34, 2 *N. Y. S. R.* 680.

The measure of a boy's responsibility for contributory negligence is his capacity to see and appreciate danger; and the rule is that, in the absence of clear evidence of the lack of it, he will be held to such measure of discretion as is usual in those of his age and experience, the measure varying of course with each additional year. *Kehler v. Schwank*, 144 *Pa. St.* 348, 22 *Atl. Rep.* 910.

(2) *Ordinary care.*—Ordinary care has relation to the situation and condition of the parties, and varies according to the exigencies which require vigilance and attention; and when contributory negligence is sought to be attributed to a child, he can only be held to that degree of care which may reasonably be expected from one under the same conditions, of the same age, sex, intelligence, and judgment. *Baker v. Flint & P. M. R. Co.*, 68 *Mich.* 90, 12 *West. Rep.* 485, 35 *N. W. Rep.* 836.

Ordinary care is such care as would ordinarily be exercised by persons of the age and in the situation of the person sought to be charged with negligence; and the fact that the person injured was a child of tender years is to be considered in determining the question of contributory negligence. *Townley v. Chicago, M. & St. P. R. Co.*, 4 *Am. & Eng. R. Cas.* 562, 53 *Wis.* 626, 11 *N. W. Rep.* 55.

(3) *Illustrations—Instructions.*—A girl twelve years old must exercise what is to be regarded as a reasonable precaution for one of her years for her own safety. *Paducah & M. R. Co. v. Hoeft*, 12 *Bush* (Ky.) 41, 18 *Am. Ry. Rep.* 338.

Where a boy of thirteen sues for being injured by a street-car, the question of his contributory negligence is determined by whether he acted as carefully and as prudently as one of his age could reasonably be expected to act under the same circumstances. *Mowrey v. Central City R. Co.*, 66 *Barb.* (N. Y.) 43; *affirmed in* 51 *N. Y.* 666, *mem.*

In an action under the statute by a father to recover damages for the death of his child, aged about five years, caused by its negligence, the plaintiff is entitled to recover if it appear that the death resulted from the want of ordinary care and caution on the part of the defendant, and that the child used such care as might reasonably be expected under the circumstances from one of her age and intelligence, and that the parent or the person to whose care she was intrusted at the time did not by his negligence directly contribute to produce the result complained of. *Baltimore & O. R. Co. v. State*, 30 *Md.* 47.

A boy between eleven and twelve years of age was killed while coasting by colliding with defendant's train on a public street in the city of St. Louis. The court instructed that if the deceased did not possess the discretion of an adult at the time of the accident, the jury should consider the fact in determining whether or not he was guilty of contributory negligence. *Held, error.* *Eswin v. St. Louis, I. M. & S. R. Co.*, 35 *Am. & Eng. R. Cas.* 390, 96 *Mo.* 290, 9 *S. W. Rep.* 577.—DISTINGUISHED IN *Ridenhour v. Kansas City Cable R. Co.*, 102 *Mo.* 270.

The instruction should have further told the jury that the deceased was required to use the care and caution which might be expected of one of his age. *Eswin v. St. Louis, I. M. & S. R. Co.*, 35 *Am. & Eng. R. Cas.* 390, 96 *Mo.* 290, 9 *S. W. Rep.* 577.

The court charged: "If the boy (being on the track) had sufficient judgment and discretion to know his danger, and did not exercise the ordinary care that one of his age and maturity should, he was guilty of such negligence as would prevent him from recovering," etc. *Held, not to be error.* *Pennsylvania R. Co. v. Lewis*, 79 *Pa. St.* 33.

75. Less care required of children than of adults.*—(1) *Generally.*—A child of tender years is not to be held to the same rule of care and diligence in avoiding the consequences of the negligent or unlawful act of others, that is required of persons of full age and capacity. *Pennsylvania R. Co. v. Kelly*, 31 *Pa. St.* 372.—APPROVED IN *Bellefontaine & I. R. Co. v. Snyder*, 18 *Ohio St.* 399. DISTINGUISHED IN *Lott v. New Orleans C. & L. R. Co.*, 37 *La. Ann.* 337; *Flower v. Pennsylvania R. Co.*, 69 *Pa. St.*

* See also *ante*, 73.

210. QUOTED IN *State v. Baltimore & O. R. Co.*, 24 Md. 84; *Memphis & C. R. Co. v. Whitfield*, 44 Miss. 466.—*Mobile & M. R. Co. v. Crenshaw*, 8 Am. & Eng. R. Cas. 340, 65 Ala. 566. *McMillan v. Burlington & M. R. R. Co.*, 46 Iowa 231, 16 Am. Ry. Rep. 239. *Cooper v. Lake Shore & M. S. R. Co.*, 66 Mich. 261, 10 West. Rep. 184, 33 N. W. Rep. 306. *Duffy v. Missouri Pac. R. Co.*, 19 Mo. App. 380.—DISAPPROVING *Hartfield v. Roper*, 21 Wend. (N. Y.) 615. QUOTING *Philadelphia & R. R. Co. v. Spearen*, 47 Pa. St. 300. REVIEWING *O'Flaherty v. Union R. Co.*, 45 Mo. 70.—*Evansich v. Gulf, C. & S. F. R. Co.*, 6 Am. & Eng. R. Cas. 182, 57 Tex. 126. *Townley v. Chicago, M. & St. P. R. Co.*, 4 Am. & Eng. R. Cas. 562, 53 Wis. 626, 11 N. W. Rep. 55. *Washington & G. R. Co. v. Gladmon*, 15 Wall. (U. S.) 401, 4 Am. Ry. Rep. 500.—QUOTED IN *Miles v. Atlantic, M. & O. R. Co.*, 4 Hughes (U. S.) 172; *Kansas Pac. R. Co. v. Whipple*, 37 Am. & Eng. R. Cas. 320, 39 Kan. 531, 18 Pac. Rep. 730; *Murray v. Richmond & D. R. Co.*, 93 N. Car. 92; *Elze v. Baumann*, 21 N. Y. Supp. 782.

What would be contributory negligence in an adult may not be such in the case of a child of tender years. *Moore v. Metropolitan R. Co.*, 2 Mackey (D. C.) 437. *O'Mara v. Hudson River R. Co.*, 38 N. Y. 445. *Warner v. Railroad Co.*, 6 Phila. (Pa.) 537.

All that is necessary to give a right of action to the plaintiff for any injury inflicted by the negligence of the defendant is, that the child should have exercised care and prudence equal to his capacity. *Boland v. Missouri R. Co.*, 36 Mo. 484.—QUOTED IN *Murray v. Richmond & D. R. Co.*, 93 N. Car. 92; *Winters v. Kansas City Cable R. Co.*, 40 Am. & Eng. R. Cas. 261, 99 Mo. 509, 12 S. W. Rep. 652, 6 L. R. A. 536.—REVIEWED IN *Wyatt v. Citizens' R. Co.*, 55 Mo. 485; *Scaling v. Pullman Palace Car Co.*, 24 Mo. App. 29.

Damages may be recovered for injuries to children who, through want of discretion, have contributed thereto, under circumstances which would defeat a recovery by persons having age and discretion. *Evansich v. Gulf, C. & S. F. R. Co.*, 6 Am. & Eng. R. Cas. 182, 57 Tex. 126.—DISTINGUISHED IN *Williams v. Texas & P. R. Co.*, 15 Am. & Eng. R. Cas. 403, 60 Tex. 205.

The rule in regard to the degree of care which an adult must exercise before he can recover damages for injuries resulting from

the negligence of another, is different from those in respect to infants of tender years. The former is required to employ that care and attention for his own safety which is ordinarily exercised by persons of intelligence; the latter is held to such care and prudence as is usual among children of his age and capacity. *Murray v. Richmond & D. R. Co.*, 93 N. Car. 92.—QUOTING *Washington & G. R. Co. v. Gladmon*, 15 Wall. (U. S.) 401; *Boland v. Missouri R. Co.*, 36 Mo. 484. REVIEWING *Meeks v. Southern Pac. R. Co.*, 52 Cal. 602; *Cauley v. Pittsburgh, C. & St. L. R. Co.*, 4 Am. & Eng. R. Cas. 533, 98 Pa. St. 498.

By the adult there must be given that care and attention for his own protection that is ordinarily exercised by persons of intelligence and discretion. If he fails to give it, his injury is the result of his own folly and cannot be visited upon another. Of an infant of tender years less discretion is required, and the degree depends upon his age and apparent knowledge. *Kansas Pac. R. Co. v. Whipple*, 37 Am. & Eng. R. Cas. 320, 39 Kan. 531, 18 Pac. Rep. 730.—QUOTING *Washington & G. R. Co. v. Gladmon*, 15 Wall. (U. S.) 402.

Where a child of tender years is injured, an action may be maintained where the parent used ordinary care and prudence in caring for it, though the conduct of the child at the time would have amounted to contributory negligence when applied to an adult of ordinary capacity. *Schmidt v. Milwaukee & St. P. R. Co.*, 23 Wis. 186.

(2) *Illustrations.*—Children cannot be held to the exercise of the same degree of care in crossing a track as is demanded of adults. *Houston & T. C. R. Co. v. Booser*, 34 Am. & Eng. R. Cas. 63, 70 Tex. 530, 8 S. W. Rep. 119. *Philadelphia & R. R. Co. v. Spearen*, 47 Pa. St. 300.—APPROVED IN *Bellefontaine & I. R. Co. v. Snyder*, 18 Ohio St. 399. DISAPPROVED IN *Battishill v. Humphreys*, 28 Am. & Eng. R. Cas. 597, 64 Mich. 494. DISTINGUISHED IN *Pennsylvania R. Co. v. Morgan*, 82 Pa. St. 134. QUOTED IN *Marquette v. Chicago & N. W. R. Co.*, 33 Iowa 562; *Duffy v. Missouri Pac. R. Co.*, 19 Mo. App. 380; *Lamb v. Camden & A. R. & T. Co.*, 2 Daly (N. Y.) 454.

In determining the question of contributory negligence the same degree of caution is not required of an infant as of an adult; and when such negligence is sought to be charged against a lad of less than 15

years of age, this rule clearly applies. *Wright v. Detroit, G. H. & M. R. Co.*, 42 *Am. & Eng. R. Cas.* 140, 77 *Mich.* 123, 43 *N. W. Rep.* 765.

A child twelve years old may not be held accountable for contributory negligence to the same extent as an adult. *Kempinger v. St. Louis & I. M. R. Co.*, 3 *Mo. App.* 581.

A child is not to be judged by the same rule as an adult, and cannot be regarded as guilty of negligence for attempting to pass under a car left standing across a street where he had a right to pass. *Rauch v. Lloyd*, 31 *Pa. St.* 358.

(3) *Massachusetts rule*.—The same general principles govern in determining whether the acts of a child amount, as matter of law, to contributory negligence as in the case of adults, although the degrees of care required are different. *Collins v. South Boston R. Co.*, 26 *Am. & Eng. R. Cas.* 371, 142 *Mass.* 301, 7 *N. E. Rep.* 856.

(4) *New York rule*.—A child of tender years is chargeable with contributory negligence whenever the same conduct would amount to contributory negligence on the part of an adult. *Solomon v. Central Park, N. & E. R. R. Co.*, 1 *Sweeney (N. Y.)* 298.—FOLLOWING *Sheridan v. Brooklyn & N. R. Co.*, 36 *N. Y.* 43.

The law requires all persons suing for personal injuries, caused by negligence, to show that they have themselves exercised that degree of care which a person of ordinary prudence would have exercised in the same situation; and this rule applies to all alike without any discrimination on account of age. *Honegsberger v. Second Ave. R. Co.*, 1 *Keyes (N. Y.)* 570, 2 *Abb. App. Dec.* 378.—DISAPPROVED IN *Costello v. Syracuse, B. & N. Y. R. Co.*, 65 *Barb. (N. Y.)* 92.

An infant, even of the tender age of 8 years, is held to the same degree of care and prudence that should be exercised by one of more mature years. *Squire v. Central Park, N. & E. R. R. Co.*, 4 *J. & S. (N. Y.)* 436.

A boy of six, suing for personal injuries, is required to show that he exercised the prudence of a person of ordinary intelligence before he can recover. A child is required to take the same care of itself as any other person. All are held accountable for a reasonable degree of prudence as to their own safety. *Burke v. Broadway & S. A. R. Co.*, 49 *Barb. (N. Y.)* 529, 34 *How. Pr.* 239.

(5) — and its modifications.—It is error to charge that there is no difference between children and adults as to the degree of care and caution to be exercised in crossing a railroad track. *Costello v. Syracuse, B. & N. Y. R. Co.*, 65 *Barb. (N. Y.)* 92; *appeal dismissed (?)* 55 *N. Y.* 641, *mem.*—DISAPPROVING *Honegsberger v. Second Ave. R. Co.*, 1 *Keyes (N. Y.)* 570; *Warner v. New York C. R. Co.*, 44 *N. Y.* 465. QUOTING *Sheridan v. Brooklyn & N. R. Co.*, 36 *N. Y.* 39; *O'Mara v. Hudson River R. Co.*, 38 *N. Y.* 445.

Less prudence and caution are to be expected from a lad of 8 years of age than of a person of maturity, and others, in their relations to him, must act accordingly. *Mentz v. Second Ave. R. Co.*, 3 *Abb. App. Dec. (N. Y.)* 274.—QUOTED IN *Dorman v. Broadway R. Co.*, 16 *N. Y. S. R.* 753. REVIEWED IN *O'Donnell v. New York & H. R. Co.*, 8 *Daly (N. Y.)* 409.

Although from an infant, if *sui juris*, a less degree of care is required than from a person of mature age, yet he is chargeable with some degree of care and prudence in approaching a known danger, and is responsible for the consequences of some degree of negligence; and in an action for injuries to him, occasioned by negligence of another, absence of this degree of negligence on his part must be made to appear to authorize a recovery. *Wendell v. New York C. & H. R. R. Co.*, 14 *Am. & Eng. R. Cas.* 663, 91 *N. Y.* 420; *reversing* 14 *Wkly. Dig.* 406.—APPLIED IN *Hooper v. Johnson, G. & K. H. R. Co.*, 35 *N. Y. S. R.* 503, 13 *N. Y. Supp.* 151, 59 *Hun* 121. DISTINGUISHED IN *Stone v. Dry Dock, E. B. & B. R. Co.*, 115 *N. Y.* 101, 21 *N. E. Rep.* 712, 23 *N. Y. S. R.* 551. QUOTED IN *McPhillips v. New York, N. H. & H. R. Co.*, 12 *Daly (N. Y.)* 365.

While children not of full age—in this case a boy of 13—cannot be held to the same degree of care and caution as adults, they are nevertheless bound to exercise so much as they are capable of doing. They may not recklessly rush into visible danger and hold the one who produced the danger responsible for injuries which they were able to avoid. *Mowrey v. Central City R. Co.*, 66 *Barb. (N. Y.)* 43; *affirmed in* 51 *N. Y.* 666, *mem.* And compare *Tucker v. New York C. & H. R. R. Co.*, 124 *N. Y.* 308, 26 *N. E. Rep.* 916, 36 *N. Y. S. R.* 272; *reversing* 33 *N. Y. S. R.* 863, 11 *N. Y. Supp.* 692.

76. Degree of care required of deaf and dumb child.—It is not irrebuttable legal presumption that a deaf and dumb child, ten years of age, is wholly incapable of reasoning, of appreciating danger, and of exercising any degree of care whatever, and therefore incapable of negligence and of being a juridical cause of an injury. It is a question of fact and one to be submitted to the jury as such. *Chicago & A. R. Co. v. Lammert*, 12 Ill. App. 408.

77. What does not constitute negligence on part of child.—The evidence fails to establish contributory negligence when it shows that certain horses were gentle and docile; that one injured, a girl of twelve, had driven them together a number of times within a short time previous to the accident; that she had driven in the vicinity of the railroads and cars, and across railroads; that the horses were not afraid of, or liable to be frightened by, the cars; and that she would have been able to stop them at the time of the accident if the railroad had been properly constructed at the crossing. *Louisville, E. & St. L. Con. R. Co. v. Pritchard*, 131 Ind. 564, 31 N. E. Rep. 358.

Although a minor, killed while playing upon a turntable, had sufficient intelligence to know that it was wrong to trespass upon the turntable, yet if he had no knowledge that playing upon the table was unsafe or dangerous, it cannot be said that he was guilty of contributory negligence. *Union Pac. R. Co. v. Dunden*, 34 Am. & Eng. R. Cas. 88, 37 Kan. 1, 14 Pac. Rep. 501.

It is not conclusive evidence of contributory negligence in a child that she did not look up the track to the east before venturing to cross, where she delayed that a train going in that direction might pass. *Cooper v. Lake Shore & M. S. R. Co.*, 66 Mich. 261, 10 West. Rep. 184, 33 N. W. Rep. 306.

The fact that a minor child was upon the platform of a street-car in violation of a municipal ordinance, while it may be proved and is proper for the consideration of the jury, in an action for negligence, does not necessarily establish negligence on child's part. *Connolly v. Knickerbocker Ice Co.*, 39 Am. & Eng. R. Cas. 441, 114 N. Y. 104, 21 N. E. Rep. 101, 22 N. Y. S. R. 675; *affirming* 8 N. Y. S. R. 901.—FOLLOWING *Knapp v. Knickerbocker Ice Co.*, 84 N. Y. 488; *Carroll v. Staten Island R. Co.*, 58 N. Y. 126.

An infant might know that it was wrong and improper for him to play on a turntable, and yet not know that it was dangerous. *Bridger v. Asheville & S. R. Co.*, 25 So. Car. 24.

A company was in the habit of throwing slack from its coal-mine onto an unfenced lot near a station, which was slowly burning, but without outward signs of danger. A lad of 12 had arrived at the station as a passenger, and, without any knowledge of the burning slack, soon after leaving the station became alarmed and ran onto it and was burned. *Held*, that he was neither a trespasser nor guilty of contributory negligence so as to prevent a recovery for the injuries received. *Union Pac. R. Co. v. McDonald*, 152 U. S. 262, 14 Sup. Ct. Rep. 619.

A boy under twelve years of age is not guilty of negligence on entering a coach in placing his fingers on a part of the door so that they are crushed when the porter closes the door violently. *Coleman v. South Eastern R. Co.*, 4 H. & C. 699, 12 Jur. N. S. 944.

78. As affecting recovery for loss of services.—In an action by the father for his own benefit for injuries received by his child, the contributory negligence of such child is a good defense, unless he was within the age which raises the legal presumption of incapacity. *Pratt C. & I. Co. v. Brawley*, 83 Ala. 371, 3 Am. St. Rep. 751, 3 So. Rep. 555.

If an infant six years old is injured by a car in going to and from school by the permission of its parents, and he has been guilty of negligence himself, neither he nor the father can recover. Where the father sues, his right of action is no greater than that of the infant would be if he was suing. It must appear that the child was exercising that degree of care which an adult of ordinary prudence would have used. *Honegsberger v. Second Ave. R. Co.*, 2 Abb. App. Dec. (N. Y.) 378; *reversing* 1 Daly 89.—FOLLOWING *Hartfield v. Roper*, 21 Wend. (N. Y.) 615. NOT FOLLOWING *Lynch v. Nurdin*, 1 Q. B. 29.

Where a father sues to recover damages for injuries to his infant child, he can recover only under the same circumstances where the child might recover if the suit was in its own name or behalf. Therefore the child's contributory negligence may be a defense. *Burke v. Broadway & S. A. R. Co.*, 49 Barb. (N. Y.) 529, 34 How. Pr. 239.

2. *As Affecting Recovery for Personal Injuries.**

70. Generally.—(1) *Statement of the rule.*—Mere negligence on the part of a child five years old does not shield a railroad from liability for negligently injuring it, where the child's parent is free from negligence. *Huerzeler v. Central C. T. R. Co.*, 139 *N. Y.* 490, 54 *N. Y. S. R.* 836; *affirming* 48 *N. Y. S. R.* 649, 1 *Misc.* 136, 20 *N. Y. Supp.* 676.

An infant, when suing in his own behalf for injuries to his person arising from the negligence of others, must be free from the imputation of negligence on his part tending to produce the damages sought to be recovered. The rule is the same whether the action be by an infant or an adult. *Burke v. Broadway & S. A. R. Co.*, 49 *Barb.* (N. Y.) 529, 34 *How. Pr.* 239.

In all cases where ordinary negligence on the part of the defendant is sufficient to infer liability, it is a sufficient defense to show that there was contributory negligence on the part of the plaintiff; i. e., to show that although the negligence of the defendant was a cause, and even the primary cause, of the occurrence, yet the occurrence would not have happened without a certain degree of blamable negligence on the part of the plaintiff. These rules apply where a child is plaintiff, whether the fault is that of the child or of one having the care of it. *Hathaway v. Toledo, W. & W. R. Co.*, 46 *Ind.* 25, 6 *Am. Ry. Rep.* 399.

(2) *Illustrations.*—Plaintiff, a boy over fifteen years of age, with others had been in the habit of walking along the track in going to and from school, and remaining on the track until the cars came near to him, and a short time before the accident had twice been complained of by one of the employes of the road for waiting too long in getting from the track. He knew about what time the train might be expected, and on the day of the accident he and a girl smaller than himself were walking on the track. The approaching train could be seen more than a quarter of a mile distant. He remained on the track until it came very near him, then stepped off beside the track, where he stood until a large part of the train

had gone by, and was looking at the wheels, when he was struck (as he claimed) by a plank projecting from a flat-car. *Held*, that he was chargeable with negligence which will prevent a recovery. *Central R. Co. v. Brinson*, 19 *Am. & Eng. R. Cas.* 42, 70 *Ga.* 207.—**DISTINGUISHING** *Baston v. Georgia R. Co.*, 60 *Ga.* 339; *Vickers v. Atlanta & W. P. R. Co.*, 64 *Ga.* 306; *Central R. Co. v. Glass*, 60 *Ga.* 441.

A child of nine years who jumped upon a properly constructed draw from a railway bridge while the draw was being lawfully closed—*held*, to be so wanting in ordinary care as not to be entitled to recover for the resulting injury. *Brown v. European & N. A. R. Co.*, 58 *Me.* 384.—**DISAPPROVED IN** *Battishill v. Humphrey*, 28 *Am. & Eng. R. Cas.* 597, 64 *Mich.* 494. **DISTINGUISHED IN** *State v. Boston & M. R. Co.*, 35 *Am. & Eng. R. Cas.* 356, 80 *Me.* 430.

The mother, who lived on a second floor, dressed her child and sent it down stairs to play in the rear of the house while she cleaned her rooms, but the child went on the street in front of the house and was injured by a street-car. *Held*, that it was proper to charge the jury that they were to decide whether the child did what was prudent in the circumstances in which it was placed, considering its age, and whether its omission of such care occasioned the injury in whole or in part; and if so, that plaintiff had no cause of action. *Hyland v. Yonkers R. Co.*, 22 *N. Y. S. R.* 100, 51 *Hun* 643, *mem.*, 4 *N. Y. Supp.* 305; *affirmed in* 119 *N. Y.* 612, *mem.*, 23 *N. E. Rep.* 1143, 28 *N. Y. S. R.* 977.

80. Crossing track in front of street-car.*—An intelligent child ten years old was crossing a public street by a diagonal cross-walk. There were no obstructions to view, and no passing vehicles except a horse-car coming in a direction toward the child, and which, had she looked in the direction she was moving, must have been seen by her long before reaching the track. A verdict that she did not negligently contribute to an injury received by being knocked down by the horses attached to the car, cannot be sustained. *Sheets v. Connolly St. R. Co.*, 54 *N. J. L.* 518, 24 *Atl. Rep.* 483.

A boy eight years old, after he sees a car coming in time to avoid it, cannot volun-

* Negligence of infant as bar to recovery for personal injuries, see note, 14 *AM. ST. REP.* 590. Injury to child at crossing; contributory negligence, see 32 *AM. & ENG. R. CAS.* 158, *abstr.*

* See also *post*, 95, 109.

tarily assume the risk of crossing the track and recover for an injury arising from the failure of his experiment. *Motel v. Sixth Ave. R. Co.*, 99 N. Y. 632, 2 How. Pr. N. S. 30.

A boy of twelve attempted to cross a street in front of a moving car, but instead of passing in front of the horses he came against the dashboard and was injured. There was no proof that the speed of the car was increased, or of any other negligence on the part of the driver. It seemed to be purely a case of a careless boy being led into danger by an error of judgment in thinking he could cross in front of the horses. *Held*, that the company was not liable. *Manahan v. Steinway & H. P. R. Co.*, 125 N. Y. 760, 35 N. Y. S. R. 813; reversing 30 N. Y. S. R. 362, 55 Hun 610.

81. Crossing track in front of train.*—The plaintiff, a boy of 13, undertook to cross defendant's track in a city where there were three tracks, two belonging to the defendant and one to another company. He crossed the track of the other company just ahead of a train going south thereon, and while between that track and one of defendant's tracks, becoming alarmed at a cry of danger, stepped near defendant's track and was struck by a car thereon going north. The train was in the act of making a flying switch, the engine being reversed, both pushing and pulling cars, and in charge of five persons, but without any one on the front cars, and without a watchman at the crossing, but with the bell ringing. *Held*, that there was not such contributory negligence as to prevent a recovery. *Kentucky C. R. Co. v. Smith*, (Ky.) 20 S. W. Rep. 392.†

Where a boy of eight admits that he knew it was dangerous to try to cross the street in front of a moving car, and it appears that he saw the car and had time to avoid it, he must be held to have voluntarily assumed the risk, and cannot recover if he is injured. *Motel v. Sixth Ave. R. Co.*, 2 How. Pr. N. S. (N. Y.) 30.

In an action for injury by a train it appeared that the defendant had put in two side-tracks which extended into the public road, and that the plaintiff, a bright boy about thirteen years old, while passing along the highway was struck and injured

by an engine while seeking to avoid another coming from the opposite direction. At a short distance on either side of the tracks there was a wire fence. *Held*, he was not entitled to recover. *Meredith v. Richmond & D. R. Co.*, 108 N. Car. 616, 13 S. E. Rep. 137.

82. Failure to look and listen.—Although it is the law that a person approaching a railroad crossing is required to look up and down the track and watch for trains, before attempting to cross, yet the law will not impute negligence to a boy of between six and seven years of age, in attempting to cross a track before an approaching train, which could not be seen until a person was within eight feet of the track. *Chicago & A. R. Co. v. Becker*, 84 Ill. 483.

A girl twelve years of age must take notice of the usual and customary signals given by trains on their approach. If sufficient signals were given by the train inflicting the injury, to warn one of ordinary diligence and care of its approach and the danger of crossing the track at the time, the injury was the result of her own negligence, and she is without remedy, unless the jury should believe that those managing the train were aware of her negligence, and, after discovering her upon the track, could, by the exercise of proper care and diligence, have avoided the injury. *Paducah & M. R. Co. v. Hoehl*, 12 Bush (Ky.) 41, 18 Am. Ry. Rep. 338.—FOLLOWED IN Kentucky C. R. Co. v. Lebus, 14 Bush (Ky.) 518. QUOTED IN Louisville & N. R. Co. v. Greene, (Ky.) 19 Am. & Eng. R. Cas. 95.

83. Entering or climbing upon standing cars or engines.—(1) *Cars.*—There can be no recovery for an injury to a boy of eleven who climbs upon a freight car which is standing on a side-track at a station, and who is injured by the moving of the car in making up a train, where the company's employes do not know that he is on the car. *Louisville & N. R. Co. v. Hurt*, (Ky.) 13 S. W. Rep. 275.

A boy ten years old, who in company with other boys entered an empty box-car standing upon a track, which was being made up into a train by the trainmen, and who was, after the train had started, pushed off by one of his companions in the car and injured by the moving train, the train men having no knowledge of their presence in the car, cannot recover of the company

* See also *post*, 95, 108.

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for the injury; the evidence upon the trial showing these facts, a demurrer to it should have been sustained. *Curley v. Missouri Pac. R. Co., 98 Mo. 13, 10 S. W. Rep. 593.*

(2) *Engines.*—An eight-year-old boy, trespassing upon the premises of a company, got on the step of an engine, and being ordered off by the fireman, jumped off, falling at the same time under the tender, which, as the engine was started at that instant, ran over him. He was a boy of more than average intelligence, and had been warned against going on the premises or riding on the engine. *Held*, that the company could not be held liable for the injury unless it was shown that its servants in charge of the engine knew that the child was in the way, or that they had been reckless or negligent in the management of the engine, or could have anticipated the injury. *Chicago & N. W. R. Co. v. Smith, 4 Am. & Eng. R. Cas. 535, 46 Mich. 504, 9 N. W. Rep. 830, 40 Am. Rep. 669, n.*

Where the plaintiff, an infant of eight years of age, in disobedience of the commands of his mother and the warnings of defendant's agents and servants, and, unobserved by the engineer, jumped upon a "shifting" engine about to move, took a position where he could not be seen by those in charge and operating the engine, and remained there until, becoming alarmed at the speed, he attempted to jump off and received severe injuries—*held*, that he was not entitled to recover, though no whistle was blown or other signal given. *Murray v. Richmond & D. R. Co., 93 N. Car. 92.*—*QUOTING Manly v. Wilmington & W. R. Co., 74 N. Car. 655; Washington & G. R. Co. v. Gladmon, 15 Wall. (U. S.) 401.*

84. Getting on moving trains.*—A boy of fifteen reached a train after it was in motion. He saw a man in uniform on the car platform whom he took to be the conductor, but who in fact was the brakeman, who beckoned to him to come on. He did so and the brakeman took his valise and tried to assist him in getting on the car, but having failed, called to the boy to catch the next railing. In attempting to do so he was injured. *Held*, that the questions involved were for the jury, and a verdict against the company would not

be disturbed. *Western & A. R. Co. v. Wilson, 71 Ga. 22.*

Where a boy, aged about seven years, was injured while attempting to climb up the ladder of a freight car while in motion along a public street in a city, and it appeared that the train was not being run at an unlawful rate of speed, it moving not faster than four miles an hour; that the train was properly manned, with every employé at his station, and that the train was under perfect control, and being run with the greatest care and caution—*held*, that the company was not liable. *Chicago, B. & Q. R. Co. v. Stumps, 69 Ill. 409.*

85. Getting off moving train.*—A man was traveling with his wife and children, and having stopped at a station, and when about to alight, the wife, with an infant in her arms, was thrown to the ground by a sudden start of the train. The husband suddenly jumped off to assist her and left the other children on the car platform, one of whom jumped off and was injured. *Held*, not such contributory negligence as to bar a recovery for an injury to the child. *Lehman v. Louisiana Western R. Co., 37 La. Ann. 705.*

The evidence established that a small boy, eight years old, a son of the plaintiff, attempted, while the steam-car was in motion, on the way from New Orleans to Carrollton, to jump from the ground near the track to the platform of the car; that he was thrown from the car to the track, and one of his legs cut entirely off by the wheel of the car. It is further shown that shortly before the accident he was told by a person on the car not to attempt to get on, that he would get hurt, etc.; that the boy was not a passenger on the car, which had then left the station and was in motion on the track. *Held*, that the accident having occurred to a person not a passenger, without any fault or blame on the part of those in charge of and running the cars, the company was not therefore liable for the damages caused by the injury which such person had received on account of the accident. *Hubener v. New Orleans & C. R. Co., 23 La. Ann. 492.*

86. Boarding moving street-car.*—A boy of 15 attempted to get on the front platform of a moving horse-car, the steps of

* See also *ante*, 15, 45; *post*, 86, 98, 110.

* See also *ante*, 16, 46; *post*, 87, 99, 110.

which were broken off, and was injured. *Held*, such contributory negligence as to defeat a recovery by either the boy or his father, though the driver called to him to get on. *Dietrich v. Baltimore & H. S. R. Co.*, 11 *Am. & Eng. R. Cas.* 115, 58 *Md.* 347.—APPROVING *Baltimore & P. R. Co. v. Jones*, 95 *U. S.* 439.

Where a child about seven years old was injured by a street-car, not from any defect in the car nor any neglect in its management, but from the sudden and unexpected act of the child in attempting to mount the front platform of the car while the driver, who was also conductor, was on the rear platform and could not have foreseen or guarded against the act, the company is not responsible. *Hestonville Pass. R. Co. v. Connell*, 88 *Pa. St.* 520.

Under such circumstances there was *prima facie* no negligence in the want of a fender on the front of the car and the absence of the driver from the front platform. *Hestonville Pass. R. Co. v. Connell*, 88 *Pa. St.* 520.

87. Alighting from moving street-car.—(1) *Negligence.*—The mere refusal of the driver or conductor of a horse-car to stop and let a child six and a half years old off, will not justify the child in getting off from the front platform while the car was in full motion. *Cram v. Metropolitan R. Co.*, 112 *Mass.* 38.—DISTINGUISHED IN *Rathbone v. Union R. Co.*, 13 *Am. & Eng. R. Cas.* 58, 13 *R. I.* 709.

(2) *Not negligence.*—If a boy of ten enters a street-car without intending to pay fare, he should be put off at once. Where he is permitted to ride a considerable distance he is not guilty of contributory negligence, so as to prevent an action against the company, where he is ordered by the driver to jump off while the car is moving at a dangerous rate of speed, and is injured in doing so. *Lovett v. Salem & S. D. R. Co.*, 9 *Allen (Mass.)* 557.—EXPLAINED IN *Murphy v. Union R. Co.*, 118 *Mass.* 228. QUOTED IN *Kline v. Central Pac. R. Co.*, 37 *Cal.* 400. REVIEWED IN *Healey v. City Pass. R. Co.*, 28 *Ohio St.* 23.

Where a boy, who trespasses by getting on a car, is made to believe by the car driver that great bodily punishment is about to be inflicted upon him, though offering no resistance, it is not contributory negligence for him to jump from the car while in motion, on the wrong side, and in front of horses

hauling a car on an adjoining track in the opposite direction. *Hogan v. Central Park, N. & E. R. R. Co.*, 11 *N. Y. Supp.* 588.—APPLYING *McCann v. Sixth Ave. R. Co.*, 117 *N. Y.* 505, 23 *N. E. Rep.* 164.

88. Passing under cars in motion.—Where a boy, in attempting to pass under a car moving along the street, is run over and seriously injured, he is not entitled to recover damages from the railway company for the injury sustained, the attempt to pass under the car while in motion being such an act of carelessness as amounts in law to contributory negligence. *McMahon v. Northern C. R. Co.*, 39 *Md.* 438.

89. Riding on car platform.—Riding on a car platform raises a presumption of negligence and casts on the plaintiff, who was injured while so riding, the burden of rebutting the presumption. And this is so though the plaintiff be a boy only 9 years old. *Solomon v. Central Park, N. & E. R. R. Co.*, 1 *Sweeney (N. Y.)* 298.—FOLLOWING *Clark v. Eighth Ave. R. Co.*, 36 *N. Y.* 135.—DISTINGUISHED IN *Nolan v. Brooklyn City & N. R. Co.*, 3 *Am. & Eng. R. Cas.* 463, 87 *N. Y.* 63, 41 *Am. Rep.* 345.—FOLLOWED IN *Ward v. Central Park, N. & E. R. R. Co.*, 11 *Abb. Pr. N. S. (N. Y.)* 411; *Ward v. Central Park, N. & E. R. R. Co.*, 1 *J. & S. (N. Y.)* 392. REVIEWED IN *Goodrich v. Pennsylvania & N. Y. C. & R. Co.*, 29 *Hun (N. Y.)* 50.

In an action for negligence against a street-railway company, where it was shown that the plaintiff, a boy thirteen years of age, seated himself, without the knowledge of the conductor, upon the front platform of a crowded car, in such position that, being struck on his projecting knees by a mortar-box in the street, he was thrown under the car and injured, it was not error to enter a compulsory nonsuit. *Butler v. Pittsburgh & B. R. Co.*, 139 *Pa. St.* 195, 21 *Atl. Rep.* 500.

90. Stealing a ride.*—Where a boy nine and one half years of age, is injured while stealing a ride upon the foot-board of a switch-engine, the facts that he is of ordinary intelligence, familiar with the workings of a switch-engine, and aware of the danger of his act, and that he has frequently been forbidden by his parents from going upon the cars, and has been driven away from them by the employes of the railroad,

* See also *ante*, 18, 51.

are sufficient to establish contributory negligence on his part. *Oregon R. & N. Co. v. Egley*, 2 Wash. 409, 26 Pac. Rep. 973.

91. Riding on or playing with turntables.*—Where a turntable was constructed in an isolated place, but not covered or walled, and was left latched but not locked—*held*, that a boy nine years old could not recover for an injury received while riding thereon. *St. Louis, V. & T. H. R. Co. v. Bell*, 81 Ill. 76.

A boy of thirteen, who joins others after they have unfastened a turntable, and places himself on it to ride in a position in which he admits that he knew there was danger, is guilty of such contributory negligence as would prevent a recovery for the injuries so received; and the evidence of the facts being uncontroverted, it is proper for the court to instruct the jury to find for the defendant. *Merryman v. Chicago, R. I. & P. R. Co.*, 85 Iowa 634, 52 N. W. Rep. 545.—FOLLOWING *McMillan v. Burlington & M. R. R. Co.*, 46 Iowa 232; *Washington & G. R. Co. v. Gladmon*, 15 Wall. (U. S.) 407; *Reynolds v. New York C. & H. R. R. Co.*, 58 N. Y. 252; *Hickey v. Taafe*, 105 N. Y. 37, 12 N. E. Rep. 286; *Dowd v. Chicopee*, 116 Mass. 96; *Messenger v. Dennie*, 137 Mass. 197; *Masser v. Chicago, R. I. & P. R. Co.*, 68 Iowa 605.

A boy of nearly ten and a half years, and of average intelligence, who had been frequently in the vicinity of a turntable, and had a general knowledge of its structure and operation, and had been repeatedly warned by his father that it was dangerous to play upon it, and told not to do so, and knew that the railway company prohibited children from playing on the table, and also knew that he had no right to play upon it, and that it was dangerous to do so, engaged with other boys in swinging upon it while in motion, and was injured by his foot being caught between the arm of the table and the stationary abutments. *Held*, that the conduct of the boy amounted to contributory negligence, although he might not have been of sufficient age and discretion to understand and comprehend the full extent of the danger to which his conduct exposed him. *Twist v. Winona & St. P. R. Co.*, 37 Am. & Eng. R. Cas. 336, 39

Minn. 164, 39 N. W. Rep. 402.—REVIEWING AND MODIFYING *Keffe v. Milwaukee & St. P. R. Co.*, 21 Minn. 207.

A boy, attracted to railroad premises by a turntable thereon left unlocked or unguarded near a public highway, or in an open and exposed position near the accustomed or probable place of resort of children, cannot recover for personal injuries sustained while at play upon the turntable, either on the ground of an implied invitation to come there, or of a duty on the part of the corporation to refrain from ordinary negligence in its management of the turntable. *Daniels v. New York & N. E. R. Co.*, 48 Am. & Eng. R. Cas. 539, 154 Mass. 349, 28 N. E. Rep. 283.—APPROVING *Frost v. Eastern R. Co.*, 64 N. H. 220. DISTINGUISHING *Stout v. Sioux City & P. R. Co.*, 2 Dill. (U. S.) 294; *Atchison & N. R. Co. v. Bailey*, 11 Neb. 332; *Evansich v. Gulf, C. & S. F. R. Co.*, 57 Tex. 123; *Houston & T. C. R. Co. v. Simpson*, 60 Tex. 103; *Gulf, C. & S. F. R. Co. v. Styron*, 66 Tex. 421; *Gulf, C. & S. F. R. Co. v. McWhirter*, 77 Tex. 356; *Bridger v. Asheville & S. R. Co.*, 25 So. Car. 24; *Ferguson v. Columbus & R. R. Co.*, 75 Ga. 637, 77 Ga. 102; *Keffe v. Milwaukee & St. P. R. Co.*, 21 Minn. 207; *O'Malley v. St. Paul, M. & M. R. Co.*, 43 Minn. 289; *Kansas C. R. Co. v. Fitzsimmons*, 22 Kan. 686; *Nagel v. Missouri Pac. R. Co.*, 75 Mo. 653; *Lynch v. Nurdin*, 1 Q. B. 29; *Birge v. Gardner*, 19 Conn. 507; *Bird v. Holbrook*, 4 Bing. 628. FOLLOWING *Johnson v. Boston & M. R. Co.*, 125 Mass. 75; *Morrissey v. Eastern R. Co.*, 126 Mass. 377; *Wright v. Boston & A. R. Co.*, 142 Mass. 296; *McEachern v. Boston & M. R. Co.*, 150 Mass. 515; *McCarty v. Fitchburg R. Co.*, 154 Mass. 17. NOT FOLLOWING *Sioux City & P. R. Co. v. Stout*, 17 Wall. (U. S.) 657; *Daley v. Norwich & W. R. Co.*, 26 Conn. 591.

An instruction to the jury, "If you believe from the evidence that the plaintiff had intelligence enough to appreciate the peril of getting on the defendant's turntable in the manner the evidence shows he did; or if you believe he was warned by defendant's employé not to get on said turntable, and that it was dangerous to do so, and said plaintiff understood and appreciated such warning, but did, nevertheless, get on said turntable and was thereby the direct cause of his injury, you will find for the defendant," was properly given in an action by the child to recover damages for injuries

* See also *ante*, 67, 77; *post*, 115 (3), 139.

sustained at a railroad turntable. *Houston & T. C. R. Co. v. Simpson*, 60 Tex. 103.

92. Playing with unfastened brake.—There can be no recovery under Massachusetts St. of 1886, ch. 140, from a street-car company for injuries to a boy 10 years old, received while playing with other children, caused by an unfastened brake on a car left in a street. *Gay v. Essex Elec. St. R. Co.*, 159 Mass. 242. *Gay v. Essex Elec. St. R. Co.*, 159 Mass. 238.

93. Recovery notwithstanding child's negligence.—Where a boy of 13 is injured while attempting to cross a track in a city, it is no defense that the boy was picking up pebbles from the street and examining them at the time of the injury, where it appears that the accident would not have happened if there had been a watchman at the crossing, or a man on the end of the backing train to keep a lookout. *Kentucky C. R. Co. v. Smith*, (Ky.) 20 S. W. Rep. 392.

In an action for injuries to a child between five and six years old, alleged to have been caused by the negligence of the defendant's agents, the plaintiff is entitled to recover, if it appear from the evidence that the injuries resulted directly from the want of ordinary care and prudence on the part of the defendant's agents, and not from the want of such care and prudence on the part of the plaintiff as ought, under the circumstances, to be reasonably expected from one of his age and intelligence, nor from the want of ordinary care and prudence on the part of his parents, directly contributing to the accident. *McMahon v. Northern C. R. Co.*, 39 Md. 438.

Where it appeared that at a station where the accident occurred, by direction of his father the boy was in the habit of driving stock from the track before the arrival of trains, and would then seat himself on the platform of the station, and was accustomed to get on freight trains on their arrival and ride to the switch; that the platform had been built by the company for the accommodation of passengers and persons having business with the road, and that the lad had been frequently told to keep off the platform; that while standing there he was struck and injured by a timber projecting from a freight car—*held*, that the direction was under the circumstances merely admonitory and not imperative, in such sense as to make him, by reason of the order, a tres-

passer; that his having no right or business there did not constitute him a trespasser, and his being there was not such negligence as in law to contribute directly to his injury; that even supposing the child were a trespasser the liability of the company to him for injuries would not be restricted to those which were wanton, but would embrace all such as resulted from want of ordinary care. *Hicks v. Pacific R. Co.*, 64 Mo. 430, 17 Am. Ry. Rep. 273; *affirmed on rehearing in 65 Mo. 34*.—QUOTING *Gillis v. Pennsylvania R. Co.*, 59 Pa. St. 129. REVIEWING *Commonwealth v. Power*, 7 Metc. (Mass.) 600; *Kerwacker v. Cleveland, C. & C. R. Co.*, 3 Ohio St. 175.—DISTINGUISHED IN *Harlan v. St. Louis, K. C. & N. R. Co.*, 65 Mo. 22.

A child two and a half years old is no such trespasser in going upon a track as to forfeit redress for being run over and seriously injured by the recklessness or negligence of the engineer. *Keyser v. Chicago & G. T. R. Co.*, 19 Am. & Eng. R. Cas. 91, 56 Mich. 559, 56 Am. Rep. 405, 23 N. W. Rep. 311.—FOLLOWED IN *Battishill v. Humphreys*, 28 Am. & Eng. R. Cas. 597, 64 Mich. 494. REVIEWED IN *Hyde v. Union Pac. R. Co.*, 7 Utah 356.

Neglect on the part of a person in charge of an engine to use ordinary care to avoid injuring a person on the track is, in contemplation of law, equivalent to intentional mischief. He has no right to run over a person, whether rightfully or wrongfully on the track, if by the exercise of ordinary care he can avoid doing so. So a company was held liable for injuries to a small child on the track, where it appeared that the engine might, with ordinary care, have been stopped. In such case the contributory negligence of the plaintiff is no defense. *Kenyon v. New York C. & H. R. R. Co.*, 5 Hun (N. Y.) 479; *affirmed in 76 N. Y. 607*.

3. As Affecting Recovery for Child's Death.

94. Generally.—(1) *Statement of rule.*—In a suit for causing the death of a child, it should be held responsible for the exercise only of such measure of capacity and discretion as, from its age and experience, it may be found to possess. *Rockford, R. I. & St. L. R. Co. v. Delaney*, 82 Ill. 198.

A boy 11 years old is not of such tender years as not to be chargeable with contributory negligence in playing and loitering upon a railroad track; and such conduct

will defeat a recovery for his death though the company was negligent in running its train at a prohibited rate of speed. *Mas-ser v. Chicago, R. I. & P. R. Co.*, 68 Iowa 602, 27 N. W. Rep. 776.

The rule requiring street-car drivers and locomotive engineers to keep a lookout for persons on the track, and to use reasonable diligence to prevent injury to such, after discovered, does not apply to a case where a boy of 17 goes on a street-car without permission and whips the mules into a run and is killed through his own reckless conduct. *Taylor v. South Covington & C. St. R. Co.*, (Ky.) 20 S. W. Rep. 275.

(2) *Illustrations.*—Defendant company constructed a switch near a village, on a grade of 80 feet to the mile. A boy, without the permission or knowledge of the company, climbed on a car left on the switch, unfastened the brakes, and let it run down of its own weight. In doing so he either jumped off or fell off in front of the car and was killed. *Held*, that the company was not liable. *Central Branch U. P. R. Co. v. Henigh*, 23 Kan. 347.—APPROVED IN *O'Connor v. Illinois C. R. Co.*, 44 La. Ann. 339. DISTINGUISHED IN *Atchison, T. & S. F. R. Co. v. Smith*, 28 Kan. 541. FOLLOWED IN *Atchison, T. & S. F. R. Co. v. Plaskett*, 47 Kan. 107.

A street railway was constructed for a distance along an embankment bordering a stream of water. Plaintiff's intestate, a girl 11 years old, was walking on the embankment on the side next to the stream on her way to school, and was last seen tossing a rubber ball. She fell into the stream and was drowned, but no one saw her fall. It was not necessary for her to pass over the embankment in going to school. *Held*, that the evidence did not show that the girl was free from contributory negligence. *Hooper v. Johnstown, G. & K. H. R. Co.*, 13 N. Y. Supp. 151.—APPLYING *Reynolds v. New York C. & H. R. Co.*, 58 N. Y. 248; *Wendell v. New York C. & H. R. Co.*, 91 N. Y. 420; *Bond v. Smith*, 113 N. Y. 385, 21 N. E. Rep. 128.

The end of a track was over a passage-way from a mill. A car was pushed over the end of the track and killed a boy below who had been often warned against the dangers of the passage, which did not relate to the dangers of the railroad. *Held*, that the boy was not guilty of negligence in not heeding the warning, as it did not

relate to the cause of his death. *Gray v. Scott*, 66 Pa. St. 345.—REVIEWED IN *Fry v. People's Pass. R. Co.*, 17 Phila. (Pa.) 61.

95. Crossing track in front of train or car.*—Plaintiff's intestate, a boy about six or seven years old, started to cross a track in front of a moving train, and reached the track when the train was about 60 feet distant, but fell and was killed. The train was running at the usual rate, and the whistle was sounded and the bell rung, which was heard by the boy, and after he fell every effort was made to stop the train. *Held*, that a recovery against the company could not be sustained. *Chicago & A. R. Co. v. Becker*, 76 Ill. 25.—QUOTED IN *Illinois C. R. Co. v. Slater*, 129 Ill. 91, 21 N. E. Rep. 575.

A girl 11 years old, familiar with a crossing, who passes under a gate after it has been lowered, before a train approaches, and is killed while attempting to cross the track, is guilty of such contributory negligence as to prevent a recovery for her death, in the absence of anything to show occasion for haste. *Marden v. Boston & A. R. Co.*, 159 Mass. 393, 34 N. E. Rep. 404.

Plaintiff's intestate, who was killed at a crossing in a city, was a bright active boy, seven years of age, and considered competent by his parents to go to school and run on errands. He was in the habit of crossing the tracks, and had before been stopped and cautioned by the flagman about crossing the track. Just before the train killing him approached he was standing near the flag-station some 50 feet from where he was struck, and where the train could be seen when 500 feet away. As the train approached the boy attempted to run across in front of it; the flagman shouted and waved to him and endeavored to catch him, but he fell on the track and was killed. *Held*, that a motion for a nonsuit on the ground of contributory negligence should have been allowed. *Wendell v. New York C. & H. R. Co.*, 14 Am. & Eng. R. Cas. 663, 91 N. Y. 420; *reversing* 14 Wkly. Dig. 406.—FOLLOWING *Reynolds v. New York C. & H. R. Co.*, 58 N. Y. 248. QUOTING *Cordell v. New York C. & H. R. Co.*, 75 N. Y. 332; *Thurber v. Harlem Bridge M. & F. R. Co.*, 60 N. Y. 331.—FOLLOWED IN *Moebus v. Herrmann*, 108 N. Y. 349, 15 N. E. Rep. 415, 13 N. Y. S. R. 648, 11 Cent. Rep.

* See also *ante*, 80, 81; *post*, 108, 109.

90. QUOTED IN *Collis v. New York C. & H. R. R. Co.*, 71 Hun (N. Y.) 504; *Atwater v. Veteran*, 26 N. Y. S. R. 945. REVIEWED IN *Conway v. Troy & B. R. Co.*, 1 N. Y. S. R. 587, 41 Hun 639.

Plaintiff's intestate, a boy of 12, had crossed over the track and turned to recross it when a train was in sight, but some 400 feet distant. He fell on the track and was killed. *Held*, that attempting to recross the track, under the circumstances, was contributory negligence, even though he might have crossed in safety had he not fallen, and a nonsuit should have been granted. *McPhillips v. New York, N. H. & H. R. Co.*, 12 Daly (N. Y.) 365.—QUOTING *Wendell v. New York C. & H. R. R. Co.*, 91 N. Y. 420.

A girl nine years old was walking on a track on her way home from school. From some cause the cars of an approaching train had become separated, and as the locomotive and cars attached approached her she stepped aside and allowed them to pass, but immediately returned to the track and was struck by the rear portion of the train, which was running some 50 yards behind the other section. As soon as the train broke in two the brakes were applied to stop the rear portion. *Held*, that the proximate cause of the injury was the girl's own act, and not that of the breaking of the train in two, and the company was not liable. *Galveston, H. & S. A. R. Co. v. Chambers*, 73 Tex. 296, 11 S. W. Rep. 279.

Deceased, a boy four years and five months of age, while playing in the street, trespassed upon one of the defendant's cars, and was compelled to leave it by the driver, who struck him twice with the whip. To escape this the boy ran upon the other track and fell under the wheel of another car moving thereupon. *Held*, that there could be no recovery. *Mack v. Lombard & S. St. Pass. R. Co.*, 20 Phila. (Pa.) 207.

96. Lying down upon track.—A boy of 16, who goes upon a track at a distance from a crossing and lies down, when he knows that it is about time for trains to pass, is guilty of such contributory negligence as to defeat a recovery for his death. *Houston & T. C. R. Co. v. Smith*, 77 Tex. 179, 13 S. W. Rep. 972. And compare *McMullen v. Pennsylvania R. Co.*, 41 Am. & Eng. R. Cas. 505, 132 Pa. St. 107, 19 Atl. Rep. 27.

97. — and falling asleep.—For a

boy about 17 years old to go to sleep on a railroad crossing is such negligence and recklessness as will prevent a recovery for an injury received, although the company may have been negligent also. *Raden v. Georgia R. Co.*, 78 Ga. 47.

A boy 12 years old was sent by his parents to mind cows near a railroad, and lay down on the track and was run over by a train and killed. The train was running down-grade without steam, and was a heavy freight 375 yards long, and the boy was struck 892 yards from a curve, where he first became visible. After he was seen every effort was made to stop the train. *Held*, that the company was not liable. *Rudd v. Richmond & D. R. Co.*, 23 Am. & Eng. R. Cas. 253, 80 Va. 546.

Where it appeared that a child four years old lay down and went to sleep upon defendant's track at a point where children were frequently on the track, and was there killed by defendant's train, whose engineer saw the child when the train was from 200 to 300 yards away, but did not slacken speed until within thirty feet of where the child lay, because he did not know what it was—*held*, that even if the child were guilty of contributory negligence, yet the defendant, having had a clear opportunity of avoiding the accident after the deceased child's negligence, was solely responsible for the injury, and the child was not such a trespasser as to bar recovery. *Hyde v. Union Pac. R. Co.*, 7 Utah 356, 26 Pac. Rep. 979.—REVIEWING *Keyser v. Chicago & G. T. R. Co.*, 56 Mich. 559, 23 N. W. Rep. 311.

98. Getting on moving trains or cars.*—A recovery cannot be had for the death of a boy six years old who was killed while climbing on a slowly moving train, being invited there by other boys who were riding by permission of the conductor, but who did not see the boy killed. *Woodbridge v. Delaware, I. & W. R. Co.*, 105 Pa. St. 460.

As a freight train was slowly moving along a street at the rate of two to three miles an hour, a lame boy 8 years old got on the fore part of the engine. The fireman saw the boy, and, realizing that he was in danger, at once motioned and called to him to hold on, and, after giving notice to the engineer, jumped off, intending to rescue him; but the engineer, in obeying a danger-signal

* See also *ante*, 84, 86; *post*, 110.

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given, reversed his engine, and the boy either jumped off or fell off by reason of the jar in checking the speed and was killed. *Held*, that the company was not liable. *Miles v. Atlantic, M. & O. R. Co.*, 4 *Hughes (U. S.)* 172.—FOLLOWING *Richmond & D. R. Co. v. Anderson*, 31 *Gratt. (Va.)* 812; *Baltimore & P. R. Co. v. Jones*, 95 *U. S.* 443. QUOTING *Washington & G. R. Co. v. Gladmon*, 15 *Wall. (U. S.)* 408. REVIEWING *Case of Atlantic, M. & O. R. Co.*, 4 *Hughes (U. S.)* 157.

A child between six and seven years of age, accustomed to board the cars of a street railway while in motion, for the purpose of selling water thereon, fell from the front platform while so engaged and was killed by being run over. *Held*, that the child was guilty of contributory negligence. *Smith v. Passenger R. Co.*, 13 *Phila. (Pa.)* 6.

99. Getting off moving street-cars.—The fact that the father of a boy had told street-car drivers to keep the boy off the cars will not make the company liable where he is killed by jumping off a car on which he had gone without the driver's consent or knowledge, and where the death is due to the boy's own reckless conduct. *Taylor v. South Covington & C. St. R. Co.*, (Ky.) 20 *S. W. Rep.* 275.

It was held that no recovery could be had for the death of a boy because he had been guilty of contributory negligence, in the following cases:

Where a boy of 17, of average intelligence and experience, who without permission went upon a street-car and grabbed the whip and whipped the mules into a run, and was killed by jumping off before it was possible for the driver to stop. *Taylor v. South Covington & C. St. R. Co.*, (Ky.) 20 *S. W. Rep.* 275.

Where a boy of 15 was stealing a ride on the rear platform of a street-car, and upon seeing the driver turn round he jumped off and was killed by a car on the adjoining track; it appearing that the car killing him could have been seen, and that the driver had threatened no violence, and was several feet away, still holding the reins. (Bradley, J., dissenting.) *Hogan v. Central Park, N. & E. R. R. Co.*, 36 *N. Y. S. R.* 352, 124 *N. Y.* 647; reversing 26 *J. & S.* 322, 33 *N. Y. S. R.* 702, 11 *N. Y. Supp.* 588.

* See also *ante*, 85, 87; *post*, 110.

—DISTINGUISHING *Clark v. New York, L. E. & W. R. Co.*, 40 *Hun* 605, 2 *N. Y. S. R.* 249.

Where a boy who got upon the platform of a street-car without permission, and was killed in jumping off the moving car before the driver knew he had been on the car. *Clutzbeher v. Union Pass. R. Co.*, (Pa.) 1 *Atl. Rep.* 597.

100. Riding in dangerous position.—The fact that the deceased, a boy 12 years old, is more reckless and not as cautious as a man, in the face of such danger, is not of itself enough to excuse him for his contributory negligence in riding on the front of an engine; and no fault of the company or its employes short of gross or wanton carelessness can excuse him from the results of such negligence. *Ecliff v. Wabash, St. L. & P. R. Co.*, 64 *Mich.* 196, 31 *N. W. Rep.* 180.

A train consisting of many cars was being backed by a locomotive at a slow speed around a curve, near which were houses which prevented the engineman from seeing the rearmost car, upon which two boys had climbed and were riding, holding by the bumper, with their feet upon the brake-bar. A sudden jolt threw them upon the road, when the cars passed over them, killing one and maiming the other. The mother of the child thus killed brought an action for damages under article 65, sections 1 and 2, of the Md. Code. It appeared that both boys had been driven from similar trains on former occasions, and complaint made to their parents; that there was no employé on the hindmost car, or walking in advance of it, while moving backwards, and that the engineman and conductor knew nothing of the accident until some time after it had happened. *Held*, that the party injured, not being a passenger, the defendants were not required to exercise that degree of vigilance which the law requires towards those with whom there is a relation of trust and confidence, or bailment between the parties; and that if there was neglect or default on the part of the boy, or the absence of that prudence which boys of like age and capacity usually exhibit, the defendants were not liable, although by the exercise of extraordinary care on their part the accident might have been prevented. *State v. Baltimore & O. R. Co.*, 24 *Md.* 84.

101. Recovery notwithstanding deceased child's negligence.*—(1)

Generally.—Where, in an action for killing a child while walking on a track, it is shown that a servant of the company stationed as a "lookout" on the train saw the child before the accident, but failed to exercise due care to avoid the injury, the company is liable, however negligently the child may have acted. *Jamison v. Illinois C. R. Co.*, 63 Miss. 33.

And whether such servant saw the child is a question of fact for the jury, and if there be sufficient evidence, if believed, to support a verdict founded on such fact, then the judge is not authorized to instruct the jury to find for the defendant. *Jamison v. Illinois C. R. Co.*, 63 Miss. 33.

Where suit is brought for the death of a girl 9 years old, who was killed by a backing train, and there are circumstances tending to show negligence on the part of a flagman, it is error to charge that "it is the duty of every person crossing a track to use their eyes and ears to see and hear the approach of trains; that it is their duty to look both ways before entering upon a crossing of a railroad, if it can be done," as such rule applies only to adults. *Finklestein v. New York C. & H. R. R. Co.*, 41 Hun (N. Y.) 34, 2 N. Y. S. R. 680.—APPLYING *Thurber v. Harlem Bridge, M. & F. R. Co.*, 60 N. Y. 326; *McGovern v. New York C. & H. R. R. Co.*, 67 N. Y. 417; *Byrne v. New York C. & H. R. R. Co.*, 83 N. Y. 620; *Dowling v. New York C. & H. R. R. Co.*, 90 N. Y. 670; *Barry v. New York C. & H. R. R. Co.*, 92 N. Y. 289.

Where a boy 16 years old is negligent in going on a track, the company is not liable for his death unless the employes in charge of the train could have prevented the accident by the use of ordinary care after he was seen. *Houston & T. C. R. Co. v. Smith*, 77 Tex. 179, 13 S. W. Rep. 972.

(2) *Against street-railway company.*—Contributory negligence of a child killed by a street-railroad car will not prevent a recovery if the driver of the car could, by the exercise of reasonable care, have seen the child and avoided injury. *Pearson v. Union R. Co.*, 14 Mo. App. 579.

Where, in an action against a street-railroad company for negligence in causing injury to a child, negligence on the part of

defendant is shown, contributory negligence on the part of the child, the parent being free from negligence, will not shield the company from liability. *Huerzeler v. Central C. T. R. Co.*, 139 N. Y. 490, 34 N. E. Rep. 1101; *affirming 1 Misc.* 136, 20 N. Y. Supp. 676.

The contributory negligence of a plaintiff is not a defense where an injury might have been avoided by the exercise of ordinary care. So held, where a girl about ten years old was killed by stopping within two feet of a track, with her back to an approaching car, but where there was nothing to obstruct a view, and it appeared that the driver might have seen her and avoided the accident. *Mallard v. Ninth Ave. R. Co.*, 15 Daly (N. Y.) 376, 7 N. Y. Supp. 666, 27 N. Y. S. R. 801.—APPLYING *Sheridan v. Brooklyn & N. R. Co.*, 36 N. Y. 39. DISTINGUISHING *McKenna v. New York C. & H. R. R. Co.*, 9 Daly 262. QUOTING *O'Mara v. Hudson River R. Co.*, 38 N. Y. 445; *Thurber v. Harlem Bridge, M. & F. R. Co.*, 60 N. Y. 326.

4. Questions of Law and Fact.

102. Child's negligence, when a question of law.—The question at what age an infant's responsibility for negligence may be presumed to commence is not one of fact, but of law. *Tucker v. New York C. & H. R. R. Co.*, 124 N. Y. 308, 26 N. E. Rep. 916, 36 N. Y. S. R. 272; *reversing 33 N. Y. S. R. 863*, 11 N. Y. Supp. 692. *Nagle v. Allegheny Valley R. Co.*, 88 Pa. St. 35.

A boy about eleven was in the habit of gathering the remains of wheat found in or under cars about a railroad depot, and about the wagons used in hauling the wheat. For this purpose he went under a car that was standing on a trestle and was killed by a sudden movement of the train. Held, that it was proper to instruct the jury, as a matter of law, that his position was an unsafe one. *Ostertag v. Pacific R. Co.*, 64 Mo. 421, 17 Am. Ry. Rep. 257.—DISTINGUISHING *Wyatt v. Citizens' R. Co.*, 55 Mo. 489; *Sioux City & P. R. Co. v. Stout*, 17 Wall. (U. S.) 657.—DISTINGUISHED IN *Smith v. Atchison, T. & S. F. R. Co.*, 4 Am. & Eng. R. Cas. 554, 25 Kan. 738. EXPLAINED IN *Lynch v. Metropolitan St. R. Co.*, 112 Mo. 420.

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* See also *ante*, 93; *post*, 118, 131.

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nine years

old, on an errand which required it to cross a track, and in crossing it was killed by a passing train. *Held*, that the court could not undertake to determine, as a question of law, the contributory negligence set up as a defense, unless it was clear, from the undisputed facts, that the child, considering its age and intelligence, was at fault while crossing the track, or it appeared that he was too young to be *sui juris*, and that the negligence of his mother in sending him alone on the errand contributed to the accident. *Ewen v. Chicago & N. W. R. Co.*, 38 Wis. 613.—QUOTED IN *Bessex v. Chicago & N. W. R. Co.*, 45 Wis. 477.

In an action for the death of T., plaintiff's intestate, the following facts appeared: T. was a boy twelve years old, intelligent, accustomed to attend school and assist the family by his labor; he lived near defendant's road; he was killed by one of defendant's locomotives when attempting to cross its tracks; the day was windy and it was snowing, but not enough to obstruct the view; the street upon which he was traveling was crossed by four of defendant's tracks; the first was a switch-track upon which cars were standing on each side of the street, a passageway having been left open for teams and individuals to pass along the street. T. stopped in the centre of the switch-track facing in the direction of the locomotive, which was backing down at a high rate of speed; if he had looked he could have seen 186 feet down the track; from the point where he stood to the centre of the track where he was struck and killed the distance was fourteen feet. T., after changing a bag he was carrying from one shoulder to another, started on; after taking one step he had an unobstructed view down the track on which the locomotive was coming, for two streets; he did not look in that direction after he started. *Held*, that T. was *sui juris*, and was guilty of contributory negligence, and that the submission of the question to the jury was error. *Tucker v. New York C. & H. R. R. Co.*, 124 N. Y. 308, 26 N. E. Rep. 916, 36 N. Y. S. R. 272; reversing 33 N. Y. S. R. 863, 11 N. Y. Supp. 692.—FOLLOWING *Reynolds v. New York C. & H. R. R. Co.*, 58 N. Y. 248.—QUOTED IN *Collis v. New York C. & H. R. R. Co.*, 71 Hun (N. Y.) 504; *Lennon v. New York C. & H. R. R. Co.*, 48 N. Y. S. R. 806, 65 Hun 578.

103. Child's negligence, when not a question of law.—(1) *General rules.*—It cannot be laid down as a matter of law that a child, however young, is incapable of contributory negligence, for it is always a question of fact for the jury. *Chicago City R. Co. v. Wilcox*, 50 Am. & Eng. R. Cas. 464, 138 Ill. 370, 27 N. E. Rep. 899; affirming 33 Ill. App. 450.

The question whether a child suing by next friend for damages alleged to have resulted from the negligence of the defendant had sufficient discretion to make him subject to the rules of law applicable to contributory negligence is not a question for the court to be determined on demurrer, but of fact to be tried by the jury. *Evansich v. Gulf, C. & S. F. R. Co.*, 6 Am. & Eng. R. Cas. 182, 57 Tex. 126.

A child cannot be adjudged guilty of contributory negligence, as a matter of law, unless the child is so young as to impute negligence to the parents for allowing it to be upon the track at all; but the mere fact, that a child of tender years was seen upon the track at or near the street crossing, even when coupled with the fact that his father saw him going towards the track, is not enough to establish contributory negligence as a matter of law, so as to authorize the court to take the case from the jury. *Johnson v. Chicago & N. Y. R. Co.*, (Wis.) 8 Am. & Eng. R. Cas. 471, 14 N. W. Rep. 181.

(2) *Particular applications.*—A minor four or five years old is not, as a matter of law, to be charged with contributory negligence in not exercising reasonable care to avoid a personal injury. *Westbrook v. Mobile & O. R. Co.*, 39 Am. & Eng. R. Cas. 374, 66 Miss. 560, 6 So. Rep. 321.—FOLLOWED IN *Vicksburg v. McLain*, 67 Miss. 4.

Nor can a child just passed seven years of age be held as a matter of law to be *sui juris* so as to be chargeable with negligence. *Stone v. Dry Dock, E. B. & B. R. Co.*, 38 Am. & Eng. R. Cas. 489, 115 N. Y. 104, 21 N. E. Rep. 712, 23 N. Y. S. R. 551; reversing 46 Hun 184, 11 N. Y. S. R. 537.

Whether the mind of a boy 10 years of age is sufficiently matured to make him responsible for his own contributory negligence should not be decided by the court on demurrer to the petition. *Avey v. Galveston, H. & S. A. R. Co.*, 81 Tex. 243, 16 S. W. Rep. 1015.

The court cannot, as a matter of law, declare and charge that a child nine years of

age is incapable of negligence. *Ridenhour v. Kansas City Cable R. Co.*, 102 Mo. 270, 13 S. W. Rep. 889, 14 S. W. Rep. 760.—DISTINGUISHING *Eswin v. St. Louis, I. M. & S. R. Co.*, 96 Mo. 290.

Nor that an infant of eleven years is *sui juris* and subject to the general rules applicable to persons of acknowledged capacity. *Bridger v. Asheville & S. R. Co.*, 25 So. Car. 24.

Nor that it constitutes negligence *per se* for a boy seventeen years old to jump from a moving street-car while it is in rapid motion. *Wyatt v. Citizens' R. Co.*, 55 Mo. 485.—QUOTING *Filer v. New York C. R. Co.*, 49 N. Y. 47. REVIEWING *Karle v. Kansas City, St. J. & C. B. R. Co.*, 55 Mo. 476; *Pennsylvania R. Co. v. Aspell*, 23 Pa. St. 147; *Boland v. Missouri R. Co.*, 36 Mo. 484; *McIntyre v. New York C. R. Co.*, 37 N. Y. 287.—DISTINGUISHED IN *Ostertag v. Pacific R. Co.*, 64 Mo. 421.—EXPLAINED IN *Richmond v. Quincy, O. & K. C. R. Co.*, 49 Mo. App. 104. FOLLOWED IN *Duncan v. Wyatt Park R. Co.*, 48 Mo. App. 659. QUOTED IN *Murphy v. St. Louis, I. M. & S. R. Co.*, 43 Mo. App. 342; *Jackson v. St. Louis, I. M. & S. R. Co.*, 29 Mo. App. 495.

104. Questions of fact—Child's negligence, generally.—Where the law raises a presumption of negligence against the defendant, by reason of the mere fact that the physical injury was inflicted by means of running its locomotive, and where, owing to special circumstances touching the conduct of the engineer towards the plaintiff, a child of only ten years of age, it is not altogether certain that the presumption is rebutted, and where, on account of the plaintiff's tender years, and his consequent immaturity of understanding, he is not amenable to so high a standard of diligence in regard to his own safety as that which adults are obliged to observe, the case made by the plaintiff's evidence is more properly one for the jury than for the court, and a motion for a nonsuit should be denied. *Vickers v. Atlanta & W. P. R. Co.*, 8 Am. & Eng. R. Cas. 337, 64 Ga. 306.—DISTINGUISHED IN *Central R. Co. v. Brinson*, 19 Am. & Eng. R. Cas. 42, 70 Ga. 207; *Smith v. Central R. & B. Co.*, 41 Am. & Eng. R. Cas. 490, 82 Ga. 801, 10 S. E. Rep. 111. EXPLAINED IN *Western & A. R. Co. v. Young*, 37 Am. & Eng. R. Cas. 489, 81 Ga. 397, 7 S. E. Rep. 912.

The right of a child to cross a track is

accompanied with the duty to use at least ordinary care in so doing, his age, experience, and intelligence being taken into consideration, with the other circumstances existing at the time of his injury; and if the jury shall find that the child had sufficient intelligence and experience—if that shall be found necessary—to know of the danger, of the signals, and the warnings against it, and the manner in which an injury might be produced by a failure to observe such signals and warnings, they are warranted in considering the question of contributory negligence. *Baker v. Flint & P. M. R. Co.*, 68 Mich. 90, 12 West. Rep. 485, 35 N. W. Rep. 836.

Whether or not plaintiff's son was guilty of negligence or misconduct which contributed to the injury was a question for the jury; and where they were instructed, in estimating the degree of care required, to consider the age, intelligence, and physical strength of the boy, and apply to his conduct the same standard that they would in judging of boys of like age, strength, and intelligence; and that if it was common for such boys to run with fire-engines, as the plaintiff's son did at the time of the accident, the jury should take the fact into consideration, in determining whether his conduct was reasonably prudent when he was injured, the instruction was held not erroneous. *Oakland R. Co. v. Fielding*, 48 Pa. St. 320.

The contributory negligence of children was held to be properly a question of fact for the determination of the jury in the following cases:

Where a seventeen-year-old boy jumped from a moving street-car. *Wyatt v. Citizens' R. Co.*, 55 Mo. 485.

Where a boy ten years old was driving in a sleigh, in which were his mother and two other persons, one of whom was driving, and was killed in crossing a track. *Jones v. Utica & B. R. Co.*, 36 Hun (N. Y.) 115.—APPLYING *Payne v. Troy & B. R. Co.*, 83 N. Y. 572; *Barry v. New York C. & H. R. R. Co.*, 92 N. Y. 289.

Where a bright, intelligent girl, eight years old, was sent on an errand, and was killed while attempting to cross a street on which were twelve tracks, it appearing that as she approached them a freight train passed over one of the middle tracks, running some fifteen miles an hour, and that her attention was directed the way the

train was going, and when the last car had passed she started on, and was struck by a caboose which had been cut loose, but was still moving at the rate of five or six miles an hour. *Ryan v. New York C. & H. R. Co.*, 37 *Hun* (N. Y.) 186.—APPLIED IN *Finklestein v. New York C. & H. R. Co.*, 41 *Hun* (N. Y.) 34, 2 N. Y. S. R. 680.

In an action for the death of five children, ranging from five to sixteen years of age, killed in a collision at a highway crossing, where it appeared that they were in a light wagon drawn by a gentle horse; that the oldest was driving; that she was acquainted with the highway; that several vehicles had just crossed the track, and others were following; that on the railroad, about three hundred and fifty feet from the crossing, was a covered bridge, and on either side of the road, between the bridge and the crossing, were a number of eucalyptus trees of such a size as to prevent the discovery of an approaching train by travelers upon the highway until within a point very close to the track; and that at the time the train was behind time and running at the rate of thirty-five miles per hour—the usual rate being from twenty-five to thirty miles per hour. *Nehrbas v. Central Pac. R. Co.*, 14 *Am. & Eng. R. Cas.* 670, 62 *Cal.* 320.

In an action for personal injuries to the plaintiff, a boy thirteen years and five months old, accustomed to ride in street-cars, in attempting to get upon the front platform of the defendant's car while it was in motion on the Lord's day, but not to travel for any purpose of necessity or charity, where the testimony tended to show that when he saw the car coming he, with another boy, left the sidewalk where they had been waiting, crossed the street, and stood by the side of the track; that the car stopped less than two car-lengths from the place of the accident, and started with a tow-horse attached; that the grade was rising; that the horses started on a walk and, at the time the plaintiff attempted to get upon the platform, were just beginning to trot, or going at a slow trot; that when the car approached the plaintiff, he signaled the driver to stop; that the driver saw him, and turned to speak to the tow-boy, who was on the front platform on the opposite side of the car from the plaintiff; that the plaintiff's companion got upon the front platform; that as the plaintiff was getting upon it, with one foot upon the

2 D. R. D.—50.

step and holding to the railing with both hands, the driver and the tow-boy started up the horses, giving the car a jerk, by which the plaintiff's foot was thrown off the step, and after being dragged a few feet he fell, receiving the injuries complained of; and that there was no rule or notice prohibiting the getting on the front platform of the car when in motion. *McDonough v. Metropolitan R. Co.*, 21 *Am. & Eng. R. Cas.* 354, 137 *Mass.* 210.

105. Whether child is sui juris and at the age of discretion.—In administering civil remedies the law does not fix any arbitrary period when an infant becomes *sui juris* so as to be charged with contributory negligence. When the inquiry is material, it becomes a question of fact for the jury, unless the child is of such very tender years that the court can safely decide. *Stone v. Dry Dock, E. B. & B. R. Co.*, 38 *Am. & Eng. R. Cas.* 489, 115 *N. Y.* 104, 21 *N. E. Rep.* 712, 23 *N. Y. S. R.* 551; reversing 46 *Hun* 184, 11 *N. Y. S. R.* 537.—DISTINGUISHING *Wendell v. New York C. & H. R. R. Co.*, 91 *N. Y.* 420. FOLLOWING *Kunz v. Troy*, 104 *N. Y.* 344.—*Heffel v. St. Paul, M. & M. R. Co.*, 49 *Minn.* 263, 51 *N. W. Rep.* 1049. *Block v. Harlem Bridge, M. & F. R. Co.*, 28 *N. Y. S. R.* 495, 55 *Hun* 607, 9 *N. Y. Supp.* 164.—QUOTING *Thurber v. Harlem Bridge, M. & F. R. Co.*, 60 *N. Y.* 326. REVIEWING *Stone v. Dry Dock, E. B. & B. R. Co.*, 23 *N. Y. S. R.* 551.—*Moore v. Metropolitan R. Co.*, 2 *Mackey* (D. C.) 437. *Baker v. Flint & P. M. R. Co.*, 68 *Mich.* 90, 12 *West. Rep.* 485, 35 *N. W. Rep.* 836. *Houston & T. C. R. Co. v. Simpson*, 60 *Tex.* 103.

In a suit for injuries to a child, where his contributory negligence is a question for the jury, it is the province of the jury to judge of his capacity and ability, and the manner in which he used the same on the occasion when the accident occurred, and whether he was of sufficient age and judgment to have used them otherwise, so as to have avoided the calamity which overtook him. *Baker v. Flint & P. M. R. Co.*, 68 *Mich.* 90, 12 *West. Rep.* 485, 35 *N. W. Rep.* 836.

Where a company is sued for injuries to a boy, if he does not seem to have been so young as to have required the court to say that he could not contribute to his injury, nor of that age where the presumption would necessarily arise, in the absence of testimony to the contrary, that he

could, it is proper to submit the question of his contributory negligence to the jury, resting it upon his intelligence and capacity. *Bridger v. Asheville & S. R. Co.*, 27 So. Car. 456, 13 Am. St. Rep. 653, 3 S. E. Rep. 860.

Whether a child is of sufficient age and capacity to take care of itself so as to be charged with contributory negligence, has been held to be a question of fact for the jury:

In the case of a six-year-old child who was run over and killed by a street-car. *Mason v. Atlantic Ave. R. Co.*, 4 Misc. (N. Y.) 291. —FOLLOWING *Stone v. Dry Dock, E. B. & B. R. Co.*, 115 N. Y. 104.

In the case of a seven-year-old girl who was injured while crossing a street in front of an approaching street-car. *Stone v. Dry Dock, E. B. & B. R. Co.*, 38 Am. & Eng. R. Cas. 489, 115 N. Y. 104, 21 N. E. Rep. 712, 23 N. Y. S. R. 551; reversing 46 Hun 184, 11 N. Y. S. R. 537. —DISTINGUISHING *Wendell v. New York C. & H. R. R. Co.*, 91 N. Y. 420. FOLLOWING *Kunz v. Troy*, 104 N. Y. 344. —FOLLOWED IN *Mason v. Atlantic Ave. R. Co.*, 4 Misc. (N. Y.) 291. QUOTED IN *Elze v. Baumann*, 21 N. Y. Supp. 782.

In the case of a ten-year-old boy who was injured in jumping from a moving train. *Avey v. Galveston, H. & S. A. R. Co.*, 81 Tex. 243, 16 S. W. Rep. 1015.

In the case of a boy about fourteen years of age, killed while uncoupling cars. *Kentucky C. R. Co. v. Gastineau*, 83 Ky. 119.

106. Whether child exercised care commensurate with his age and capacity.—Where the plaintiff is of tender years, the question as to the care and diligence he should exercise, considering his age, is properly left to the jury under instructions. *Saare v. Union R. Co.*, 20 Mo. App. 211.

The caution required is according to the maturity and capacity of the child, to be determined in each case by the facts in such case; and the degree of discretion in avoiding danger depends upon the age and knowledge of the child; and when there is conflicting evidence as to the danger likely to be incurred, or as to the act or acts in getting in the way of such danger, or as to the age or capability of the child; or if all the circumstances of the case, when the facts are undisputed, are such that ordinarily prudent men would be liable to differ in their views as to the negligence imputed, the question of contributory negligence should be submitted to the jury. *Ecliff v.*

Wabash, St. L. & P. R. Co., 64 Mich. 196, 31 N. W. Rep. 180.

In the case of a child of tender years, where the circumstances would justify an inference that he was misled or confused in respect to the actual situation, and that his conduct was not unreasonable in view of those circumstances, and his age, the question of contributory negligence is for the jury, although he may have omitted some precaution which in the case of an adult would be deemed conclusive evidence of negligence. *Barry v. New York C. & H. R. R. Co.*, 13 Am. & Eng. R. Cas. 615, 92 N. Y. 289; affirming 28 Hun 441. —FOLLOWING *McGovern v. New York C. & H. R. R. Co.*, 67 N. Y. 417.

It seems it cannot be held as matter of law that, under the circumstances of this case, the ringing of the bell would fulfil the whole duty resting on defendant. *Barry v. New York C. & H. R. R. Co.*, 13 Am. & Eng. R. Cas. 615, 92 N. Y. 289; affirming 28 Hun 441. —APPLIED IN *Finklestein v. New York C. & H. R. R. Co.*, 41 Hun (N. Y.) 34, 2 N. Y. S. R. 680. DISTINGUISHED IN *Philadelphia, W. & B. R. Co. v. Fronk*, 32 Am. & Eng. R. Cas. 31, 67 Md. 339, 9 Cent. Rep. 64, 10 Atl. Rep. 307.

107. Whether child exercised care expected of children of like age and capacity.—Whether a child has used the care which might fairly and reasonably be expected of children of his age and capacity is a question of fact to be determined by the jury. *Eswin v. St. Louis, I. M. & S. R. Co.*, 35 Am. & Eng. R. Cas. 390, 96 Mo. 290, 9 S. W. Rep. 577. *Burger v. Missouri Pac. R. Co.*, 112 Mo. 238. *Williams v. Kansas City, S. & M. R. Co.*, 37 Am. & Eng. R. Cas. 329, 96 Mo. 275, 9 S. W. Rep. 573.

Whether such care and prudence is used by a child in crossing a railway track as would be incumbent on one of his age, must be a question to be determined by the jury. *Houston & T. C. R. Co. v. Booser*, 34 Am. & Eng. R. Cas. 63, 70 Tex. 530, 8 S. W. Rep. 119.

Young children are bound to use such care only as is usually exercised by children of the same age and degree of intelligence; and it is always a question of fact, to be determined by the jury, whether the child was in the exercise of proper care, his tender years, his intelligence or want of it, and all the circumstances by which he was surrounded being taken into account. *Chicago*

City R. Co. v. Wilcox, 30 Am. & Eng. R. Cas. 464, 138 Ill. 370, 27 N. E. Rep. 899; affirming 33 Ill. App. 450.

A boy five years old was on the street in charge of another about nine. In approaching a track the younger boy was walking a little in advance of the other, and turned toward him, and while walking backward fell on the track and was struck by a locomotive, but there was nothing to indicate the approach of an engine as they entered the track. *Held*, that the question of contributory negligence of the boys and their parents was for the jury. *O'Connor v. Boston & L. R. Corp.*, 15 Am. & Eng. R. Cas. 362, 135 Mass. 352. — DISTINGUISHING *Hinckley v. Cape Cod R. Co.*, 120 Mass. 257; *Wills v. Lynn & B. R. Co.*, 129 Mass. 351.

108. Crossing track in front of train.*—Where a boy ten years old waits for a passing train and then undertakes to cross the track, and is struck by another train running in the opposite direction at an unusual rate, and without signals, it is proper to submit the question of his negligence to the jury, under an instruction that he was only required to exercise such care as could be expected of a child of his age and capacity. *McGuire v. Chicago, M. & St. P. R. Co.*, 37 Fed. Rep. 54.

The intestate was a boy ten years old. The train which ran over him went past the crossing, followed by a freight train. The bell on the freight train was ringing and the flagman on the crossing was flagging it, paying no attention to the other. The first train was switched onto another track, and backed up on the track the boy attempted to cross. There was no direct proof as to what precautions he took before crossing the track. *Held*, that the question of contributory negligence was properly submitted to the jury; that it was competent for them to infer that the boy, seeing the first train pass, supposed it was going on, and his attention being attracted by the freight train, he did not observe that the first train had changed its direction and was backing up. *Barry v. New York C. & H. R. R. Co.*, 13 Am. & Eng. R. Cas. 615, 92 N. Y. 289; affirming 28 Hun 441.—APPLIED IN *Jones v. Utica & B. R. Co.*, 36 Hun (N. Y.) 115; *Finklestein v. New York C. & H. R. R. Co.*, 41 Hun (N. Y.) 34, 2 N. Y. S. R. 680. FOL-

LOWED IN *Collis v. New York C. & H. R. R. Co.*, 71 Hun (N. Y.) 504. REVIEWED IN *Walsh v. Fitchburg R. Co.*, 51 N. Y. S. R. 240.

The question of the child's contributory negligence was properly submitted to the jury in the following cases:

Where a boy thirteen years old was out with an older brother, who upon approaching a track looked both ways, and seeing no train approaching told his younger brother to come on, and the latter while hurrying across the track was hit and killed. *Beckwith v. New York C. & H. R. R. Co.*, 7 N. Y. Supp. 721, 28 N. Y. S. R. 130.—QUOTING *Tolman v. Syracuse, B. & N. Y. R. Co.*, 98 N. Y. 203.

Where a boy of ordinary intelligence who lived near the railroad had been employed by the advance agents of a circus in doing advertising, and in going from the inside of the circus-car, which lay on a siding, to its platform, in plain view of an approaching train, he stepped off and was killed by the train while attempting to cross the main track. *Collis v. New York C. & H. R. R. Co.*, 24 N. Y. Supp. 1090.

Where a boy ten years old was injured while recovering his sister's hat, which had blown on a railroad track about 400 feet from a sharp curve, his testimony being to the effect that he looked and listened for trains before going on the track. The evidence was conflicting as to whether a whistle was sounded or a bell rung. *Wilson v. Pennsylvania R. Co.*, 132 Pa. St. 27, 18 Atl. Rep. 1087.

Where it appeared that in the dusk of the evening a freight train of about forty cars, some of which were behind the caboose, while backing slowly and with little noise down a side-track ran into and injured the plaintiff, a boy thirteen years old; that plaintiff saw the cars upon the track ahead of him, but thought they were standing still; that he then allowed his attention to be diverted by a passing engine, but continued walking towards the backing freight train; and that it was not necessary for him to walk upon the track to reach his destination. *Whalen v. Chicago & N. W. R. Co.*, 41 Am. & Eng. R. Cas. 558, 75 Wis. 654, 44 N. W. Rep. 849.

It was held that the question of the child's contributory negligence was for the jury, and a nonsuit could not be properly granted, in the following cases:

*See also ante, 80, 81, 95.

Where a boy nine years old waited at a crossing until a long freight train had passed, and immediately attempted to cross the track and was struck by a locomotive going in the opposite direction at a speed of thirty to thirty-five miles an hour, it appearing that he was struck in less than a half minute from the time the locomotive passed through a cut where it was invisible. *Powell v. New York C. & H. R. R. Co.*, 22 Hun (N. Y.) 56.

Where the evidence tended to show that the boy, while crossing the track in the night-time over a public crossing, was struck by a train of gravel-cars, which were being pushed in front of a locomotive; that there was no light in the foremost car, but there was a strong headlight on the locomotive; that before starting to cross the boy looked up and down the track, but did not see the train nor headlight of the locomotive. *Bohan v. Milwaukee, L. S. & W. R. Co.*, 15 Am. & Eng. R. Cas. 374, 58 Wis. 30, 15 N. W. Rep. 801.

109. Crossing track in front of street-car.—A child attempted to cross the street in front of her father's store to join a companion on the other side. The track of defendant's road was about twelve feet from the sidewalk. As she stepped down into the street an approaching car was fifty feet or more distant. At about that time the speed of the car was increased; its driver was looking back into the car. The child was struck by the car and killed. *Held*, that a nonsuit was improperly granted; that the question of contributory negligence should have been submitted to the jury. *Stone v. Dry Dock, E. B. & B. R. Co.*, 38 Am. & Eng. R. Cas. 489, 115 N. Y. 104, 21 N. E. Rep. 712, 23 N. Y. S. R. 551; reversing 46 Hun 184, 11 N. Y. S. R. 537.

It was held proper to submit the question of a child's contributory negligence to the jury, in the following cases:

Where it appeared that when the street-car was fifty feet away and approaching rapidly, the deceased, a girl between nine and ten years of age, stood on the crosswalk about two feet from the track with her back toward the car, calling to her companions on the sidewalk to follow; that the speed of the car was not checked, though the driver had a clear view, and that as the girl turned to cross the track she was struck and killed. *Mallard v. Ninth Ave. R. Co.*, 15 Daly (N. Y.) 376.

Where a boy seven years old had crossed a street to a point between two railroad tracks, where cars moving in opposite directions on each track were in full sight, and he undertook to retrace his steps, but fell on the track and was killed; it appearing that bystanders called to the driver, but he made no effort to stop his car. *Block v. Harlem Bridge, M. & F. R. Co.*, 28 N. Y. S. R. 495, 55 Hun 607, 9 N. Y. Supp. 164.

110. Getting on or off moving street-car.*—*The child's contributory negligence was a question of fact for the jury in the following cases:*

Where a boy ten years old attempted to enter the front platform of a street-car while it was in motion, at the invitation of the driver, and was injured. *Maier v. Central Park, N. & E. R. R. Co.*, 67 N. Y. 52, 15 Am. Ry. Rep. 293; affirming 7 J. & S. 155.—FOLLOWING *Thurber v. Harlem Bridge, M. & F. R. Co.*, 60 N. Y. 326.—FOLLOWED IN *Lent v. New York C. & H. R. R. Co.*, 44 Am. & Eng. R. Cas. 373, 120 N. Y. 467, 24 N. E. Rep. 653, 31 N. Y. S. R. 538; *Pfeffer v. Buffalo R. Co.*, 4 Misc. (N. Y.) 465. REVIEWED IN *Saffer v. Dry Dock, E. B. & B. R. Co.*, 53 Hun 629, 24 N. Y. S. R. 210.

Where it appeared that a boy fourteen years old entered a street-car, paid his fare, but, finding the car full, was riding on the top; that on reaching the point where he wished to leave the car, at a crossing, he asked the driver to stop and let him off, which he failed to do, and after riding about half a block the boy undertook to get off while the car was in motion; that the driver caught him by his head, and after pulling off his cap, struck at him with a whip, and that in attempting to avoid the blow the boy fell and was injured. *Mettlerstadt v. Ninth Ave. R. Co.*, 32 How. Pr. (N. Y.) 428, 4 Robt. 377.

Where it was shown that plaintiff, thirteen years of age, and a companion of the same age, signaled a street-car, got on the front platform without objection from the driver or conductor, and paid their fare; that after riding for a considerable distance plaintiff said he was going to get off, and the driver "slacked up" but did not stop; and in getting off plaintiff was injured. *Crissey v. Hestonville, M. & F. Pass. R. Co.*, 75 Pa. St. 83.

* See also *ante*, 15, 16, 45, 46, 84-87, 98, 99.

111. Riding on platform of street-car.—The question of the negligence of a boy of 12 who stands on the front platform of a street-car while in motion and was thrown therefrom and injured, is a question for the jury. *Willmott v. Corrigan Con. St. R. Co., (Mo.)* 16 S. W. Rep. 500.

While the plaintiff, a boy seven years of age, was standing upon the platform of a street-car, it was, while turning the corner of a street, run against by an ice-wagon, and the plaintiff was thrown off and injured. In an action against the company owning the ice-wagon—*held*, that the question of the defendant's negligence and the boy's contributory negligence was properly submitted to the jury. *Connolly v. Knickerbocker Ice Co.,* 39 Am. & Eng. R. Cas. 441, 114 N. Y. 104, 21 N. E. Rep. 101, 22 N. Y. S. R. 675; *affirming* 8 N. Y. S. R. 901.—APPLIED IN *Finley v. Hudson Elec. R. Co.,* 46 N. Y. S. R. 202.

112. Jumping from moving car.—The contributory negligence of a boy of 10 in jumping from a moving train is a question for the jury, where it appears that he arranged with the conductor to ride some two miles to the station, the conductor agreeing to stop the train to let him get off, but which he refused to do, the boy thereupon becoming frightened and confused and jumping from the moving train. *Avey v. Galveston, H. & S. A. R. Co., (Tex.)* 17 S. W. Rep. 31.

Whether the deceased, a boy eleven years of age, was guilty of contributory negligence in attempting to climb out of the car while in motion, in obedience to the order of the conductor, was a question for the jury under all the evidence. *Benton v. Chicago, R. I. & P. R. Co.,* 55 Iowa 496, 8 N. W. Rep. 330. See also *Philadelphia City Pass. R. Co. v. Hassard,* 75 Pa. St. 367.

Where a boy goes on a car without paying fare and is injured in jumping off while the car is in motion, after the conductor has ordered him off, and has made a show of putting him off by force, his negligence is a question of fact for the jury, and he is entitled to recover if the jury believe that he was not in fault in jumping off. His wrongfully getting on the car is not the direct cause of the injury, and is not in itself contributory negligence. *Kline v. Central Pac. R. Co.,* 37 Cal. 400.—QUOTED IN *Bogges v. Chesapeake & O. R. Co.,* 37 W. Va. 297.

113. Voluntarily undertaking dangerous service.—Whether a boy of thirteen years, who assumed to assist the servants of a company, at their request, in moving a loaded car, without the knowledge, consent, or authority of the company, and while thus employed was injured so that he died, could be held responsible for his acts and conduct, is for determination by the jury upon the proof as to his knowledge of the distinction between good and evil and his capacity to comprehend and avoid the danger to which he was exposed. Sufficiency of such knowledge and capacity would prevent a recovery for the homicide; otherwise there might be a recovery should the jury believe the company was negligent. *Rhodes v. Georgia R. & B. Co.,* 41 Am. & Eng. R. Cas. 302, 84 Ga. 320, 10 S. E. Rep. 922.—FOLLOWING *Nagle v. Allegheny R. Co.,* 88 Pa. St. 35.

IV. CONTRIBUTORY NEGLIGENCE OF PARENTS, CUSTODIANS, Etc.

1. As Affecting Recovery for Personal Injuries.*

a. In General.

114. Parent's duty to guard and protect child†—Degree of care.—Where a parent sues for an injury to a child, to constitute negligence in the parent which would bar a recovery, there must have been an omission of such care as persons of ordinary prudence exercise in the care of their children. *O'Flaherty v. Union R. Co.,* 45 Mo. 70.—REVIEWING *Mangum v. Brooklyn R. Co.,* 38 N. Y. 455.—REVIEWED IN *Duffy v. Missouri Pac. R. Co.,* 19 Mo. App. 380.

Parents of children of tender years must use care proportionate to known dangers, or dangers that might be known by the exercise of ordinary diligence. *Louisville, N. A. & C. R. Co. v. Shanks,* 132 Ind. 395, 31 N. E. Rep. 1111.

* Negligence of parent where child injured while trespassing, see note, 15 AM. & ENG. R. CAS. 406.

Effect of negligence of parent where child is injured, see note, 31 AM. & ENG. R. CAS. 420.

Contributory negligence of parent or guardian as bar to recovery for injury to child, see notes, 21 L. R. A. 76; 10 *Id.* 653.

Negligence of parents in permitting child to go on street, see 50 AM. & ENG. R. CAS. 473, *abstr.*

† Duty of parent to take care of child; contributory negligence, see notes, 15 AM. & ENG. R. CAS. 408; 10 *Id.* 780.

To constitute negligence in parents there must be an omission of such care as persons of ordinary prudence exercise and deem adequate in the care of children. *O'Flaherty v. Union R. Co.*, 45 Mo. 70.

Parents are not obliged to restrain their children within doors at their peril. It is not negligence for a parent to permit his child to go on the sidewalk in front of his residence. *Westerfield v. Levi*, 43 La. Ann. 63, 9 So. Rep. 52.

Parents are bound to protect their infant children from danger, so far as that can be done by the exercise of reasonable care and prudence, but are required only to exercise such a degree of care as is reasonable in their situation and under all the circumstances. *Weil v. Dry Dock, E. B. & B. R. Co.*, 119 N. Y. 147, 23 N. E. Rep. 487, 28 N. Y. S. R. 944; *reversing* 25 J. & S. 188, 25 N. Y. S. R. 698, 5 N. Y. Supp. 833.

115. What is negligence on part of parent.—(1) *Generally*.—If a father knowingly permits his child, about seven years of age, to go unprotected on the track for the purpose of picking up coal, at a place where trains are constantly passing, he is guilty of culpable negligence; and if he permits the grandmother to have the care and custody of the child, her negligence in this particular is imputed to him. *Pratt C. & I. Co. v. Brawley*, 83 Ala. 371, 3 Am. St. Rep. 751, 3 So. Rep. 555.

The fact that a child two years old is passing unattended across a public street in a city traversed by a horse railroad is necessarily *prima-facie* evidence of neglect in those who have it in charge. *Wright v. Malden & M. R. Co.*, 4 Allen (Mass.) 283.

(2) *Negligence per se*.—It is negligence *per se* for parents to allow an infant of six years to make use of a track for a playground and to lie down upon it unattended, and this, whether the child was asleep or awake. *Meeks v. Southern Pac. R. Co.*, 52 Cal. 602, 20 Am. Ry. Rep. 115.—REVIEWED IN *Murray v. Richmond & D. R. Co.*, 93 N. Car. 92.

It is contributory negligence *per se* in parents to suffer their children to trespass on the cars or track of a railroad company. The fact that the trespass was committed without the knowledge or consent of the parent is immaterial. *Cauley v. Pittsburgh, C. & St. L. R. Co.*, 2 Am. & Eng. R. Cas. 4, 95 Pa. St. 398.

(3) *Illustrations*.—A father and mother,

with their child, six years old, and another friend, were crossing on defendant's ferry-boat. The friend had the child by the hand and was standing by an iron gate across the bow of the boat with the others all near, and the child was injured by an employé opening the gate. It appeared that the father had often crossed on the boat, and knew how the gate was worked. *Held*, in an action by the child, that there could be no recovery, as those having it in charge had not used ordinary care for its protection. *Schindler v. New York, L. E. & W. R. Co.*, 1 N. Y. S. R. 289.

While it is said that it is negligence for parents to permit their young children, incapable of protecting themselves, to go unattended about the streets of a city, where cars and other vehicles are constantly passing, it is not true that whenever such a child may escape for a time from its parents' immediate view that the latter are necessarily to be deemed guilty of negligence if the child, thus unknown to its parents, exposes itself to danger. Negligence on the part of the parents must consist in the neglect of the duty in matters which parents owe to their child, of exercising over it such protective care as its age, capacity, and the dangers to which it may be exposed render reasonably necessary; and it must always be measured by the circumstances of the case. *Houston City St. R. Co. v. Dillon*, 3 Tex. Civ. App. 303, 22 S. W. Rep. 1066.

Where the mother of the injured child had no family but herself and children, and she had been accustomed to send the child to gather coal around the round-house and turntable of defendant, though she directed him otherwise on the day of the accident, it is not error to charge the jury, upon the subject of her contributory negligence, to the effect that to sustain such defense they must find a want of ordinary care on her part as a parent with respect to the cause of the injury; that her failure to use more than ordinary care in providing for the safety of her child would not defeat the action; that the burden of proof of her negligence was upon the defendant; that they might consider the evidence as to her condition and circumstances in determining the question as to her negligence, and that if she did not know, or have reason to know, or anticipate or fear the danger of the turntable, she was not negligent in not providing against it.

Barrett v. Southern Pac. Co., 48 Am. & Eng. R. Cas. 532, 91 Cal. 296, 27 Pac. Rep. 666.

116. What is not negligence on part of parent.—Contributory negligence on the part of the parents of an injured child is not shown by mere proof that the child, but four years of age, strayed from home a distance of two blocks, and was at play with other children when injured. *Morgan v. Illinois & St. L. Bridge Co.*, 5 Dill. (U. S.) 96.

It is not negligence on the part of parents to allow a boy of between six and seven years of age to go where he must cross a track, under the charge of an elder brother, a boy ten or eleven years old. *Chicago & A. R. Co. v. Becker*, 84 Ill. 483.

Parents have a right to assume that street-railway companies furnish conveyances which are reasonably safe and have regulations which preclude persons from riding in unsafe places upon them; and they cannot, therefore, be charged with negligence in permitting their children to ride on the street-cars without escort if the company consent so to receive them. *East Saginaw City R. Co. v. Bohn*, 27 Mich. 503, 10 Am. Ry. Rep. 309.—DISTINGUISHED IN *Battisill v. Humphreys*, 28 Am. & Eng. R. Cas. 597, 64 Mich. 494.

The parents of a child about six years old were not negligent in allowing him to go out of the house to play within their own premises fronting on a public street. *Strutzel v. St. Paul City R. Co.*, 47 Minn. 543, 50 N. W. Rep. 690.

There was nothing to show negligence on the part of parents where it appeared that the child was not permitted to go upon the street unattended; that a few minutes before the accident she had been brought downstairs by her mother and seated in the dining-room, with a piece of bread in her hands, and that she had made her escape from the house by way of an open door, not exceeding five minutes before the car ran upon her and caused her death. *Weissner v. St. Paul City R. Co.*, 47 Minn. 468, 50 N. W. Rep. 606.

Where suit is brought by the parent as next friend, for injuries received by his child, all the circumstances are to be taken into account, and, if the parent took as much care of the child as reasonably prudent persons of the same condition in life and in the same situation ordinarily do,

the parent cannot be successfully charged with negligence to defeat the action. *Winters v. Kansas City Cable R. Co.*, 40 Am. & Eng. R. Cas. 261, 99 Mo. 509, 12 S. W. Rep. 652, 6 L. R. A. 536.

Where a father lives near a railroad track it is not negligence *per se* in him to leave his child in the custody of its mother; neither is it negligence *per se* for the mother to permit a child to go into the dooryard with its aunt, who is mature in years, and who is accustomed to care for the child. *Meagher v. Cooperstown & C. V. R. Co.*, 75 Hun 455, 27 N. Y. Supp. 504, 57 N. Y. S. R. 679.

A little girl nearly four years of age, and of ordinary intelligence, was injured by a street-car. The proof showed that her father was on the sidewalk near her, talking with a man, but facing toward the child, and near enough to watch and assist her, and that he ran to her assistance when he saw that she was about to be struck. There was other evidence tending to show that a boy five or six years old was with the girl until they reached the track. *Held*, sufficient evidence to justify a jury in finding that she was sufficiently guarded. *Levy v. Dry Dock, E. B. & B. R. Co.*, 35 N. Y. S. R. 769, 58 Hun 610, 12 N. Y. Supp. 485.

A parent of a child 10 years old cannot be held guilty of contributory negligence where it appears that his mother sent him on an errand two miles away, and when he was ready to return asked a conductor to let him ride home on a train that did not stop at the station, but which the conductor agreed to stop to let him off; but upon approaching the station the train was not stopped, and the boy, becoming frightened and confused, jumped from the train and was injured. *Avey v. Galveston, H. & S. A. R. Co.*, (Tex.) 17 S. W. Rep. 31.—FOLLOWING *Avey v. Galveston, H. & S. A. R. Co.*, 81 Tex. 243, 16 S. W. Rep. 1015.

117. Parent's negligence must be proximate cause.—The negligence of the parent, to defeat his child's action for personal injuries, must be the proximate cause of the injury. *Winters v. Kansas City Cable R. Co.*, 40 Am. & Eng. R. Cas. 261, 99 Mo. 509, 12 S. W. Rep. 652, 6 L. R. A. 536.—FOLLOWING *Isabel v. Hannibal & St. J. R. Co.*, 60 Mo. 475.—Compare also *South & N. Ala. R. Co. v. Donovan*, 36 Am. & Eng. R. Cas. 151, 84 Ala. 141, 4 So. Rep. 142. *Little Rock & Ft. S. R. Co. v.*

Barker, 33 Ark. 350. *Meeks v. Southern Pac. R. Co.*, 52 Cal. 602, 20 Am. Ry. Rep. 115. *Barrett v. Southern Pac. R. Co.*, 48 Am. & Eng. R. Cas. 532, 91 Cal. 296, 27 Pac. Rep. 666. *Lake Erie & W. R. Co. v. Pike*, 31 Ill. App. 90. *Westerfield v. Lewis*, 43 La. Ann. 63, 9 So. Rep. 52.

In a suit for running over a child which had strayed upon the track, it appeared that the child was seen by the officers in time to avoid the collision, but was mistaken for something else; and that by the exercise of a proper degree of care and caution they might, after first observing the object, have discovered that it was a child in time to stop the train before the accident occurred. *Held*, that in such case, although some negligence might have been attributable to those having charge of the infant, it was not the proximate cause of the casualty, and the company was liable. *Isabel v. Hannibal & St. J. R. Co.*, 60 Mo. 475, 9 Am. Ry. Rep. 261.—FOLLOWED IN *Winters v. Kansas City Cable R. Co.*, 40 Am. & Eng. R. Cas. 261, 99 Mo. 509, 12 S. W. Rep. 652, 6 L. R. A. 536; *Maher v. Atlantic & P. R. Co.*, 64 Mo. 267.

A father's consent for his son to ride on defendant's car is not the direct and proximate cause of the injury. *Buck v. People's St. R., E. L. & P. Co.*, 46 Mo. App. 555.

Whether parent's contributory negligence was the proximate or remote cause of the child's injury, is a question of fact for the jury. *South & N. Ala. R. Co. v. Donovan*, 36 Am. & Eng. R. Cas. 151, 84 Ala. 141, 4 So. Rep. 142.

118. Recovery notwithstanding parent's negligence.*—The negligence of the parents in allowing their child to be alone in the street does not relieve the defendant from liability, if the injury occurred through the gross negligence of its employé. *Schierhold v. North Beach & M. R. Co.*, 40 Cal. 447.

If those in charge of a street-railway car may, by the exercise of ordinary care, avoid injuring a child of very tender years, and fail to exercise such care, the question of the negligence of those having the care and custody of the child will be immaterial, and the railway company will be liable to the child directly, regardless of the negligence of those having its custody. *Chicago W. D. R. Co. v. Ryan*, 43 Am. & Eng. R. Cas. 396,

131 Ill. 474, 23 N. E. Rep. 385; affirming 31 Ill. App. 621. *Baltimore City Pass. R. Co. v. McDonnell*, 43 Md. 534, 14 Am. Ry. Rep. 272.

The plaintiff would be entitled to recover if the injuries complained of resulted from the want of ordinary care and caution on the part of the defendant's agents, providing it should appear from the evidence that the accident causing the injury could not have been avoided by the exercise of such care and caution by the plaintiff as ought, under the circumstances, to be reasonably expected from one of his age and intelligence, or by the exercise of ordinary care and caution on the part of his parents. *McMahon v. Northern C. R. Co.*, 39 Md. 438.—DISTINGUISHING *Baltimore & O. R. Co. v. State*, 33 Md. 542.

Although a child of tender years may be in the highway through the fault or negligence of his parents, and so be improperly there, yet if he be injured through the negligence of the defendant, he is not precluded from his redress. *Robinson v. Cone*, 22 Vt. 213.—APPROVED IN *Bellefontaine & I. R. Co. v. Snyder*, 18 Ohio St. 399. REVIEWED IN *Chicago City R. Co. v. Wilcox*, 138 Ill. 370; *Wright v. Malden & M. R. Co.*, 4 Allen (Mass.) 283; *Mangam v. Brooklyn R. Co.*, 38 N. Y. 455.

δ. When Negligence of Parent is Imputable to Child.*

119. California.—If the negligence of a parent or person standing in *loco parentis* materially and proximately contribute to the injury of a child, the company will not be liable. *Meeks v. Southern Pac. R. Co.*, 52 Cal. 602, 20 Am. Ry. Rep. 115. *Schierhold v. North Beach & M. R. Co.*, 40 Cal. 447. But see also *Meeks v. Southern Pac. R. Co.*, 56 Cal. 513, 38 Am. Rep. 67.

120. Delaware—Illinois.†—The negligence of a father is imputable to a child that is driving with him on the highway

* Doctrine of imputed negligence as applied in cases of injured children, see note, 36 Am. & Eng. R. Cas. 68.

Imputing negligence of parent to injured child, see notes, 57 Am. Rep. 474; 43 Id. 216; 3 L. R. A. 385.

Whether negligence of parent is imputable to child, see notes, 2 Am. & Eng. R. Cas. 17; 31 Id. 420; 6 L. R. A. 545.

Rule of imputed negligence where parent sues for injury to child, see note, 6 L. R. A. 545.

† See also *post*, 127.

* See also *ante*, 93, 101; *post*, 131.

and is injured by a railroad train, thereby preventing a recovery by the child. *Kyne v. Wilmington & N. R. Co., (Del.) 14 Atl. Rep. 922.*

The negligence of a parent or one having the care and custody of a child of tender years in unnecessarily and imprudently exposing it to danger will preclude a recovery in an action for the benefit of the child for injuries by him sustained through the alleged negligence of a railroad company. *Ohio & M. R. Co. v. Stratton, 78 Ill. 88.*

And for the same reason under like circumstances a recovery will be barred in an action in behalf of next of kin for death of child. *Toledo, W. & W. R. Co. v. Grable, 88 Ill. 441. Chicago & A. R. Co. v. Becker, 84 Ill. 483. But see also Chicago & A. R. Co. v. Gregory, 58 Ill. 226. Aurora Branch R. Co. v. Grimes, 13 Ill. 585.*

121. Indiana—Iowa.—The rule that the negligence of the parent or custodian of a child of tender years will be imputed to such child so as to prevent recovery against a company, has been applied in Indiana in an action by the child itself for injuries received. *Hathaway v. Toledo, W. & W. R. Co., 46 Ind. 25. Lafayette & I. R. Co. v. Huffman, 28 Ind. 287.*

As well as in actions for the death of the child caused by wrongful act of the company or its servants. *Evansville & C. R. Co. v. Wolf, 59 Ind. 89. Jeffersonville, M. & I. R. Co. v. Bowen, 40 Ind. 545. Pittsburgh, Ft. W. & C. R. Co. v. Vining, 27 Ind. 513.*

If a child of tender years, while playing upon a railroad track at a point near its home, receives injuries from a passing locomotive, the fact that such child is thus upon the track unexplained, is an act of negligence on the part of those having him in custody, and damages for injuries thus received cannot be recovered, unless defendant's conduct was so negligent as to amount to a willingness to inflict the injury. *Lafayette & I. R. Co. v. Huffman, 28 Ind. 287.*—APPROVING *Pittsburgh, Ft. W. & C. R. Co. v. Vining, 27 Ind. 513.*—DISAPPROVED IN *Bellefontaine & I. R. Co. v. Snyder, 18 Ohio St. 399; Battishill v. Humphreys, 28 Am. & Eng. R. Cas. 597, 64 Mich. 494.* DISTINGUISHED IN *Atchison, T. & S. F. R. Co. v. Smith, 28 Kan. 541.* QUOTED IN *Bellefontaine R. Co. v. Hunter, 33 Ind. 335.*

So in an Iowa case—held, that contributory negligence must be imputed to a twelve-year-old boy who was injured at a

railway crossing while riding with his mother in a carriage driven by a servant, where it appeared that the mother was negligent in failing to compel the driver to stop, and the latter was negligent in not stopping and looking for the approaching train. *Slater v. Burlington, C. R. & N. R. Co., 71 Iowa 209.*—REVIEWED IN *Nesbit v. Garner, 75 Iowa 314.*

122. Kansas—Kentucky.—In Kansas it has been decided that where a child is too young to be responsible for any contributory negligence of its own, it is a question for the jury, under the circumstances of the particular case, to determine whether the parents were guilty of contributory negligence such as to be imputed to the child, and bar his recovery for injuries received through the negligence of a railroad company. *Atchison, T. & S. F. R. Co. v. Smith, 28 Kan. 541; former appeal, sub nom. Smith v. Atchison, T. & S. F. R. Co., 25 Kan. 738.* Compare also *Atchison & N. R. Co. v. Flinn, 24 Kan. 627.*

Parents are the legal and natural custodians of their children, and when the children are so young as not to be capable of exercising any discretion, their parents must exercise it for them. *Louisville P. Canal Co. v. Murphy, 9 Bush (Ky.) 522.*

123. Maine—Maryland—Massachusetts.—If a child is of too tender an age to be permitted to go in the streets without the attendance and supervision of those having him in charge, their negligence and want of due care will have the same effect in preventing the maintenance of an action for an injury occasioned by the neglect of another as would the plaintiff's want of care if he were an adult. *Brown v. European & N. A. R. Co., 58 Me. 384.*—APPROVING *Wright v. Malden & M. R. Co., 4 Allen (Mass.) 283.*

The case of *Hartfield v. Roper, 21 Wend. (N.Y.) 615*, laying down the rule that the negligence of the parent of a child of tender years must be regarded as a want of care on the child's part, was cited with approval in a Maryland case. *Bannon v. Baltimore & O. R. Co., 24 Md. 108.* And see also *McMahon v. Northern C. R. Co., 39 Md. 439. Baltimore City Pass. R. Co. v. McDonnell, 43 Md. 534.*

The negligence of a parent or other person who has the care of a child of tender years has the same effect in preventing the maintenance of an action by the child for

the injury occasioned by the negligence of others, that his own want of due care would have if the plaintiff were an adult. And to entitle the plaintiff to recover, in such case, it is incumbent on him to prove that there was no other culpable cause of the injury than the negligence of the defendants. *Wright v. Malden & M. R. Co.*, 4 Allen (Mass.) 283.—APPROVING *Holly v. Boston Gas Light Co.*, 8 Gray (Mass.) 123; *Hartfield v. Roper*, 21 Wend. (N. Y.) 615; *Lehman v. Brooklyn*, 29 Barb. (N. Y.) 236. REVIEWING *French v. Nurdin*, 1 Q. B. 29; *Robinson v. London*, 22 Vt. 213; *Daley v. Norwich & W. R. Co.*, 26 Conn. 591; *Rauch v. Lloyd*, 31 Pa. St. 358.—DISAPPROVED IN *Battishill v. Humphreys*, 28 Am. & Eng. R. Cas. 597, 64 Mich. 494; *Bellefontaine & I. R. Co. v. Snyder*, 18 Ohio St. 399. QUOTED IN *Wall v. Helena St. R. Co.*, 12 Mont. 44.—But see also *McGeary v. Eastern R. Co.*, 135 Mass. 363. *Lovett v. Salem & S. D. R. Co.*, 9 Allen (Mass.) 557.

124. Minnesota—Missouri.—The negligence of a parent having the care of an infant child *non sui juris*, which contributes, with the negligence of a third person, to produce injury to the child, bars a recovery by the latter. The negligence of the parent is in the law to be imputed to the infant. *Fitzgerald v. St. Paul, M. & M. R. Co.*, 8 Am. & Eng. R. Cas. 310, 29 Minn. 336, 43 Am. Rep. 212, 13 N. W. Rep. 168. To the same effect, substantially, see also *Reed v. Minneapolis St. R. Co.*, 34 Minn. 557. *Grethen v. Chicago, M. & St. P. R. Co.*, 19 Am. & Eng. R. Cas. 342, 22 Fed. Rep. 609.

The negligence of the parents of a child who is injured may be imputed to the child, who by reason of tender years cannot be guilty of negligence. *Cadmus v. St. Louis B. & T. Co.*, 15 Mo. App. 86.

If a father be negligent in directing his child, only nine years old, as to the manner of crossing a track, his negligence is imputed to the child, if it is injured. *Stillson v. Hannibal & St. J. R. Co.*, 67 Mo. 671.—QUOTING *Holly v. Boston Gas Light Co.*, 8 Gray (Mass.) 132; *Waite v. North Eastern R. Co.*, El. Bl. & El. (96 E. C. L.) 719, 728. REVIEWING *Ohio & M. R. Co. v. Stratton*, 78 Ill. 88.—APPROVED IN *Cadmus v. St. Louis B. & T. Co.*, 15 Mo. App. 86. DISTINGUISHED IN *Winters v. Kansas City Cable R. Co.*, 40 Am. & Eng. R. Cas. 261, 99 Mo. 509, 12 S.W. Rep. 652, 6 L. R. A. 536.

125. New York—Wisconsin.—Contributory negligence on the part of the parent or guardian furnishes the same answer to an action by a child for personal injuries inflicted as would the want of care on the part of a plaintiff in an action by an adult. *Thurber v. Harlem Bridge, M. & F. R. Co.*, 60 N. Y. 333. *Ihl v. Forty-second St. & G. S. F. R. Co.*, 47 N. Y. 317, 7 Am. Rep. 450. *Morrison v. Erie R. Co.*, 56 N. Y. 302. *Mangam v. Brooklyn R. Co.*, 38 N. Y. 455, 98 Am. Dec. 66; affirming 36 Barb. 230. *Honegsberger v. Second Ave. R. Co.*, 1 Keyes (N. Y.) 570, 2 Abb. App. Dec. 378, 33 How. Pr. 193. *Willets v. Buffalo & R. R. Co.*, 14 Barb. (N. Y.) 585. And compare also *Bulger v. Albany R. Co.*, 42 N. Y. 459. *Munger v. Tonawanda R. Co.*, 4 N. Y. 349; affirming 5 Den. 255. *Burke v. Broadway & S. A. R. Co.*, 49 Barb. (N. Y.) 529.

Although a child, by reason of his tender age, be incapable of using that ordinary care which is required of a discreet and prudent person, the want of such care on the part of the parents and guardians of the child, furnishes the same answer to an action by the child as would its omission on the part of the plaintiff in an action by an adult. *Hartfield v. Roper*, 21 Wend. (N. Y.) 614.—APPROVED IN *Wright v. Malden & M. R. Co.*, 4 Allen (Mass.) 283; *Mowrey v. Central City R. Co.*, 66 Barb. (N. Y.) 43; *Galveston, H. & H. R. Co. v. Moore*, 59 Tex. 64. DISAPPROVED IN *Winters v. Kansas City Cable R. Co.*, 40 Am. & Eng. R. Cas. 261, 99 Mo. 509, 12 S.W. Rep. 652, 6 L. R. A. 536; *Duffy v. Missouri Pac. R. Co.*, 19 Mo. App. 380; *Norfolk & P. R. Co. v. Ormsby*, 27 Gratt. (Va.) 455; *Norfolk & W. R. Co. v. Groseclose*, 88 Va. 267. DISTINGUISHED IN *Gonzales v. New York & H. R. Co.*, 39 How. Pr. (N. Y.) 407. FOLLOWED IN *Honegsberger v. Second Ave. R. Co.*, 2 Abb. App. Dec. (N. Y.) 378; *Button v. Hudson River R. Co.*, 18 N. Y. 248; *Mangam v. Brooklyn R. Co.*, 38 N. Y. 455. REVIEWED IN *Chicago City R. Co. v. Wilcox*, 138 Ill. 370; *Pittsburgh, Ft. W. & C. R. Co. v. Vining*, 27 Ind. 513.

A child too young to have discretion for himself cannot recover, if his parent or protector fails to exercise ordinary care. *Schindler v. New York, L. E. & W. R. Co.*, 1 N. Y. S. R. 289.

The negligence of a mother in sending a child of tender years on the street unat-

tended is imputed to the child if it is injured. *Dudley v. Westcott*, 18 N. Y. Supp. 130; reversing 15 N. Y. Supp. 952.

In an action under the statute for the death of a boy killed by a locomotive while crossing a track, where it appears that in view of his tender years his parent was guilty of negligence in permitting him to go alone on an errand which must take him across the track, then the court may as a proposition of law determine that there could be no recovery. *Ewen v. Chicago & N. W. R. Co.*, 38 Wis. 613.

The mere fact that a boy, between six and seven years old, was upon a railroad track at or near a street crossing, even though his father had, a short time previous, seen him going toward the track, is not enough to establish contributory negligence as a matter of law, in an action against the railroad company for the killing of the boy. *Johnson v. Chicago & N. W. R. Co.*, 56 Wis. 274, 14 N. W. Rep. 181.—REVIEWING *Townley v. Chicago, M. & St. P. R. Co.*, 53 Wis. 634.

126. England.—Where a child of tender years, actually within the custody and control of its parent, or other protector or guardian, suffers an injury at the hands of the servants of a railroad company, the contributory negligence of such parent or custodian will be imputed to the child so as to bar an action for such injury brought for the benefit of the child. *Waite v. North Eastern R. Co.*, *El. Bl. & El.* (96 E. C. L.) 719, 728. And see also *Singleton v. Eastern Counties R. Co.*, 7 C. B. N. S. (97 E. C. L.) 287.

c. When Negligence of Parent is Not Imputable to Child.*

127. Generally.—The doctrine of *Hartfield v. Roper*, 21 Wend. (N. Y.) 615, that the negligence of a parent, custodian, guardian, or any one in *loco parentis* must be imputed to a child who is of such tender years as to be deemed *non sui juris*, thereby constituting a defense to an action by or on behalf of such child for personal injuries, has been denied and repudiated in Alabama. *Pratt C. & I. Co. v. Brawley*, 83 Ala. 371, 3 Am. St. Rep. 751, 3 So. Rep. 555. *Government St. R. Co. v. Hanlon*, 53 Ala. 70. And consult also *St. Louis, I. M. & S. R.*

Co. v. Freeman, 4 Am. & Eng. R. Cas. 608, 36 Ark. 41.

The doctrine of imputed negligence as laid down in *Hartfield v. Roper*, 21 Wend. (N. Y.) 615, does not prevail in Connecticut. *Daley v. Norwich & W. R. Co.*, 26 Conn. 591.

Nor in Illinois. *Chicago City R. Co. v. Wilcox*, 50 Am. & Eng. R. Cas. 464, 138 Ill. 370, 27 N. E. Rep. 899; affirming 33 Ill. App. 450; former appeal, 43 Am. & Eng. R. Cas. 299, 24 N. E. Rep. 419. And compare *Chicago City R. Co. v. Robinson*, 36 Am. & Eng. R. Cas. 66, 127 Ill. 9, 4 L. R. A. 126, 18 N. E. Rep. 772; affirming 27 Ill. App. 26. *Walters v. Chicago, R. I. & P. R. Co.*, 41 Iowa 71.

Nor in Louisiana. *Westerfield v. Lewis*, 43 La. Ann. 63, 9 So. Rep. 52.

Nor in Michigan. *Battishill v. Humphreys*, 28 Am. & Eng. R. Cas. 597, 64 Mich. 494, 31 N. W. Rep. 894.

Nor in Mississippi. *Westbrook v. Mobile & O. R. Co.*, 66 Miss. 560, 6 So. Rep. 321.

Nor in Missouri. *Brill v. Eddy*, 115 Mo. 596, 22 S. W. Rep. 488. *Boland v. Missouri R. Co.*, 36 Mo. 490. But see also *Frick v. St. Louis, K. C. & N. R. Co.*, 75 Mo. 595. *Stillson v. Hannibal & St. J. R. Co.*, 67 Mo. 671. *Isabel v. Hannibal & St. J. R. Co.*, 60 Mo. 475.

Nor in Nebraska. *Huff v. Ames*, 16 Neb. 139, 19 N. W. Rep. 623. Compare also *Meyer v. Midland Pac. R. Co.*, 2 Neb. 319.

Nor in New Hampshire. *Bissailon v. Blood*, 64 N. H. 565, 15 Atl. Rep. 147, 6 N. Eng. Rep. 908.

Nor in Ohio. *St. Clair St. R. Co. v. Eadie*, 43 Ohio St. 91. *Cleveland, C. & I. R. Co. v. Manson*, 30 Ohio St. 451.—REVIEWED IN *Battishill v. Humphreys*, 28 Am. & Eng. R. Cas. 597, 64 Mich. 494.—*Bellefontaine & I. R. Co. v. Snyder*, 18 Ohio St. 399.—APPROVING *Birge v. Gardner*, 19 Conn. 507; *Robinson v. Cone*, 22 Vt. 213; *Pennsylvania R. Co. v. Kelly*, 31 Pa. St. 372; *Philadelphia & R. R. Co. v. Spearen*, 47 Pa. St. 300. DISAPPROVING *Wright v. Malden & M. R. Co.*, 4 Allen (Mass.) 283; *Pittsburgh, Ft. W. & C. R. Co. v. Vining*, 27 Ind. 513; *Lafayette & I. R. Co. v. Huffman*, 28 Ind. 287. DISTINGUISHING *Waite v. North Eastern R. Co.*, 5 Jur. 936; *Singleton v. Eastern Counties R. Co.*, 7 C. B. N. S. (97 E. C. L.) 287. QUOTING *North Pa. R. Co. v. Mahoney*, 57 Pa. St. 187. REVIEWING *Rauch v. Lloyd*, 31 Pa. St. 358.—APPROVED IN *Winters v. Kan-*

* Negligence of parent not imputable to child, see note, 17 L. R. A. 79.

sas City Cable R. Co., 40 Atl. & Eng. R. Cas. 261, 99 Mo. 509, 12 S. W. Rep. 652, 6 L. R. A. 536. QUOTED IN *Battishill v. Humphreys*, 28 Am. & Eng. R. Cas. 597, 64 Mich. 494.

Nor in Pennsylvania. *Erie City Pass. R. Co. v. Schuster*, 113 Pa. St. 412, 6 Atl. Rep. 269, 57 Am. Rep. 471.—DISAPPROVING *Fitzgerald v. St. Paul, M. & M. R. Co.*, 8 Am. & Eng. R. Cas. 510, 29 Minn. 336.—APPROVED IN *Winters v. Kansas City Cable R. Co.*, 40 Am. & Eng. R. Cas. 261, 99 Mo. 509, 12 S. W. Rep. 652, 6 L. R. A. 536.—*North Pa. R. Co. v. Mahoney*, 57 Pa. St. 187. But see also *Philadelphia & R. R. Co. v. Long*, 75 Pa. St. 257. *Kay v. Pennsylvania R. Co.*, 65 Pa. St. 269. *Glassey v. Hestonville, M. & F. Pass. R. Co.*, 57 Pa. St. 172. *Pennsylvania R. Co. v. Kelly*, 31 Pa. St. 372.

Nor in Tennessee. *Whirley v. Whiteman*, 1 Head (Tenn.) 620.

Nor in Texas. *Galveston, H. & H. R. Co. v. Moore*, 59 Tex. 64, 46 Am. Rep. 265. *Texas & P. R. Co. v. O'Donnell*, 58 Tex. 27.

Nor in Vermont. *Robinson v. Cone*, 22 Vt. 213.

Nor in Virginia. *Trumbo v. City St. Car Co.*, 89 Va. 780. *Norfolk & W. R. Co. v. Groseclose*, 88 Va. 267, 13 S. E. Rep. 454.—DISAPPROVING *Hartfield v. Roper*, 21 Wend. (N. Y.) 615.—*Norfolk & P. R. Co. v. Ormsby*, 27 Gratt. (Va.) 455.—APPROVING *Lynch v. Nurdin*, 1 Q. B. 29, 41 E. C. L. 422. DISAPPROVING *Hartfield v. Roper*, 21 Wend. (N. Y.) 615.—REVIEWED IN *Battishill v. Humphreys*, 28 Am. & Eng. R. Cas. 597, 64 Mich. 494.

Nor in the District of Columbia. *Moore v. Metropolitan R. Co.*, 2 Mackey (D. C.) 437.

128. Illustrations.—(1) *Alabama—Connecticut.*—In an action brought by a child the contributory negligence of the father is no defense; nor can contributory negligence be imputed to the child when of such tender years that it is, by legal presumption, incapable of judgment and discretion; but when between the ages of seven and fourteen years, though *prima facie* incapable of exercising judgment and discretion, evidence of capacity may be received, contributory negligence imputed, and such negligence shown in defense of the action. *Pratt C. & I. Co. v. Brawley*, 83 Ala. 371, 3 Am. St. Rep. 751, 3 So. Rep. 555.

Where, by negligence of an adult, injury

results to a child of tender years, to whom judgment and discretion cannot be imputed, and who is conclusively presumed incapable of their exercise, contributory negligence cannot be set up to defeat his right to recover for injuries received by being run over by a street-car. *Government St. R. Co. v. Hanton*, 53 Ala. 70.—APPLYING *Lynch v. Nurdin*, 1 Q. B. 28, 41 E. C. L. 422.—APPROVED IN *Donahoe v. Wabash, St. L. & P. R. Co.*, 83 Mo. 560, 53 Am. Rep. 594. DISAPPROVED IN *Battishill v. Humphreys*, 28 Am. & Eng. R. Cas. 597, 64 Mich. 494. QUOTED IN *Galveston, H. & H. R. Co. v. Moore*, 59 Tex. 64.

Where a child is negligently injured it is not prevented from recovering damages by the mere fact that the negligence of its parents suffered it to go into the place of danger. So *held*, where plaintiff, a child of less than three years, was injured by a train while she was playing along the track. *Daley v. Norwich & W. R. Co.*, 26 Conn. 591.—DISAPPROVED IN *Daniels v. New York & N. E. R. Co.*, 154 Mass. 349. REVIEWED IN *Wright v. Malden & M. R. Co.*, 4 Allen (Mass.) 283; *Mangam v. Brooklyn R. Co.*, 38 N. Y. 455; *Battishill v. Humphreys*, 28 Am. & Eng. R. Cas. 597, 64 Mich. 494.

(2) *Illinois—Michigan—Mississippi.*—The negligence of a parent, guardian, or other person having control of a child is not to be imputed to the child itself so as to defeat an action by it for an injury caused by the negligence of another. So *held*, where plaintiff was run over by a cable-car and his leg so crushed as to necessitate its amputation. *Chicago City R. Co. v. Wilcox*, (Ill.) 43 Am. & Eng. R. Cas. 299, 24 N. E. Rep. 419.

In a case where the conduct of an infant would not be negligence in an adult, the question of imputable negligence is immaterial. *Chicago City R. Co. v. Robinson*, 36 Am. & Eng. R. Cas. 66, 127 Ill. 9, 4 L. R. A. 126, 18 N. E. Rep. 772; *affirming* 27 Ill. App. 26.

The plaintiff was a child about three years of age. The mother left it in the care of its grandfather. The child left the house, went upon the street crossing of a railroad track, and was injured by one of defendant's trains. There was no bell rung or whistle blown at the crossing. There was, however, a flagman at the next street crossing, who had a clear view of the track. *Held*,

that if the injury was caused by the negligence of the company, the negligence or fault of the parent or guardian was not to be taken into account. *Battishill v. Humphreys*, 28 Am. & Eng. R. Cas. 597, 64 Mich. 494, 31 N. W. Rep. 894.

A parent's negligence which contributes to an injury to his child is a bar to an action by the parent for damages; but if the action be by the child, or for its benefit, the parent's negligence is not imputed to the child and is no defense. *Westbrook v. Mobile & O. R. Co.*, 39 Am. & Eng. R. Cas. 374, 66 Miss. 560, 6 So. Rep. 321.—APPROVING *Government St. R. Co. v. Hanlon*, 53 Ala. 70.

(3) *Missouri—New Hampshire.*—The negligence of a mother in permitting her child, unattended by a person of mature years, to go upon the public street, where it was run against and injured by the cable-car of the defendant, is no defense to an action by the child for its injuries. *Winters v. Kansas City Cable R. Co.*, 40 Am. & Eng. R. Cas. 261, 99 Mo. 509, 12 S. W. Rep. 652, 6 L. R. A. 536.

Evidence that a boy's father failed to keep him away from the cars after being notified to do so was properly excluded, since the father's negligence is not imputable to the boy. *Brill v. Eddy*, 115 Mo. 596, 22 S. W. Rep. 488.

A child of tender years is not precluded from recovering damages for an injury which might have been avoided by the exercise of ordinary care by defendant, from the fact that his parent or guardian allowed him to place himself in a position of danger without a custodian. *Bisaillon v. Blood*, 64 N. H. 565, 6 N. Eng. Rep. 908, 15 Atl. Rep. 147.

(4) *Ohio—Pennsylvania.*—It is the duty of persons in charge of cars passing along streets or other frequented places to exercise great caution; and if, by failure to do so, a child of tender years is injured the company represented is liable in an action by the child, notwithstanding the negligence of the parent in permitting it to be upon the track, or of the person in charge of the child in not keeping a proper lookout for the cars. *Bellefontaine & I. R. Co. v. Snyder*, 18 Ohio St. 399.—REVIEWED IN *Harriman v. Pittsburg, C. & St. L. R. Co.*, 32 Am. & Eng. R. Cas. 37, 45 Ohio St. 11.

A young girl who was injured at a railroad crossing while in a buggy with her

mother, but with the latter driving, is not chargeable with her mother's negligence; but if danger be apparent it is the duty of the daughter to suggest necessary precautions, and to protest if the mother does not take them. *Griffith v. Baltimore & O. R. Co.*, 44 Fed. Rep. 574.

The plaintiff was a minor aged sixteen years, and was fully capable of taking due and reasonable care of her person. She was lawfully riding with her father, who was driving his own wagon, when she was injured by a collision between the wagon and a street-car, caused by the mutual and concurring negligence of a street-car driver and her father, but without any fault or negligence on her part. Held, that the negligence of her father was not to be imputed or attributed to her, and did not bar a recovery against the street-car company, whose negligence directly contributed to the injury. *St. Clair St. R. Co. v. Eadie*, 23 Am. & Eng. R. Cas. 269, 43 Ohio St. 91, 54 Am. Rep. 144, n., 1 N. E. Rep. 519.—DISAPPROVING *Thorogood v. Bryan*, 8 C. B. 115; *Prideaux v. Mineral Point*, 43 Wis. 513. FOLLOWING *Transfer Co. v. Kelly*, 36 Ohio St. 86. REVIEWING AND QUOTING *Robinson v. New York C. & H. R. R. Co.*, 66 N. Y. 11.—REVIEWED IN *Caillat v. Cincinnati, N. O. & T. P. R. Co.*, 92 Ky. 345.

The doctrine that imputes the negligence of the parent to the child is not applicable to a case where a poor woman was obliged to do washing, and was doing the best she could under the circumstances to save her nineteen-months-old child from injury. *Kay v. Pennsylvania R. Co.*, 65 Pa. St. 269.

In an action by a child six years old against a company for personal injuries inflicted in the street of a city by the running of its cars, the negligence of the parent in sending the child unattended on an errand which required it to cross the railway track cannot be imputed to the child, or affect its right to recover for injury sustained. It will only be chargeable with such discretion in realizing and avoiding danger as a child would exercise. *Galveston, H. & H. R. Co. v. Moore*, 59 Tex. 64.—APPROVING *Hartfield v. Roper*, 21 Wend. (N. Y.) 615. QUOTING *Government St. R. Co. v. Hanlon*, 53 Ala. 82.—DISAPPROVED IN *Battishill v. Humphreys*, 28 Am. & Eng. R. Cas. 597, 64 Mich. 494. DISTINGUISHED IN *Williams v. Texas & P. R. Co.*, 15 Am. & Eng. R. Cas. 403, 60 Tex. 205.

2. *As Affecting Recovery for Death of Child.***129. When parent's negligence will prevent recovery.**—(1) *Generally.*

—The parents of a child of too tender age to exercise care, having its custody, are chargeable with the duty of exercising reasonable care for its safety, and if for the want of such care it is killed by a passing train, no recovery can be had. *Toledo, W. & W. R. Co. v. Grable*, 88 Ill. 441, 21 Am. Ry. Rep. 336.—DISAPPROVED IN *Battishill v. Humphreys*, 28 Am. & Eng. R. Cas. 597, 64 Mich. 494. QUOTED IN *Chicago & N. W. R. Co. v. Schumilowsky*, 8 Ill. App. 613.

The negligence of a child which is killed by a railroad train, and her conduct, if negligence, must be regarded as the negligence of the parents, and not that of the child. Where children are so young as not to be capable of exercising any discretion, their parents must exercise it for them with ordinary prudence. *Louisville & P. Canal Co. v. Murphy*, 9 Bush (Ky.) 522.

When the parents are negligent, and contribute to the injury by exposing a child of tender years to danger of which they were aware, they cannot recover for his death. *Williams v. Texas & P. R. Co.*, 15 Am. & Eng. R. Cas. 403, 60 Tex. 205.—DISTINGUISHING *Evansich v. Gulf, C. & S. F. R. Co.*, 57 Tex. 123; *Texas & P. R. Co. v. O'Donnell*, 58 Tex. 28; *Houston & T. C. R. Co. v. Simpson*, 2 Tex. L. Rev. 107; *Galveston, H. & H. R. Co. v. Moore*, 59 Tex. 64.

In order that a parent may recover, under the second cause of action in the Louisiana Act 71 of 1884, for the death of his child of tender years, he must be free from negligence proximately contributing to his death. *Westerfield v. Lewis*, 43 La. Ann. 63, 9 So. Rep. 52.

The unnecessary exposure to known danger of a child incapable of exercising the care and judgment of mature years is an act of negligence sufficient to defeat a recovery, unless the injury be wilful. *Pittsburgh, Ft. W. & C. R. Co. v. Vining* 27 Ind. 513.—REVIEWING *Lynch v. Nurdin*, 1 Q. B. 29; *Lygo v. Newbold*, 9 Ex. 302; *Hughes v. Macfie*, 2 H. & C. 744; *Mangan v. Atterton*, L. R. 1 Ex. 239; *Hartfield v. Roper*, 21 Wend. (N. Y.) 615.—APPROVED IN *Lafayette & I. R. Co. v. Huffman*, 28 Ind. 287.

In order that a parent may recover damages suffered by him on account of the loss of the child which was killed, under the

Louisiana act of 1884, such parent must be free from negligence proximately contributing to the death. *Westerfield v. Lewis*, 43 La. Ann. 63, 9 So. Rep. 52.

Where a child is so young as to be *non sui juris*, it is a material question whether the parent was negligent or not in committing the child to a temporary custodian, and whether such custodian was of proper age and discretion to suitably care for it. So held, where a mother sent her little girl five years old to spend an afternoon with a woman neighbor, and who was killed by a train while in her charge. *Hooker v. Chicago, M. & St. P. R. Co.*, 41 Am. & Eng. R. Cas. 498, 76 Wis. 542, 44 N. W. Rep. 1085.

(2) *Illustrations.*—It is gross negligence for parents living near a railroad to leave children too young for discretion at their house unattended by any one of sufficient discretion, and without any precaution to prevent their escape from the house; and if a child so left gets upon the track and is killed, the company is not liable to the parents unless the trainmen could have avoided the injury by the use of reasonable care after discovering the child. *St. Louis, I. M. & S. R. Co. v. Freeman*, 4 Am. & Eng. R. Cas. 608, 36 Ark. 41.

Where a father sues for the death of his son, 7 years old, it is error to instruct the jury that if plaintiff crossed the track with his son on the leading horse, over which plaintiff had no control, it was strong evidence of negligence; defendant may have a new trial, although the assumed facts are in dispute, as such facts, if true, show negligence on plaintiff's part conclusively. *Pennsylvania R. Co. v. Bock*, 6 Am. & Eng. R. Cas. 20, 93 Pa. St. 427.

In an action for damages for the wrongful death of plaintiff's child, where it appears that the child met its death at the same time as its mother, that it was under the latter's control, and that the deaths were caused by the failure of the mother to exercise ordinary prudence, there can be no recovery. *Houston v. Vicksburg, S. & P. R. Co.*, 34 Am. & Eng. R. Cas. 76, 39 La. Ann. 796, 2 So. Rep. 562.

It is negligence *per se* for a mother to permit her child only seven years old to serve conductors and drivers of street-cars with water on board the cars, and if it is killed in so doing she cannot recover. *Smith v. Hestonville, M. & F. Pass. R. Co.*, 2 Am. & Eng. R. Cas. 12, 92 Pa. St. 450, 37 Am. Rep.

705.—**DISTINGUISHING** *Smith v. O'Connor*, 48 Pa. St. 218.

A boy nine years old was permitted to ride, for his own amusement, on a coal and ice wagon of a third party, from which he was thrown down and killed by the wheel of the wagon dropping from a plank into a chuck-hole in crossing a railroad track. *Held*, that notwithstanding the negligence of the company in not maintaining the crossing in a safe condition, the father's negligence in permitting the boy to so ride was the proximate cause of the death, and there could be no recovery. *Lake Erie & W. R. Co. v. Pike*, 31 Ill. App. 90.

130. Permitting child to go unattended upon or near track.—If a parent permit a young child without sufficient discretion to get out of the way of a running train to go alone upon a railway track, this is *prima-facie* evidence of negligence, and he cannot recover against the company for the death of the child from the running of the train, unless the trainmen, after discovering the child, omitted to use reasonable precaution to avoid the collision. *St. Louis, I. M. & S. R. Co. v. Freeman*, 4 Am. & Eng. R. Cas. 608, 36 Ark. 41. FOLLOWED IN *Gaither v. Kansas City*, etc., R. Co., 27 Fed. Rep. 544.

It is negligence in a parent to permit a child between three and four years of age to be upon a railroad track where trains are frequently passing; and if the child be killed by a train of cars the parent cannot recover damages therefor, unless such killing be done purposely or wilfully. *Jeffersonville, M. & I. R. Co. v. Bowen*, 49 Ind. 154.—ADHERED TO IN *Evansville & C. R. Co. v. Wolf*, 59 Ind. 89.

Where a parent suffered a child two years and nine months old to wander unattended eight hundred and seventy-five feet from its home, near a railroad, and then to go upon the track, and it was injured by a passing train and died from the injury—*held*, that there was such contributory negligence that the parent could not recover against the company for the death, unless the injury was wilfully done. *Evansville & C. R. Co. v. Wolf*, 59 Ind. 89.—ADHERING TO *Jeffersonville, M. & I. R. Co. v. Bowen*, 49 Ind. 154.

If a father directs or permits his children,

*Negligence of parents in permitting child on street, see 50 AM. & ENG. R. CAS. 473, *abstr.*

aged eight and four, to walk down a railroad track and to cross a long trestle, knowing that a train is due about that time, and the younger child is run over by the train and killed while on the trestle, the contributory negligence of the parent will bar a recovery by him for any mere negligence of defendant's servants in charge of the train. *Mobile & O. R. Co. v. Watty*, 69 Miss. 145, 13 So. Rep. 825.

If under such circumstances recovery is sought notwithstanding the contributory negligence, on the ground that the engineer failed, after seeing the children in peril, to make reasonable efforts to avert injury, it is error to submit in the instructions the question of defendant's negligence in not being on the lookout and sooner discovering the children. *Mobile & O. R. Co. v. Watty*, 69 Miss. 145, 13 So. Rep. 825.

Parents who suffer their children of tender years to wander along the tracks of a railroad, where they are run down and killed by a car, are guilty of such contributory negligence as will prevent a recovery of damages. *Westerberg v. Kinzua, C. & K. R. Co.*, 142 Pa. St. 471, 21 Atl. Rep. 878.—**DISTINGUISHING** *Hydraulic Works Co. v. Orr*, 83 Pa. St. 332.

131. When parent's negligence will not prevent recovery.—(1) *Generally*.—Where a child is killed through the negligence of another, his administrator may recover for the wrong, though the parents of the child may have been guilty of negligence contributing to the injury; and such right to recover is not affected by the consideration that the negligent parents will inherit his estate, though their negligence would prevent a recovery in their own right. *Wymore v. Mahaska County*, 78 Iowa 396, 6 L. R. A. 545, 43 N. W. Rep. 264.

Where a child, less than two years old, escapes from the immediate presence of its mother, who has taken all reasonable precautions for its safety, considering her circumstances in life, and goes upon the street and is killed by a passing car, contributory negligence cannot be set up as a defense. *Farris v. Cass Ave. & F. G. R. Co.*, 80 Mo. 325; *affirming* 8 Mo. App. 538.

Where an action for an injury to a child by a street-car is tried upon the theory that the child is *non sui juris*, and the jury also, under the instruction of the court, finds that the child was not guilty of contributory negligence, the negligence by its parents is

ineffectual to defeat a recovery. *Huerzeler v. Central C. T. R. Co.*, 48 N. Y. S. R. 649, 20 N. Y. Supp. 676.

(2) *Illustrations.*—If the plaintiff, the mother of the child, was in fault, and the child, while wrongfully on defendant's track, was killed by defendant's engine or cars, but defendant's agents were aware, or by the use of ordinary diligence might have been aware, of the fact that the child was on the track in time to avoid injuring him by reasonable diligence, the failure to use such diligence alone must be considered the proximate cause of the injury. *Little Rock & Ft. S. R. Co. v. Barker*, 33 Ark. 350.

In an action against a horse-railroad company for a personal injury caused by their running over with a car a child of two years of age in a public street, in a city, in which the evidence shows that the child was passing across the street unattended, it is sufficient ground for a new trial, after a verdict for the plaintiff, if, in reply to a request by the defendants for an instruction that it is negligence to permit a child of this age to go on a public street, the judge instructs the jury that, if the parents, knowing the position of the child and its danger, had the means of preventing the injury and neglected to use them, and permitted the child to remain in danger, the plaintiff cannot recover; and that the mere fact that a child was passing across the street unattended is not in and of itself necessarily such evidence of fault or neglect as entitles the defendants to a verdict. *Wright v. Malden & M. R. Co.*, 4 Allen (Mass.) 283.

Where a child three years old is sent across a track with another child nine and a half years old, negligence on the part of the child would not of itself absolve defendant company from liability, unless negligence on the part of the guardian or custodian had brought about the situation, or in some manner contributed to the injury. *Ihl v. Forty-second St. & G. S. F. R. Co.*, 47 N. Y. 317, 2 Am. Ry. Rep. 409.

3. As Affecting Recovery for Loss of Services.

132. Generally.—A parent's negligence which contributes to an injury to his child is a bar to an action by the parent for damages. *Westbrook v. Mobile & O. R. Co.*, 39 Am. & Eng. R. Cas. 374, 66 Miss. 560, 6 So. Rep. 321.

If a parent sues for the loss of services of

a child by reason of injuries resulting from the defendant's negligence, contributory negligence on the part of the parent is a complete defense; but it is otherwise if the child sues by the parent or any other next friend. *Moore v. Metropolitan R. Co.*, 2 Mackey (D. C.) 437; *Battisill v. Humphreys*, 28 Am. & Eng. R. Cas. 597, 64 Mich. 494, 31 N. W. Rep. 894.—DISAPPROVING *Mangam v. Brooklyn R. Co.*, 38 N. Y. 455; *Ihl v. Forty-second St. & G. S. F. R. Co.*, 47 N. Y. 317; *Holly v. Boston Gas Light Co.*, 8 Gray (Mass.) 123; *Wright v. Malden & M. R. Co.*, 4 Allen (Mass.) 283; *Pittsburgh, Ft. W. & C. R. Co. v. Vining*, 27 Ind. 513; *Lafayette & I. R. Co. v. Huffman*, 28 Ind. 287; *Jeffersonville, M. & I. R. Co. v. Bowen*, 40 Ind. 545; *Brown v. European & N. A. R. Co.*, 58 Me. 384; *Ford v. Chicago & N. W. R. Co.*, 38 Wis. 60; *W. & W. R. Co. v. Grable*, 88 Ill. 441; *Singleton v. Eastern Counties R. Co.*, 7 C. B. N. S. (97 E. C. L.) 287; *Waite v. North Eastern R. Co.*, El. Bl. & El. (96 E. C. L.) 719, 728; *Kay v. Pennsylvania R. Co.*, 65 Pa. St. 269; *North Pa. R. Co. v. Mahoney*, 57 Pa. St. 187; *Philadelphia & R. R. Co. v. Spearen*, 47 Pa. St. 300; *Daley v. Norwich & W. R. Co.*, 26 Conn. 598; *Boland v. Missouri R. Co.*, 36 Mo. 490; *Government St. R. Co. v. Hanlon*, 53 Ala. 70; *Keffe v. Milwaukee & St. P. R. Co.*, 21 Minn. 207; *St. Paul v. Kuby*, 8 Minn. 154; *Cleveland, C., C. & I. R. Co. v. Manson*, 30 Ohio St. 451; *Galveston, H. & H. R. Co. v. Moore*, 59 Tex. 64; *Norfolk & P. R. Co. v. Ormsby*, 27 Gratt. (Va.) 455. DISTINGUISHING *East Saginaw City R. Co. v. Bohn*, 27 Mich. 503. QUOTING *Bellefontaine & I. R. Co. v. Snyder*, 18 Ohio St. 408.

In an action by the father for his own benefit, the contributory negligence of the father himself is a complete defense, without regard to the age or capacity of the child; but if the injury was caused by the wanton, reckless, or intentional negligence of the defendant's employes after the peril of the child was or ought to have been discovered, the contributory negligence of neither father nor child is available as a defense. *Pratt C. & I. Co. v. Brawley*, 83 Ala. 371, 3 Am. St. Rep. 751, 3 So. Rep. 555.

Where a child of tender years is injured by the negligence of another, the negligence of his parents, or others standing in loco parentis, cannot be imputed to the child so as to support the defense of contributory

negligence to his suit for damages. But where the action is brought by the parent, or for the parent's own benefit, the contributory negligence of such parent may be shown in bar of the action. *Chicago City R. Co. v. Wilcox*, 50 Am. & Eng. R. Cas. 464, 138 Ill. 370, 27 N. E. Rep. 899; *affirming* 33 Ill. App. 450.—REVIEWING *Waite v. North Eastern R. Co.*, El. Bl. & El. (96 E. C. L.) 719; *Robinson v. Cone*, 22 Vt. 213; *Gavin v. Chicago*, 97 Ill. 66; *Ohio & M. R. Co. v. Stratton*, 78 Ill. 88; *Hartfield v. Roper*, 21 Wend. (N. Y.) 615.—DISTINGUISHED IN *Atchison, T. & S. F. R. Co. v. Plaskett*, 47 Kan. 112.

133. Parent's negligence must be the proximate cause.*—The contributory negligence of a parent in allowing his infant child to go upon the track, to bar his recovery against the company for loss of services caused by the injury to such child, must be proximate and not remote. *South & N. Ala. R. Co. v. Donovan*, 36 Am. & Eng. R. Cas. 151, 84 Ala. 141, 4 So. Rep. 142.—FOLLOWING *Meeks v. Southern Pac. R. Co.*, 52 Cal. 602, 30 Am. Ry. Rep. 115.

134. Parent's negligence which will bar recovery.—If a father permits a child of tender years to run at large, without a protector, in a city traversed constantly by cars and other vehicles, he is guilty of negligence, and cannot recover for loss of services, if the child be injured by a passing street-car. *Glassey v. Hestonville*, M. & F. Pass. R. Co., 57 Pa. St. 172.

Allowing a child under five years of age to be upon a track, unattended, where cars are passing hourly, and where its presence may be undiscovered by the person in control of trains, is such negligence in the parent as will defeat a recovery by the parent unless such injury be wilful. *Jeffersonville, M. & I. R. Co. v. Bowen*, 40 Ind. 545.—ADHERED TO IN *Evansville & C. R. Co. v. Wolf*, 59 Ind. 89. DISAPPROVED IN *Battishill v. Humphreys*, 28 Am. & Eng. R. Cas. 597, 64 Mich. 494.

The father of an infant two years old, injured by a train, cannot recover of the company for loss of services and expenses incurred by reason of the injury, if the negligence of the parents contributed thereto, unless, notwithstanding such negligence, the injury might have been avoided by the exercise of proper care by the company's

employés. *Albertson v. Keokuk & D. M. R. Co.*, 48 Iowa 292.

135. Parent's negligence which will not bar recovery.—A child two years old escaped from its home and went on a railroad track and was injured before its absence was discovered. There was no evidence that it was in the habit of running out or that it had ever done so before. The father was engaged in his business at the time away from home, and the mother had charge of her household duties and another infant only a month old. *Held*, that the father could not be charged with contributory negligence. *Frick v. St. Louis, K. C. & N. R. Co.*, 10 Am. & Eng. R. Cas. 776, 75 Mo. 542.

4. Contributory Negligence of Persons in Loco Parentis, Custodians, etc.

136. Negligence barring recovery.—In an action by a parent for his own benefit for loss of services occasioned on account of the injury sustained by his child, the contributory negligence of a person to whom the parent has intrusted the custody of the child will bar the parent's recovery, if such negligence proximately contributed to the injury. *Lake Erie & W. R. Co. v. Pike*, 31 Ill. App. 90.

Where a child, too young to take full care of itself, is exposed to danger through the neglect of its parents or proper custodians, and is injured by the negligence of defendants, the law imputes the neglect of adult guardians to the child; and the defendants may avail themselves of the guardians' negligence, as a defense to an action for damages, in the same manner as the contributory negligence of an adult plaintiff may be shown to defeat his action for a similar injury. *Pittsburgh, Ft. W. & C. R. Co. v. Vining*, 27 Ind. 513.—QUOTING *Holly v. Boston Gas Light Co.*, 8 Gray (Mass.) 123.—DISAPPROVED IN *Battishill v. Humphreys*, 28 Am. & Eng. R. Cas. 597, 64 Mich. 494; *Bellefontaine & I. R. Co. v. Snyder*, 18 Ohio St. 399.

An adult, having the care of a girl eight years old, left a horse-car with her and went immediately upon an adjacent horse-car track, without having hold of the child and without giving attention to possible danger, except in one direction. The child was run over by a car coming from the other direction. *Held*, that the guardian was chargeable with contributory negligence. *Reed v.*

* See also *ante*, 117.

Minneapolis St. R. Co., 34 Minn. 557, 27 N. W. Rep. 77.

Where an infant child, intrusted to the care and custody of another by the father, is injured through the negligence of a railroad company, the custodian of the child also being guilty of negligence contributing to the result, although the infant may maintain an action for such injury, the father cannot, the negligence of his agent, the custodian of the child, being in law the negligence of the father. *Bellefontaine R. Co. v. Snyder*, 24 Ohio St. 670.

137. Negligence not barring recovery.—(1) *Iowa—Mississippi—New Jersey.*—Where the parents of a child of tender years are unable to give it their personal care and attention, and intrust it to the care of a suitable person, the negligence of such person cannot be imputed to the parents, and will not defeat a recovery, if the child be negligently killed by a railroad company. *Walters v. Chicago, R. I. & P. R. Co.*, 41 Iowa 71.

Where a girl aged fourteen, in attempting to reach the station by going over a crossing, being under the charge of an older person, was injured by a train which backed upon her as she was attempting to pass in front of an engine on another track, the negligence of the older person could not properly be imputed to the child, since she had arrived at years of sufficient discretion to exercise care for herself. *Louisville, N. O. & T. R. Co. v. Hirsch*, 56 Am. & Eng. R. Cas. 291, 69 Miss. 126, 13 So. Rep. 244.

Where two girls, aged seven and fourteen, attended by an adult, went upon a track and were injured by a moving train—in a suit by the parent to recover for the injury, an instruction for defendant that contributory negligence of the attendant should be imputed to the children was properly refused. Whatever might be true as to the younger, the act of the older child cannot be considered without reference to the capacity and discretion which, at her age, she was presumed to possess. *Louisville, N. O. & T. R. Co. v. Hirsch*, 56 Am. & Eng. R. Cas. 291, 69 Miss. 126, 13 So. Rep. 244.

An infant of tender years is not to be charged with the negligence of the person having it in charge. *Newman v. Phillipsburg H. C. R. Co.*, 43 Am. & Eng. R. Cas. 305, 52 N. J. L. 446, 19 Atl. Rep. 1102.

(2) *New York—Pennsylvania—Texas.*—Plaintiff, a child between five and six years

old, attempted to cross a street on which was a railroad track, with a woman, but the child's foot slipped on the rail and caught in a hole, and it was injured by an approaching car before it could be extricated. They saw the car coming at a rapid rate, but it appeared that there would have been time to cross in safety had the child not caught its foot. *Held*, not sufficient to show contributory negligence. *Aaron v. Second Ave. R. Co.*, 2 Daly (N. Y.) 127.

The negligence of a person having a child in charge, but without authority of its parents, is not a defense to an action by the child. Contributory negligence cannot be attributed to a child of tender years. *Mahoney v. Railroad Co.*, 6 Phila. (Pa.) 242.

There was evidence that the elder child put the plaintiff off. *Held*, that her negligence was not to be imputed to plaintiff, the other being a companion and plaintiff not in her charge. *Pittsburg, A. & M. Pass. R. Co. v. Caldwell*, 74 Pa. St. 421, 6 Am. R. Rep. 100.—APPLIED IN *Buck v. People's St. R.*, E. L. & P. Co., 46 Mo. App. 555.

A child of tender years, for the purpose of protection, was taken into the arms of a person to whose care she had not been intrusted, and by the negligence of such person was injured by the engine. *Held*, that such negligence was not contributory negligence so as to discharge the company, their servants having also been negligent. *North Pa. R. Co. v. Mahoney*, 57 Pa. St. 187.—DISAPPROVED IN *Battishill v. Humphreys*, 28 Am. & Eng. R. Cas. 597, 64 Mich. 494. QUOTED IN *Bellefontaine & I. R. Co. v. Snyder*, 18 Ohio St. 399.

The duty to do no act which will inflict injury on a child rests upon all persons and corporations as well as upon the parent, and the fact that the negligence of some third person contributed to an injury wrought on the child can afford no excuse for the wrong-doer. *Galveston, H. & H. R. Co. v. Moore*, 59 Tex. 64.

138. Negligence of grandparent.—Where a father leaves his infant child in the care of its grandmother, the negligence of the latter, in allowing it to go upon the railroad track, will defeat a recovery in an action by the father for injuries to the child. *Pratt C. & I. Co. v. Brawley*, 83 Ala. 371, 3 Am. St. Rep. 751, 3 So. Rep. 555.

A child in the charge of his grandmother, injured while crossing a railway track, is so identified with his grandmother that if her

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against the company. *Waite v. North*
Eastern R. Co., 5 *Jur. N. S.* 936, 28 *L. J. Q.*
B. 258, 7 *W. R.* 311; *affirming El. Bl. &*
El. 719, 4 *Jur. N. S.* 1300, 27 *L. J. Q. B.* 417.

**130. Negligence of older brother
or sister.**—The plaintiff, about two years
of age, being under the care of her adult
sister, wandered onto the track of the horse
railroad and was there run over by the care-
lessness of the driver of the car. *Held*, that
plaintiff's right of action was not lost even
if the sister's carelessness of supervision, in
part, was cause of her injury. *Newman v.*
Phillipsburg H. C. R. Co., 43 *Am. & Eng. R.*
Cas. 305, 52 *N. J. L.* 446, 19 *Atl. Rep.* 1102.

Where a child five years old is injured
by playing on a turntable while in charge
of a sister fourteen years old, though her
negligence and other children's, the negli-
gence of the sister cannot be imputed to
the child. *Gulf, C. & S. F. R. Co. v. Mc-*
Whirter, 77 *Tex.* 356, 14 *S. W. Rep.* 26.

140. Negligence of uncle.—Where a
mother leaves her child, only two years old,
in the care of a third person, there can be
no recovery by the next of kin if the child is
negligently killed through the failure of such
person to exercise reasonable care for the
child's safety. *Chicago & N. W. R. Co. v.*
Schumilowsky, 8 *Ill. App.* 613.—*QUOTING*
Toledo, W. & W. R. Co. v. Grable, 88 *Ill.*
442; *Toledo, W. & W. R. Co. v. Miller*, 76
Ill. 278.

5. Parent's Negligence is a Question for the Jury.

141. Generally.—(1) *Statement of the
rule.*—The contributory negligence of the
mother of a sixteen-months-old child, in-
jured in a street by a passing car, is a ques-
tion of fact for the jury. *Fisselmayer v.*
Third Ave. R. Co., 2 *N. Y. S. R.* 75.

The following questions are properly for
the determination of the jury:

The question of contributory negligence
on the part of the parent, and of those in
charge of the child. *Rajnowski v. Detroit,*
B. C. & A. R. Co., 74 *Mich.* 20, 41 *N. W.*
Rep. 847.

Whether a father in a particular case did
in fact all that a reasonably careful and
prudent man ought to have done, under the

* Children left in charge of other children,
see note, 19 *AM. & ENG. R. CAS.* 123.

circumstances, to protect his infant child
from danger. *Weil v. Dry Dock, E. B. &*
B. R. Co., 119 *N. Y.* 147, 23 *N. E. Rep.* 487,
28 *N. Y. S. R.* 944; *reversing 25 J. & S.*
188, 25 *N. Y. S. R.* 698, 5 *N. Y. Supp.*
833.—*FOLLOWING Birkett v. Knickerbocker*
Ice Co., 110 *N. Y.* 506; *Kunz v. Troy*, 104
N. Y. 344; *Stackus v. New York C. & H.*
R. R. Co., 79 *N. Y.* 464.—*REVIEWED*
IN Barry v. Second Ave. R. Co., 16 *N. Y.*
Supp. 518; *Elze v. Baumann*, 21 *N. Y. Supp.*
782.

Where an infant sues for personal in-
juries, the question of its parents' contribu-
tory negligence, unless it appears beyond
rational controversy. *Barry v. Second Ave.*
R. Co., 41 *N. Y. S. R.* 342, 16 *N. Y. Supp.*
518; *affirmed in 136 N. Y.* 669, *mem.*, 33 *N.*
E. Rep. 336, 50 *N. Y. S. R.* 929.

When there is not an entire abnegation
of the duty which rests upon the parents,
the question of their contributory negli-
gence. *Houston City St. R. Co. v. Dillon*, 3
Tex. Civ. App. 303, 22 *S. W. Rep.* 1066.

The question of negligence on the part of
an attendant of a child six years old, in
allowing it to run in advance when the street
was reasonably clear of vehicles and other
causes of danger. *Jetter v. New York & H.*
R. Co., 2 *Abb. App. Dec.* 458, 2 *Keyes* 154.

(2) *Illustrations.*—Where a child five
years old, in charge of a brother nine years
old, is killed while crossing a railroad track,
the question of whether the parents are
guilty of imputative negligence is one of fact
for the jury. *O'Connor v. Boston & L. R.*
Co., 15 *Am. & Eng. R. Cas.* 362, 135 *Mass.*
352.—*FOLLOWED IN McGeary v. Eastern R.*
Co., 15 *Am. & Eng. R. Cas.* 407, 135 *Mass.*
363.

A father's consent for the son to ride on
defendant's car is not such contributory
negligence as to take the case from the jury,
as such consent is not the direct and prox-
imate cause of the injury. *Buck v. People's*
St. R., E. L. & P. Co., 46 *Mo. App.* 555.

It cannot be said, as a matter of law, that
permitting a child four years old to go upon
a street in which there is a horse railway, in
company with a child eleven years old, is
negligence in the parents, or that the elder
child had not sufficient intelligence to be
intrusted with the care of the younger.
Collins v. South Boston R. Co., 26 *Am. &*
Eng. R. Cas. 371, 142 *Mass.* 301, 7 *N. E.*
Rep. 856.

The contributory negligence of the parent,

brother, or sister was properly a question of fact for the jury in the following cases:

Where a boy six years old was allowed to go to a circus near a railroad track with his sister, eleven years old, and the sister leaving him on the circus ground, he went to a turntable near by and was killed; it being shown that neither the sister nor the child's parent knew that there was a turntable near. *Nagel v. Missouri Pac. R. Co.*, 10 Am. & Eng. R. Cas. 702, 75 Mo. 653, 42 Am. Rep. 418.

Where it appeared that the parents of the child were poor and dependent on their labor; that the father was sick in a hospital from which the child and his mother had just returned; that the house was twenty-five feet from the street, with an alley leading to the street; that the child was seated on the door-step eating food which the mother had provided for him; that she went into the house to get him something more to eat and returned in a few minutes and found the child had gone, whereupon she started to hunt him and met persons carrying him home, already injured. *Rosenkrantz v. Lindell R. Co.*, 108 Mo. 9, 18 S. W. Rep. 890.

Where a mother sent her child, three years old, with another child, nine and a half years old, on an errand which would require them to cross a railway track, and in doing so the younger one was killed. *Ihl v. Forty-second St. & G. S. F. R. Co.*, 47 N. Y. 317, 2 Am. Ry. Rep. 409.—FOLLOWING *Mangum v. Brooklyn R. Co.*, 38 N. Y. 455; *Drew v. Sixth Ave. R. Co.*, 26 N. Y. 49.—DISAPPROVED IN *Battishill v. Humphreys*, 28 Am. & Eng. R. Cas. 597, 64 Mich. 494. REVIEWED IN *Nagel v. Missouri Pac. R. Co.*, 10 Am. & Eng. R. Cas. 702, 75 Mo. 653, 42 Am. Rep. 418.

Where a boy twelve years old was traveling with his mother, and not being able to get a seat in the car with her, by her permission he went to another car and rode to the next station, and was injured in returning to his mother. *Downs v. New York C. R. Co.*, 47 N. Y. 83, 1 Am. Ry. Rep. 542.

Whether a father is negligent in allowing two boys, one between eleven and twelve years old and the other two years younger, to drive a loaded wagon and team along a country road at night. *Parish v. Eden*, 62 Wis. 272, 22 N. W. Rep. 399.

Where the evidence showed, among other things, that plaintiff's intestate, a boy six-

teen months old, whose parents were poor, had been left in charge of his brother, seven years old, while his mother went across the railroad track to milk her cow in a pasture; that a few minutes later the child was killed by a passing train upon the track, immediately opposite a hole in the fence through which the mother had gone; and that the mother knew that once, a few weeks before, the child had followed her upon the track through such hole in the fence. *Hoppe v. Chicago, M. & St. P. R. Co.*, 19 Am. & Eng. R. Cas. 74, 61 Wis. 357, 21 N. W. Rep. 227.—APPLIED IN *Parish v. Eden*, 62 Wis. 272.

142. Children unattended, generally.—A boy eight years old was sent to school in a large city unattended, and rode part of the way on a street-car. In attempting to get on he fell and was injured. *Held*, that whether it was negligence on the part of his parent to send a boy of that age unattended was for the jury. *Drew v. Sixth Ave. R. Co.*, 26 N. Y. 49.—FOLLOWED IN *Ihl v. Forty-second St. & G. S. F. R. Co.*, 47 N. Y. 317. REVIEWED IN *Mowrey v. Central City R. Co.*, 66 Barb. (N. Y.) 43.

143. Children unattended in streets and highways.—Whether the parents of a child eleven years old are negligent in permitting it to go on a street alone in the vicinity of a railroad track is a question for the jury, to be determined from the child's age, intelligence, and physical development. *Schierhold v. North Beach & M. R. Co.*, 40 Cal. 447.

If such a child has the necessary discretion and physical ability to be allowed to be in the streets at all, unattended, the purpose for which he went there is entirely immaterial. *Schierhold v. North Beach & M. R. Co.*, 40 Cal. 447.

A boy ten years old was permitted by his parents to go with another boy on the street at night, and he was injured while attempting to steal a ride on a street-car. In an action against the company it was contended that the parents of the boy were guilty of negligence in permitting him to be abroad at that time. *Held*, that the question depended upon whether he was a boy of sufficient capacity to take care of himself, which presented a question for the jury. *Lovett v. Salem & S. D. R. Co.*, 9 Allen (Mass.) 557.

A child eighteen months old went from its home, which stood near a railroad track

on uninclosed grounds, to the track and was injured. It appeared that the mother placed the child in a chair with something to eat, but left a door open facing toward the track. She turned her back while engaged in some work, and in about two minutes heard the child and saw it by the track. *Held*, that it was a question for the jury whether the mother exercised due care. *McGeary v. Eastern R. Co.*, 15 Am. & Eng. R. Cas. 407, 135 Mass. 363.—FOLLOWING *Gibbons v. Williams*, 135 Mass. 333; *O'Connor v. Boston & L. R. Co.*, 135 Mass. 352.

Where there was evidence that the boy's mother, the plaintiff in this case, had taken the boy out of school because of a defect in his speech, it was a question for the jury to determine whether the plaintiff, who was suing in her own right for his death, was negligent in trusting the child alone and unattended upon a principal street of the city, where she knew that the cars were running at all times of the day, and that the streets were usually crowded. *Lynch v. Metropolitan St. R. Co.*, 56 Am. & Eng. R. Cas. 571, 112 Mo. 420, 20 S. W. Rep. 642.

It is not negligence, as matter of law, for the mother of a child five years old to permit her to be in the street, but it is a question of fact for the jury. *Huerzeler v. Central C. T. R. Co.*, 139 N. Y. 490, 54 N. Y. S. R. 836; *affirming* 48 N. Y. S. R. 649, 1 Misc. 136, 20 N. Y. Supp. 676.—FOLLOWING *McGarry v. Loomis*, 63 N. Y. 104; *Kunz v. Troy*, 104 N. Y. 344, 5 N. Y. S. R. 642; *Birkett v. Knickerbocker Ice Co.*, 110 N. Y. 504, 18 N. Y. S. R. 130.

It is not negligence, as matter of law, for the parents of a bright child four and a half years old, living in a crowded locality in a city, with no other place for amusement, to permit the child, with proper instructions and directions against going into the street, to play upon the sidewalk without an attendant. As to whether it was negligence under the particular circumstances is a question of fact for the jury. *Birkett v. Knickerbocker Ice Co.*, 110 N. Y. 504, 18 N. Y. S. R. 130; *affirming* 41 Hun 404, 10 Civ. Pro. 52, 3 N. Y. S. R. 133.—FOLLOWED IN *Weil v. Dry Dock, E. B. & B. R. Co.*, 119 N. Y. 147, 23 N. E. Rep. 487, 28 N. Y. S. R. 944.—And see also *Cugrove v. Ogden*, 49 N. Y. 255.

144. Children escaping from con-

trol of custodian.*—Where a child between four and five years old was left in the care of a boy thirteen years old, escaped from him, went upon the track of a street railway, and was run over and killed by a passing car, the question of the negligence of the boy in charge was properly submitted to the jury. *Dahl v. Milwaukee City R. Co.*, 65 Wis. 371, 27 N. W. Rep. 185.

The parent's contributory negligence in failing to keep the child away from the track was held to be a question, not of law, but of fact, in the following cases:

Where a child two years old strayed away from his home, without the knowledge or consent of his parents, and went upon a track, which was about 100 feet from his home, and within three minutes after leaving his home was injured by a car, belonging to the company, running over him. *Smith v. Atchison, T. & S. F. R. Co.*, 4 Am. & Eng. R. Cas. 554, 25 Kan. 738.

Where it was shown that a child two years of age, without the knowledge of its parents, escaped from home and strayed upon a track, where it was injured, it not appearing how it got upon the track, or that it was ever known to have been there before, or that its absence had been discovered when the accident occurred; that its father at the time was at his shop in another part of the city, and that its mother, besides the care of her household duties, in which she had no help, had charge of an infant about one month old. *Frick v. St. Louis, K. C. & N. R. Co.*, 10 Am. & Eng. R. Cas. 776, 75 Mo. 542.—APPLIED IN *Buck v. People's St. R., E. L. & P. Co.*, 46 Mo. App. 555. DISTINGUISHED IN *Yarnall v. St. Louis, K. C. & N. R. Co.*, 10 Am. & Eng. R. Cas. 726, 75 Mo. 575. FOLLOWED IN *Farris v. Cass Ave. & F. G. R. Co.*, 80 Mo. 325; *Werner v. Citizens' R. Co.*, 81 Mo. 368.

Where it appears that the child was left, in an inclosed yard, in charge of a sister twenty years old and escaped to the street, without being in the habit of doing so, while the sister stepped in the house a moment on business. *Fisselmayer v. Third Ave. R. Co.*, 2 N. Y. S. R. 75.—REVIEWING *Prendegast v. New York C. & H. R. R. Co.*, 58 N. Y. 652.

* Child escaping from control of parent, see notes, 19 AM. & ENG. R. CAS. 82, 334.

Where a child escaped into the street through an open window coming to within four feet of the floor, this being his only means of egress, the doors being locked. *Mangam v. Brooklyn R. Co.*, 38 N. Y. 455; *affirming* 36 Barb. 230.—APPLIED IN *Fallon v. Central Park, N. & E. R. R. Co.*, 64 N. Y. 13. DISAPPROVED IN *Battishill v. Humphreys*, 28 Am. & Eng. R. Cas. 597, 64 Mich. 494. FOLLOWED IN *Ihl v. Forty-second St. & G. S. F. R. Co.*, 47 N. Y. 317. QUOTED IN *Pendril v. Second Ave. R. Co.*, 43 How. Pr. (N. Y.) 399, 2 J. & S. 481; *Johnson v. Chicago & N. W. R. Co.*, 1 Am. & Eng. R. Cas. 155, 49 Wis. 529; *Follet v. Toronto St. R. Co.*, 15 Ont. App. 346. REVIEWED IN *O'Flaherty v. Union R. Co.*, 45 Mo. 70.

The question of the parent's contributory negligence was properly one of fact for the jury in the following cases:

Where a mother left her infant child, sixteen months old, in one room of the house while she went into an adjoining room to perform some labor, when the child shortly thereafter wandered out of the house and yard and onto the railroad track in the street in front of them, and was killed by a passing engine. *Reilly v. Hannibal & St. J. R. Co.*, 34 Am. & Eng. R. Cas. 81, 94 Mo. 600, 13 West. Rep. 658, 7 S. W. Rep. 407.

Where a child four years old, who was not in the habit of going on the street, escaped from its mother without her knowledge or consent, and was injured on the street by a car, the evidence not showing the exact time that the child had been out of the mother's presence, but not above a few minutes. *Barry v. Second Ave. R. Co.*, 16 N. Y. Supp. 518; *affirmed* in 136 N. Y. 669, 33 N. E. Rep. 336.—QUOTING *Casey v. New York C. & H. R. R. Co.*, 78 N. Y. 518. REVIEWING *Mangam v. Brooklyn City R. Co.*, 36 Barb. (N. Y.) 230; *Fallon v. Central Park, N. & E. R. R. Co.*, 64 N. Y. 13; *Weil v. Dry Dock, E. B. & B. R. Co.*, 119 N. Y. 147, 23 N. E. Rep. 487; *Waldele v. New York C. & H. R. R. Co.*, 95 N. Y. 284; *Hanover R. Co. v. Coyle*, 55 Pa. St. 396.—FOLLOWED IN *Barry v. Second Ave. R. Co.*, 16 N. Y. Supp. 520. REVIEWED IN *Dudley v. Westcott*, 18 N. Y. Supp. 130.

Where a mother placed her child, five years old, in a court-yard in New York city, from which it was easy to approach the street, but cautioned the child not to pass the door; but the child went into the street and was injured by a car. *Ames v.*

Broadway & S. A. R. Co., 24 J. & S. (N. Y.) 3, 4 N. Y. Supp. 803, 24 N. Y. S. R. 818.—QUOTING *Kunz v. Troy*, 104 N. Y. 350.

Where the evidence showed that the plaintiff, a child five years old, resided with his mother on the first floor of a tenement-house communicating directly by a flight of stairs with the street; that he had been playing in the back yard and came in for a drink of milk, which the mother gave to him, and he sat down at a table to drink it; that she went into a bedroom adjoining, leaving the door open and telling him to go back into the yard; that the door leading to the street was open. He went out onto the street, and in five minutes from the time his mother left him was run over and injured by one of defendant's cars, through the negligence of the driver. The mother testified that she had never known him to go out into the street alone before. *Fallon v. Central Park, N. & E. R. R. Co.*, 64 N. Y. 13; *affirming* 6 Daly 8.—APPLYING *Mangam v. Brooklyn R. Co.*, 38 N. Y. 455.—REVIEWED IN *Barry v. Second Ave. R. Co.*, 16 N. Y. Supp. 518; *Elze v. Baumann*, 2 Misc. (N. Y.) 72, 21 N. Y. Supp. 782.

Where a child eighteen months old had usually been under charge of a sister thirteen years old, who was away from the child for a short time, and escaped from the house whilst the mother, to enable her to scrub the floor, had removed a barrier against the child's escape, and within a few minutes was run over by a car and killed. *Pittsburg, A. & M. R. Co. v. Pearson*, 72 Pa. St. 169, 7 Am. Ry. Rep. 42.

145. Allowing children to go upon or near the track.—Ordinarily it is a question for the jury whether or not the parents, in permitting their child to wander to the track, were chargeable with negligence. *Tobin v. Missouri Pac. R. Co.*, (Mo.) 18 S. W. Rep. 996.

Where there was evidence that when the child went on the track he looked both ways and saw no train approaching, it is a question for the jury whether the father's act in allowing the child to go on the track was the proximate or remote cause of the injury. *South & N. Ala. R. Co. v. Donovan*, 36 Am. & Eng. R. Cas. 151, 84 Ala. 141, 4 So. Rep. 142.

The fact that a child under the age of discretion is upon a track, where trains are frequently passing, without a proper attendant is only *prima-facie* evidence of negli-

gence in a parent, and is subject to explanation; and it is for the jury to determine from the evidence whether the explanation is sufficient to repel the presumption of negligence. *St. Louis, I. M. & S. R. Co. v. Freeman*, 4 *Am. & Eng. R. Cas.* 608, 36 *Ark.* 41.

A child about fifteen months old lived with its parents about forty-five yards from a track. While the other members of the family were engaged in their ordinary employments the child wandered away from the house and entered upon the track, where it was injured by a train. *Held*, that the question of the parent's contributory negligence was for the jury. *Payne v. Humestone & S. R. Co.*, 70 *Iowa* 584, 31 *N. W. Rep.* 886.

A small child was allowed to play about a mill where the father worked. It wandered out and was killed on the track near by. *Held*, in an action by the father, that his contributory negligence was for the jury. *Pennsylvania Co. v. James*, 81* *Pa. St.* 194.

Where a child of tender years is killed by an engine on a track in a street, while running eight miles an hour, the questions of the company's negligence in running at that speed, and that of the parents of the child in permitting it on the street, are proper for the jury. *Philadelphia & R. R. Co. v. Long*, 75 *Pa. St.* 257.

A mother left a child, sixteen months old, with its brother, seven years old, for a few minutes, and it escaped to a railroad track and was injured. It appeared that the mother knew that the child on a former occasion had gone to the track. *Held*, not such conclusive proof of contributory negligence as to justify withdrawing the case from the jury. *Hoppe v. Chicago, M. & St. P. R. Co.*, 19 *Am. & Eng. R. Cas.* 74, 61 *Wis.* 357, 21 *N. W. Rep.* 227.

146. Allowing children to play in dangerous localities.—*It is a question of fact for the jury to decide whether the parents were guilty of contributory negligence:*

In permitting their son to make a playground of defendant's tracks and yards. *Baker v. Flint & P. M. R. Co.*, 54 *Am. & Eng. R. Cas.* 131, 91 *Mich.* 298, 51 *N. W. Rep.* 897.

In allowing a child to play near an unfenced sand-pit. *Fink v. Missouri Furnace Co.*, 10 *Mo. App.* 61; *reversed on other grounds in* 82 *Mo.* 376.

In permitting their child to play at a place where lumber was alleged to have been piled in a dangerous manner, from the fall of which the child died. *Texas Mexican R. Co. v. Herbeck*, 60 *Tex.* 602.

V. PROCEDURE.

1. In General.

147. Right of action, generally.*—For personal injuries to a minor child, caused by the negligence or wrongful act of a third person, separate and concurrent actions may, in the absence of statutory provisions, be maintained by the child and its father. *Pratt C. & I. Co. v. Brawley*, 83 *Ala.* 371, 3 *Am. St. Rep.* 751, 3 *So. Rep.* 555.

The Alabama act approved January 23, 1885, giving a right of action to the father for personal injuries to a minor child, and providing that but one suit shall be maintained for such injuries (Sess. Acts 1884-5, p. 99), does not take away the infant's right of action, in the event the father fails to sue. *Georgia Pac. R. Co. v. Propst*, 83 *Ala.* 518, 3 *So. Rep.* 764.—FOLLOWING *Pratt C. & I. Co. v. Brawley*, 83 *Ala.* 371.

Under the Arkansas statute (Mansf. Dig. § 5539), which provides that "when any person shall be wounded by a railroad train running in this state he may sue for damages in his own name; or if he be a minor, his father, if living, may sue; and if the father be dead, then the mother may sue; and if both father and mother be dead, then the guardian of such minor may sue," two rights of action arise, one in favor of the infant for his personal injuries, and one in favor of the parent for loss suffered by him or her. *Sibley v. Ratliffe*, 37 *Am. & Eng. R. Cas.* 295, 50 *Ark.* 477, 8 *S. W. Rep.* 686.

A minor, being damaged in his person, may bring suit to recover for any permanent injury which he has sustained reaching beyond his majority, whilst the father may sue for any trespass done or damage sustained whereby he loses the services of the child, as also for any expense incurred resulting from such injury. *Central R. Co. v. Brinson*, 8 *Am. & Eng. R. Cas.* 343, 64 *Ga.* 475.

The right of a father to recover for the

* Right of action for injuries to children, see note, 37 *AM. & ENG. R. CAS.* 299.

Right to recover damages for death of emancipated minor child, see note, 27 *AM. & ENG. R. CAS.* 325.

value of the services of his child, when such child is injured through the negligence of a third person, is predicated upon the relation of master and servant. *Schmitz v. St. Louis, I. M. & S. R. Co.*, 46 Mo. App. 380.

The right of action to recover for the services of the child is presumed to be in the father, and continues in him till the child's emancipation is shown or the right is waived; and this right grows out of, and is correlative to, the father's obligation to support the child. *Buck v. People's St. R., E. L. & P. Co.*, 46 Mo. App. 555.

An action may be maintained by a parent for the loss of his child's services during minority, and for all necessary expenses and losses incurred in attention to it while sick from an injury caused by the negligence of another, and this notwithstanding an action may be maintained in behalf of the child for such injury as results in personal damage to himself. *Evansich v. Gulf, C. & S. F. R. Co.*, 57 Tex. 123.—DISTINGUISHED IN *Daniels v. New York & N. E. R. Co.*, 154 Mass. 349.

148. Action by mother.—A mother's right to her minor child's services ceases when she remarries and the child is supported by its stepfather. *Whitehead v. St. Louis, I. M. & S. R. Co.*, 22 Mo. App. 60.

A minor, having no father, but living with his mother, and by his labor contributing to her support, was a passenger on a railway car and paid his fare. He was injured by the negligence of the company's servants, and was provided with medical attendance, nursed, and supported by his mother. *Held*, that the contract to carry safely was with the minor; that the mother was a stranger to it, and she could not recover for the injury. *Fairmount & A. St. Pass. R. Co. v. Stuller*, 54 Pa. St. 375.—DISTINGUISHED IN *Pennsylvania R. Co. v. Bantom*, 54 Pa. St. 495.

149. — by stepfather.—A stepfather's right to the services of his wife's minor child is coextensive only with the expenses by him incurred in its maintenance. *Whitehead v. St. Louis, I. M. & S. R. Co.*, 22 Mo. App. 60.

150. — by one who takes care of child.—One taking care of a minor not his child, and without adopting the child, is not entitled to damages for personal injuries to the child for diminished capacity to labor during minority. The minor can recover

for such damages. *Ft. Worth St. R. Co. v. Witten*, 74 Tex. 202, 11 S. W. Rep. 1091.

151. Recovery by child is no bar to action by parent.—Prior to the act of January 23, 1885 (Ala. Code, § 2588), a recovery by an infant for injuries caused by negligence, in a suit brought in his name by his next friend, was no defense to an action by the father, for his own benefit, for the same injury. *South & N. Ala. R. Co. v. Donovan*, 36 Am. & Eng. R. Cas. 151, 84 Ala. 141, 4 So. Rep. 142.

The fact that a child, by her father as next friend, has recovered damages against a corporation for a personal injury, does not bar a subsequent action by him for the loss of her services, occasioned by the same injury. *So held*, where a girl nearly thirteen years old had recovered from a horse-car company \$5000 for an injury to her arm, and, on her arriving of age, her father recovered from the company \$500 for his loss therefrom. *Wilton v. Middlesex R. Co.*, 125 Mass. 130.—DISTINGUISHED IN *Baker v. Flint & P. M. R. Co.*, 91 Mich. 298.

152. Recovery by parent is no bar to action by child.—A minor, being damaged in his person, may bring suit to recover for any permanent injury which he has sustained reaching beyond his majority, notwithstanding the father has brought an action for damages sustained by the loss of the services of the child, and for expenses incurred resulting from such injury. *Central R. Co. v. Brinson*, 8 Am. & Eng. R. Cas. 343, 64 Ga. 475.—DISTINGUISHED IN *Baker v. Flint & P. M. R. Co.*, 91 Mich. 298.

While a father in his own right might recover compensation for a loss of services of his infant daughter until her majority, and for expenses incurred on account of her injuries, such a recovery would not preclude her from maintaining an action in her own name for such elements of damage. *Texas & P. R. Co. v. Howard*, 2 Tex. Unrep. Cas. 429.

153. Proper parties plaintiff.—In Pennsylvania both parents must be joined as plaintiffs in an action for loss of services of an injured child. *Pennsylvania R. Co. v. Bock*, 6 Am. & Eng. R. Cas. 20, 93 Pa. St. 427.

154. — in suits by next friend.—Though in suits conducted by a next friend the minors ought regularly to sue by him, yet if the next friend sue in behalf of the minors it is the same in substance. *Van*

St. R. Co. v. Rep. 1091.

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Pelt v. Chattanooga, R. & C. R. Co., 89 Ga. 706, 15 S. E. Rep. 622.

Under the Revised Statutes a father may maintain an action, as next friend to his son, to recover damages for personal injuries wrongfully inflicted on the son. *Evan-sick v. Gulf, C. & S. F. R. Co.*, 6 Am. & Eng. R. Cas. 182, 57 Tex. 126.—APPROVING Kansas C. R. Co. v. Fitzsimmons, 22 Kan. 687; Koons v. St. Louis & I. M. R. Co., 65 Mo. 592; Keffe v. Milwaukee & St. P. R. Co., 21 Minn. 207.

The essential facts of a suit in behalf of a minor by a next friend are that the action must be prosecuted for the use and benefit of the minor, by some proper representative. Any person who is permitted by the court to prosecute such an action is to be deemed a suitable person without regard to the volition of the minor. *Gulf, C. & S. F. R. Co. v. Styron*, 66 Tex. 421, 1 S. W. Rep. 161.

When it appears with certainty that the action is based on the right of the minor, that the relief sought is such as it alone would be entitled to on the facts pleaded, and that this is sought for the use and benefit of the minor, the minor is the real plaintiff. *Gulf, C. & S. F. R. Co. v. Styron*, 66 Tex. 421, 1 S. W. Rep. 161. But compare *Gulf, C. & S. F. R. Co. v. Styron*, 2 Tex. Unrep. Cas. 275, where it was held that while under the Texas Rev. St. a minor might prosecute suits by next friend, yet a father could not maintain a suit in his own name for the benefit of the child who is a minor, to recover damages against a railroad company for a personal injury to the child, received while playing at a turntable.

155. Suing in forma pauperis.—An infant cannot sue in *forma pauperis*, nor by a next friend in *forma pauperis*, for a personal injury, either by the common law of Tennessee or under the Tennessee Code, § 2804. *Cargle v. Nashville, C. & St. L. R. Co.*, 7 Lea (Tenn.) 717.

156. Bond required of fathers suing as guardian of his child.—Where a father sues as guardian of his infant child for personal injuries to the latter, he should first be required to give bond, as required by law (Mo. Rev. St. 1889, § 5279). *Spillane v. Missouri Pac. R. Co.*, 111 Mo. 555, 20 S. W. Rep. 293.

2. Pleading.

157. Complaint.—(1) *Interpretation.*—A complaint in an action for injuries to a

small child while playing on a railroad track charged that the defendant, in a "careless and wanton manner" ran the locomotive against the child. Held, that the use of the word "wanton" was not equivalent to the word "wilful," and meant no more than charging that it was done in a careless manner. *Lafayette & I. R. Co. v. Huffman*, 28 Ind. 287.

(2) *Sufficient.*—In a complaint for an injury to a child of tender years, it is sufficient to aver that the injury happened without the fault of the parents, with whom the child resided. *Pittsburgh, Ft. W. & C. R. Co. v. Vining*, 27 Ind. 513.

Where a company is sued for injuring a child away from a crossing, an allegation in the complaint that the train was running at an unlawful speed is immaterial, where there is no reference to a statute fixing the speed of trains, and no facts stated tending to show that the speed was unlawful. *Woodruff v. Northern Pac. R. Co.*, 47 Fed. Rep. 689.

(3) *Insufficient.*—A complaint charging a company with negligence in burning coal slack on its uninclosed grounds, but which a boy mistook for ashes only, and was burned in trying to run across, is demurrable, as the company had a right to burn the slack on its own grounds, and the boy seemed to have been but a trespasser thereon. *McDonald v. Union Pac. R. Co.*, 35 Fed. Rep. 38.—DISTINGUISHING *Sioux City & P. R. Co. v. Stout*, 17 Wall. (U. S.) 657.

Where a company is sued for injuries to a child occurring on the track at a point where the public has no right to go, the complaint must either show by what right the child was on the track, or that the injury was wantonly and intentionally committed after the child was seen. *Woodruff v. Northern Pac. R. Co.*, 47 Fed. Rep. 689.

A complaint to recover damages for an injury to the person of plaintiff, a child of seven years, caused by the negligence of the defendant's employes in the course of their employment, which fails to show, either by direct averment or by the allegation of facts, that there was no contributory negligence, is bad on demurrer. *Higgins v. Jeffersonville, M. & I. R. Co.*, 52 Ind. 110.

158. Petition.—A petition of the father for the loss of services of an infant son, by reason of injuries received through defendant's negligence, is not fatally defective because it fails to allege specifically

that said son is the servant of the plaintiff, when the relation of father and son, the infancy of the son, and the right of the father to the services of the son, are fully set out. *Buck v. People's St. R., E. L. & P. Co.*, 46 Mo. App. 555.—REVIEWING *Matthews v. Missouri Pac. R. Co.*, 26 Mo. App. 75.

A petition by a mother for loss of services of her minor son, occasioned by defendant's negligence, need not in words state the death of the son's father, where the plain import and common understanding of the language used therein is that the father was dead. *Goins v. Chicago, R. I. & P. R. Co.*, 47 Mo. App. 173; see 37 Mo. App. 676.

The fact that the bond required by Missouri Rev. St. 1889, § 5279, to be given by a father when he sues as guardian of his infant for personal injuries to the latter, was actually given is an essential averment of the petition. *Spillane v. Missouri Pac. R. Co.*, 111 Mo. 555, 20 S. W. Rep. 293.

The objection that such averment was not made in the petition is properly made by demurrer and not by answer. Where it was so raised by demurrer, and was overruled, the defendant must stand on his demurrer; otherwise he will be deemed to have waived the defect. *Spillane v. Missouri Pac. R. Co.*, 111 Mo. 555, 20 S. W. Rep. 293.

The petition in the present case stated in substance that the defendant railroad company "used and operated" a turntable in connection with its railroad, and that it was the duty of the company to keep the turntable locked and fastened. Held, that these averments were equivalent to a charge that the defendant controlled the turntable. *Nagel v. Missouri Pac. R. Co.*, 10 Am. & Eng. R. Cas. 702, 75 Mo. 653, 42 Am. Rep. 418.

In a suit by minor children for damages under the Texas act, the objection, that the petition failed to allege that there were no surviving parents or widow, is not available under a general exception to the petition. *March v. Walker*, 48 Tex. 372.—DISTINGUISHED IN *Dallas & W. R. Co. v. Spiker*, 59 Tex. 435.

159. Answer.—Where the age of the child leaves a doubt as to his maturity and capacity, this must be alleged in the answer of the defendant. *Westerfield v. Lewis*, 43 La. Ann. 63, 9 So. Rep. 52.

Defendant, sued for injuries to a child through its negligence, denied, in its answer,

the negligence charged, and alleged contributory negligence of the child and others who accompanied him. Held, that this limited its right to prove contributory negligence to that pleaded, so that it could not prove negligence of the child's mother in allowing him to go upon defendant's grounds. *O'Malley v. St. Paul, M. & M. R. Co.*, 45 Am. & Eng. R. Cas. 62, 43 Minn. 289, 45 N. W. Rep. 440.

3. Evidence.*

160. What is admissible, generally.—A train ran over a child on the track. It appeared that there were visitors in the cab of the engine, and that the presence of strangers without leave was prohibited by rule. Held, that it was proper for the jury to consider the fact, with other circumstances, as bearing on the question of negligence. *Marcott v. Marquette, H. & O. R. Co.*, 4 Am. & Eng. R. Cas. 548, 47 Mich. 1, 10 N. W. Rep. 53.

Where a child is injured while on a track at a point which was in plain view from the train for more than 1200 feet, and the train was a light one, and running on a bright day, and the child was seen when the train was 600 feet from it, it is proper to admit further proof of the distance required in which a train of the kind could be stopped, as tending to prove that by proper effort the train might have been stopped in time to avoid the injury. *Meagher v. Coopers-town & C. V. R. Co.*, 75 Hun (N. Y.) 455, 27 N. Y. Supp. 504, 57 N. Y. S. R. 679.

It is competent to prove that an average boy's labor, from eight to twenty-one years of age, was worth \$10 a month, testimony showing that the injured boy, before the accident, had been healthy and was obedient. *Ft. Worth & D. C. R. Co. v. Measles*, 81 Tex. 474, 17 S. W. Rep. 124.

161. — and what is inadmissible.—In an action for an injury to a boy who had climbed upon a freight car standing on the side-track, it is not competent for plaintiff to prove, as tending to show negligence on the part of the company, that there was no railing between the depot and the side-track; that persons were in the habit of crossing to such side-track, and that the car on which the boy climbed was moved without giving any signal. *Louisville & N. R. Co. v. Hurt*, (Ky.) 13 S. W. Rep. 275.—REVIEW—

* See also ante, 30-32.

ING Kentucky C. R. Co. v. Gastineau, 83 Ky. 119.

Where suit is brought for driving a car over a child only four years old, evidence of the careless and inhuman conduct of the car driver after the accident is incompetent, and its admission is reversible error, as its tendency is to inflame the jury and augment the damages. *Barry v. Second Ave. R. Co.*, 16 N. Y. Supp. 518, 520; affirmed in 136 N. Y. 669, 33 N. E. Rep. 336.

Where a street-car company is sued for running over and injuring a child in the street, it is not competent for it to prove that the child and its sister were accustomed to play in the street unattended. *Smith v. Grand St. P. & F. R. Co.*, 11 Abb. N. Cas. (N. Y.) 62.

A child of tender years was injured by a passenger railway car. The court permitted plaintiffs to ask a witness how many hours the drivers and conductors on the railway were employed each day, for the purpose of showing that the driver of the car which injured the child was physically unable to discharge his duty at the time of the accident. Held, that this was error, in the absence of any evidence that the driver of the car doing the injury was unfitted for his duties. *Philadelphia City Pass. R. Co. v. Henrice*, 4 Am. & Eng. R. Cas. 544, 92 Pa. St. 431, 37 Am. Rep. 699.—DISTINGUISHING *Pennsylvania R. Co. v. Books*, 57 Pa. S. 339; *Mansfield C. & C. Co. v. McEnery*, 9: Pa. St. 185.

In an action by a boy to recover for injuries received in jumping from a moving car at the conductor's command, where the undisputed evidence showed that the train was moved but a few yards, it was not error to reject an offer to prove that the train was moving at a rapid rate, it being impossible for the train to have gained a rapid speed. *Cauley v. Pittsburgh, C. & St. L. R. Co.*, 4 Am. & Eng. R. Cas. 533, 98 Pa. St. 498.

102. Materiality.—In an action against a street railway for killing a boy, who jumped off after stealing a ride, evidence of a habit to allow the cars to move along without a driver, thus inducing boys to get upon the platform, is immaterial where, as upon this occasion, the car had a driver who had gone inside to collect fares. *Largan v. Central R. Co.*, 40 Cal. 272.—DISTINGUISHED IN *Craven v. Central Pac. R. Co.*, 72 Cal. 345, 13 Pac. Rep. 878.

In an action for the killing of a child by

a train at a highway crossing, what the engineer said about the accident a few minutes after it happened was admissible in evidence as part of the *res gestæ*, and it was error to exclude a question as to whether a witness heard the engineer say anything at that time as to how he came to run over the child, although it was not stated for what purpose the question was asked, and did not appear how material the answer would have been. *Hermes v. Chicago & N. W. R. Co.*, 80 Wis. 590, 50 N. W. Rep. 584.

Where, in an action to recover damages for injuries sustained by a child of tender years who, when passing along a public street where it was crossed by a railroad track, was struck by a train, it appeared that the child exercised the degree of care and prudence required by a person *sui juris*—held, it was immaterial that the parents of the child were guilty of negligence in permitting it to be on the streets, and that the reception of improper evidence offered to excuse such negligence was not a ground for reversal. *Cumming v. Brooklyn City R. Co.*, 104 N. Y. 669, 10 N. E. Rep. 855, 5 N. Y. S. R. 737, 1 *Silv. App.* 345; affirming 38 Hun 362.

103. Showing emancipation of child.*—Where a father sues for personal injuries to his minor son, and claims damages for the loss of services, and the company in defense has introduced evidence tending to show that the son had been emancipated and the father no longer entitled to his services, it is not competent then for the father to show an undisclosed intention on his part, only known to his own mind, not to emancipate the son. *McCarthy v. Boston & L. R. Corp.*, 148 Mass. 550, 20 N. E. Rep. 182, 2 L. R. A. 608.

104. Showing former accidents of like character.†—In an action by the parents of a child of tender years, for bodily injuries caused it from a turntable in a public place, unguarded and unfastened, to which children theretofore had resorted, and had been injured, the testimony is competent of a boy that 18 months before he himself had been injured at the same place by the turntable; also that he had sued the defendant for damages for the injury; also the record of such suit was competent on the question of alleged notice to the company,

* Emancipation of child killed, as a defense, see DEATH BY WRONGFUL ACT, 162.

† See also *ante*, 30.

etc. *Fl. Worth & D. C. R. Co. v. Measles*, 81 Tex. 474, 17 S. W. Rep. 124.

165. Showing negligence of child.

—Where suit is brought for injuries to a boy nine years old, it is competent for the company, as tending to show a want of due care, to prove that the boy had been seen on the tracks prior to the accident, and had been warned not to go there. *Fitzpatrick v. Fitchburg R. Co.*, 1 Am. & Eng. R. Cas. 154, 128 Mass. 13.

Where a parent sues for a personal injury to his son and claims damages for the loss of services, it is not error to instruct the jury that, in determining whether or not the negligence of the son concurred in causing the injury, they are to consider all the circumstances affecting his conduct at the time, although it might involve the consideration of the acts of third parties, which could not be the ground for a recovery. *Gilligan v. New York & H. R. Co.*, 1 E. D. Smith (N. Y.) 453.

Where a company is sued for injuries to a small girl seven years old, and attempts to show in defense that her own negligence in going on a trestle contributed to the injury, it is competent for the plaintiff then to show that the child became frightened at cattle and went on the trestle for safety. *Cassida v. Oregon R. & N. Co.*, 14 Oreg. 551, 13 Pac. Rep. 438.—REVIEWING Eckert v. Long Island R. Co., 43 N. Y. 502.

Where the father sues to recover damages for personal injuries to his boy about ten years old, received while playing on a turntable, it is proper to prove the boy's intelligence, and his capacity to know and understand the danger of such conduct, but not his prudence or recklessness in encountering it. *Bridger v. Asheville & S. R. Co.*, 27 So. Car. 456, 13 Am. St. Rep. 653, 3 S. E. Rep. 860.

But evidence of the boy's caution, prudence, recklessness, or impetuosity as an excuse for contributory negligence was properly excluded. *Bridger v. Asheville & S. R. Co.*, 27 So. Car. 456, 13 Am. St. Rep. 653, 3 S. E. Rep. 860.

166. Showing negligence of parent.—In an action by a child to recover for a personal injury inflicted while it was attempting to cross a street intersection in company with an elder sister, who was killed, both sides tried the case on the theory that the negligence of the parents of the plaintiff might be imputed to it in sup-

port of the claim of contributory negligence. The father of the plaintiff testified, without objection, that he occupied a position of night-car inspector, and was in the habit of working in the night-time and of sleeping in the daytime. He also testified, against the objection of defendant, that at the time of the accident he had a wife and three children, viz., the plaintiff, then five and one half years of age, a daughter seven years old, who was killed, and a son a little over two years old, and that his wife was at that time in an advanced pregnancy, and that he did not employ a servant in his house. Held, that there was no error in the admission of this evidence, as it merely tended to show that the plaintiff's parents were so situated as to make it impracticable for them to attend the plaintiff to and from school. *Elgin, J. & E. R. Co. v. Raymond*, 148 Ill. 241, 35 N. E. Rep. 729; affirming on other grounds 47 Ill. App. 242.—DISTINGUISHING *Chicago City R. Co. v. Wilcox*, 138 Ill. 370.

Where a child of tender years sues for an injury at a crossing, and the company sets up, as a defense, the negligence of plaintiff's mother, it is proper to show that she was pregnant, and therefore unable to give the child better attention. *Elgin, J. & E. R. Co. v. Raymond*, 47 Ill. App. 242; affirmed on other grounds in 148 Ill. 241, 35 N. E. Rep. 729.

It seems evidence that the parents were unable to hire any servant or person to aid the mother in looking after the child is not competent to rebut proof of negligence on her part. *Cumming v. Brooklyn City R. Co.*, 104 N. Y. 669, 10 N. E. Rep. 855, 5 N. Y. S. R. 737, 1 Silv. App. 345; affirming 38 Hun 362.

167. Sufficiency.*—If a child, injured, is still capable of performing some kind of work, then the father, in suing for the loss of the services of the child, must establish by evidence the probable earning capacity of the child in its injured condition in order to make out a case. *Schmitz v. St. Louis, I. M. & S. R. Co.*, 46 Mo. App. 380.—FOLLOWING *Mauerman v. St. Louis, I. M. & S. R. Co.*, 41 Mo. App. 348. OVERRULING

* See also *ante*, 32.

Company not liable for killing a boy where evidence merely showed that he was picked up dead by the track with a foot cut off, but without proof as to how he came there, see 45 AM. & ENG. R. CAS. 52, *abstr.*

Matthews v. Missouri Pac. R. Co., 26 Mo. App. 75.

If a minor be injured while in the employ of a railroad, and sue for damages, the averment in the complaint of the appointment of a guardian or next friend must be supported by evidence, if it be denied in the answer. *Porter v. Hannibal & St. J. R. Co.*, 60 Mo. 160.—FOLLOWED IN *Sherman v. Hannibal & St. J. R. Co.*, 4 Am. & Eng. R. Cas. 589, 72 Mo. 62, 37 Am. Rep. 423. MODIFIED IN *Rogers v. Marsh*, 73 Mo. 70. REVIEWED IN *Clowers v. Wabash, St. L. & P. R. Co.*, 21 Mo. App. 213.

In cases where a parent's or a protector's contributory negligence may be claimed, the absence thereof is part of the plaintiff's case, and the burden of satisfying the jury on that point by a preponderance of evidence rests upon him. *Schindler v. New York, L. E. & W. R. Co.*, 1 N. Y. S. R. 289.

Where, on a trial for injury to a child, three persons on the train testified that it was their duty to keep a lookout, and two of them testified that they occupied positions where they could have seen the child had it been upon the track, and that they did not see it, and three witnesses swear that they saw the child upon the track, and the train approaching several hundred feet away, and the child is run over in the broad light of a summer afternoon—held, conclusive proof of reckless negligence in running the train without a proper lookout. *Battishill v. Humphreys*, 29 Am. & Eng. R. Cas. 411, 34 Am. & Eng. R. Cas. 69, 64 Mich. 514, 38 N. W. Rep. 581, 14 West. Rep. 863.

That a petition alleged that a child of 10 years had mental capacity to make a contract for his carriage as passenger, and knew the movement of the trains of the road upon which he was a passenger, does not show admitted intelligence such as to render him responsible for contributory negligence when injured. *Avey v. Galveston, H. & S. A. R. Co.*, 81 Tex. 243, 16 S. W. Rep. 1015.

A boy's body was found some distance from a crossing, indicating that he had been run over by a train, but there was no direct evidence as to how he was killed. The only evidence tending to show negligence on the part of the company was that it failed to give the necessary signal when approaching the crossing; but, on the other hand, there was no evidence to show that

the boy was killed at the crossing, or that the failure to give the signal was the cause of his death. Held, not sufficient evidence of negligence to sustain a verdict against the company. *Missouri Pac. R. Co. v. Porter*, 73 Tex. 304, 11 S. W. Rep. 324.

In an action for personal injuries sustained by the plaintiff, by reason of being thrown out of a vehicle while crossing the defendant's track, at a highway crossing where the grade of the railroad had been constructed and maintained at a much higher grade than that of the highway, the fact that the injured party was an infant, and was driving the team at the time of the accident, does not of itself establish contributory negligence. *Louisville, E. & St. L. Con. Co. v. Pritchard*, 131 Ind. 564, 31 N. E. Rep. 358.

168. Declarations—Res gestæ.—Where a child is injured by a railroad train, the statements of the engineer made immediately after the accident are admissible as part of the *res gestæ*. *Durkee v. Central Pac. R. Co.*, (Cal.) 9 Pac. Rep. 99.

169. Documentary evidence—City ordinance.—In an action against a horse-railroad company for negligence in running over a child, the plaintiff may introduce in evidence a city ordinance regulating and limiting the speed of cars upon horse-railroads, which has been served upon the defendants, with proof that, at the time of the injury complained of, the defendants' servant was driving at a greater rate of speed. *Wright v. Malden & M. R. Co.*, 4 Allen (Mass.) 283.

170. Opinion evidence.—In an action for recklessly and wantonly injuring a little boy nine years of age, who was on the track and was run over by one of defendant's engines, it was error not to allow defendant to ask a witness, who was the fireman on the engine, and had testified to all the facts, whether the boy had ample time to get off the track after the engineer blew his danger whistle before he was struck by the engine. *Kansas Pac. R. Co. v. Whipple*, 37 Am. & Eng. R. Cas. 320, 39 Kan. 531, 18 Pac. Rep. 730.—QUOTING *Quinn v. New York, N. H. & H. R. Co.*, 56 Conn. 44, 12 Atl. Rep. 97.

A question as to how far a child sitting or lying on the crossing could be seen on the day of the accident was properly excluded, that being a question for the jury to

* See also *ante*, 30.

decide in view of all the circumstances. *Hermes v. Chicago & N. W. R. Co.*, 80 Wis. 590, 50 N. W. Rep. 584.

4. Instructions.*

171. Generally.—On appeal by the plaintiff below, a child of ten, in an action against a railroad company for damages on account of personal injuries, the plaintiff having recovered judgment on a verdict, and the rule as to the measure of damages having been correctly stated to the jury, other charges given as to the legal liability of the defendant under the facts in evidence, if erroneous, are not ground for reversal. *Donovan v. South & N. Ala. R. Co.*, 79 Ala. 429.—FOLLOWED IN *Carrington v. Louisville & N. R. Co.*, 41 Am. & Eng. R. Cas. 543, 88 Ala. 472.

In submitting the issue of proper care on part of the injured party, who is of tender age, the fact must be considered by the jury. The charge of the court properly required the jury "to consider the age of the boy at the time." His age was about 14 years. *Texas & P. R. Co. v. Hall*, 83 Tex. 675, 19 S. W. Rep. 121.

Where a street-car company is sued for injuries to a child it is error to refuse to charge, at the request of the company, that it was bound to exercise no greater care than the owners of other vehicles driven on the street, and then to charge that the company was bound to exercise "the greatest care" in the management of its vehicle. *Falotio v. Broadway & S. A. R. Co.*, 9 Daly (N. Y.) 243.

The obligation to exercise due care was mutual and correlative, and the jury should have been instructed that the deceased child, if himself in the exercise of ordinary care and prudence, had a right to assume that the company would obey the law, and to act on that belief. *Lynch v. Metropolitan St. R. Co.*, 112 Mo. 420, 20 S. W. Rep. 642.—APPROVING *O'Connor v. Missouri Pac. R. Co.*, 94 Mo. 150. EXPLAINING *Ostertag v. Pacific R. Co.*, 64 Mo. 421.

172. Instructions properly given.—No objection can be urged to instructions which, when taken together, as the court instructed they should be, declare that a boy between eight and nine years of age is

only required to exercise care and prudence equal to his capacity, age, knowledge, and experience. *McCarthy v. Cass Ave. & F. G. R. Co.*, 92 Mo. 536, 10 West. Rep. 333, 4 S. W. Rep. 516.

An instruction declared it to be the duty of companies "to exercise the greatest caution and skill in the management of their business." Held, that although this degree of caution and skill can, perhaps, only be exacted when the relation of passenger and carrier exists, and the instruction may therefore be inapplicable to the case of a child injured by being run over by a gravel-train, yet under the circumstances (which are detailed in the opinion) the judgment should not for this reason be reversed. *Frick v. St. Louis, K. C. & N. R. Co.*, 8 Am. & Eng. R. Cas. 280, 75 Mo. 595.—REVIEWING *Brown v. Hannibal & St. J. R. Co.*, 50 Mo. 467; *Harlan v. St. Louis, K. C. & N. R. Co.*, 65 Mo. 22; *Stillson v. Hannibal & St. J. R. Co.*, 67 Mo. 671; *Bell v. Hannibal & St. J. R. Co.*, 72 Mo. 50.

173. Instructions properly refused.—Where a company is sued for negligently killing a boy nine years of age, it is not error in a trial court to refuse to charge "that the fact that the deceased was a child makes no difference in the application of the rule as to the question of negligence; if not of years of discretion he should have a protector." Children are entitled to more consideration and care than adults possessing full faculties. *Sheridan v. Brooklyn City & N. R. Co.*, 36 N. Y. 303, 34 How. Pr. 217, 93 Am. Dec. 490.—APPROVING *Mallard v. Ninth Ave. R. Co.*, 5 Daly (N. Y.) 304, 7 N. Y. Supp. 666, 27 N. Y. S. R. 801.

In an action by a child to recover for a personal injury by having its foot caught in an opening between the rail and sidewalk, an instruction that "if they believed, from the evidence, that as soon as the servants of defendant discovered that plaintiff could not get out of the way they used all reasonable diligence to stop the engine before it struck plaintiff, and that the bell of the engine was rung, as required by law, and that the engine was not running at a greater speed than ten miles an hour, plaintiff could not recover," is properly refused, there being other acts of negligence charged in the declaration than those referred to in the instruction. *Elgin, J. & E. R. Co. v. Raymond*, 148 Ill. 241, 35 N. E. Rep. 729.

Where the evidence showed that the en-

* Instructions as to contributory negligence of child, see DEATH, etc., 315.

Instructions as to damages for killing child, see DEATH, etc., 324.

gineer discovered the child, but supposed it to be a pig on the track, and did not slacken speed until it was too late to stop the train, after discovering the object to be a child, an instruction that "an object lying between the ties, not more than two or three inches above, is not ordinarily an object indicating danger or calling for increased vigilance, * * * nor would the engineer be required to slow down the speed of his engine until he discovered that it would probably endanger the train or passengers, or would, if a human being, be itself in danger," is properly refused. *Keyser v. Chicago & G. T. R. Co.*, 31 Am. & Eng. R. Cas. 399, 66 Mich. 390, 10 West. Rep. 646, 33 N. W. Rep. 867.

An instruction that "the father was guilty of negligence if the boys were of such tender years and discretion that they could not appreciate the danger of driving in the night or the importance of exercising ordinary care to avoid injury," is properly refused, the jury having been charged in effect that it was essential to a recovery that the older boy exercised the care and prudence of an adult person. *Parish v. Eden*, 62 Wis. 272, 22 N. W. Rep. 399.—*APPLYING Hoppe v. Chicago, M. & St. P. R. Co.*, 61 Wis. 357.

174. Erroneous instructions, generally.—An instruction ignoring the rule that the degree of care required of an infant depends upon its age and discretion is erroneous. *Washington & G. R. Co. v. Gladmon*, 15 Wall. (U. S.) 401, 4 Am. Ry. Rep. 500.

Where a company is sued for injuries to a child it is error to instruct the jury that if the child "was not seen by the driver in time to stop his car and to avoid the accident" they must find for the defendant, as such instruction overlooks the fact that the driver may have been negligent in not discovering the child as soon as he should. *Welsh v. Jackson County Horse R. Co.*, 81 Mo. 466.—*FOLLOWED IN Bergman v. St. Louis, I. M. & S. R. Co.*, 88 Mo. 678.

It seems that a general instruction to the jury, in an action by a parent for the negligent killing of an infant child, that in determining the amount of the verdict they should have "regard to the mitigating and aggravating circumstances" is bad; the instruction should designate what circumstances are to be considered as mitigating or aggravating damages. But if there are no mitigating circumstances in evidence, the defendant cannot complain of such an

instruction for its generality. *Nagel v. Missouri Pac. R. Co.*, 10 Am. & Eng. R. Cas. 702, 75 Mo. 653, 42 Am. Rep. 418.—*REVIEWING Ihl v. Forty-second St. & G. S. F. R. Co.*, 47 N. Y. 317.—*DISTINGUISHED IN Dunn v. Cass Ave. & F. G. R. Co.*, 21 Mo. App. 188. *FOLLOWED IN Smith v. Wabash, St. L. & P. R. Co.*, 31 Am. & Eng. R. Cas. 331, 92 Mo. 359.

Where a boy stopped on a railroad at a street crossing to await the passage of a train on another track and did not look or listen for a train on the track on which he stood, it is error to instruct the jury that, although he did not exercise care according to his age and discretion, the company is liable if the bell of the engine by which he was struck was not sounded for the crossing, and the failure to so sound the bell directly caused the injury. *Dlauhi v. St. Louis, I. M. & S. R. Co.*, 105 Mo. 645, 16 S. W. Rep. 281.—*EXPLAINING AND QUALIFYING Kelly v. Union R. & T. Co.*, 95 Mo. 279. *FOLLOWING Guenther v. St. Louis, I. M. & S. R. Co.*, 95 Mo. 286. *QUOTING Kelley v. Hannibal & St. J. R. Co.*, 75 Mo. 138; *Gorton v. Erie R. Co.*, 45 N. Y. 662; *Zimmerman v. Hannibal & St. J. R. Co.*, 71 Mo. 476; *Powell v. Missouri Pac. R. Co.*, 76 Mo. 80; *Moore v. Philadelphia, W. & B. R. Co.*, 108 Pa. St. 349.

Said instruction is also in conflict with another which told the jury that if the train approached the place of accident at a low rate of speed, but without sounding the engine-bell for the crossing, and plaintiff went on the track when the train was within fifteen or twenty feet of him, the defendant's agents in charge of the train, after seeing plaintiff's danger, did all they could to stop the train and prevent the accident, plaintiff could not recover. *Dlauhi v. St. Louis, I. M. & S. R. Co.*, 105 Mo. 645, 16 S. W. Rep. 281.—*APPLIED IN Prewitt v. Eddy*, 115 Mo. 283.

175. Misleading instructions.—Where it is charged that a boy is injured by reason of a sudden jolt of a street-car while he is standing on the front platform, and the company sets up as a defense his own contributory negligence in standing on such platform, it is error for the court to instruct the jury that they must find for the defendant if they believe from the evidence that the boy was injured by his own carelessness in jumping from the car, such instruction being liable to divert the atten-

tion of the jury and the question of the negligence of the boy in standing on the platform. *Willmott v. Corrigan Con. St. R. Co.*, (Mo.) 16 S. W. Rep. 500.

Where a company is sued for injuries to a child, the company cannot complain of an instruction to the effect that the degree of care which the child must exercise "must not be measured by a person of mature years," where it appears that the jury must have understood it as but a suggestion that in considering the child's conduct it was their duty to consider and give proper weight to the fact that she was but a child. *Bennett v. New York C. & H. R. R. Co.*, 16 N. Y. Supp. 765. But compare *Bates v. Nashville, C. & St. L. R. Co.*, 90 Tenn. 36, 15 S. W. Rep. 1069.

A charge of the court, in an action for injury done a child by a turntable, that the law does not impose any duty on the company to lock or fasten its turntable, was properly refused, because tending to mislead the jury to the belief that no duty rested on the company to keep its turntable securely. *Gulf, C. & S. F. R. Co. v. Evansich*, 61 Tex. 3.—FOLLOWED IN *Gulf, C. & S. F. R. Co. v. Evansich*, 63 Tex. 54.

176. Instructions invading the province of the jury.—Plaintiff sued for injuries sustained by being thrown from the foot-board of a switching-engine. The testimony was conflicting as to plaintiff being on the foot-board, or, if there, as to his being seen by the engineer, or whether, if seen at all, he was seen before or after starting. The court instructed the jury not to find for the plaintiff unless the engineer actually saw plaintiff on the foot-board, in which case he should have ordered him off before starting the train, and said that it was conceded that the boy was on the foot-board, and assumed the boy said the engineer saw him before starting. *Held*, that the court erred in treating controverted facts as undisputed, and that, as the duty to keep off a child entirely could not be quite the same as the duty which would arise from seeing him already on a moving train, there was error in saying the plaintiff should recover if the engineer saw him, without reference to the time and circumstances of seeing him. *Hughes v. Detroit, G. H. & M. R. Co.*, 65 Mich. 10, 31 N. W. Rep. 603.

In an action for the death of plaintiff's son, a boy ten years of age, the evidence tended to show that while on the street un-

attended he was run over and killed by defendant's street-cars, drawn by mules. It was daylight, and the deceased knew the street well; the mules were going in a walk, and he could have seen the car if he had looked. *Held*, that it was error to charge the jury that the deceased had a right to presume that the company had complied with the law requiring bells on the mules, in the absence of knowledge to the contrary, as it was a question for the jury whether, if he had exercised due care, deceased would not have observed the lack of bells. *Lynch v. Metropolitan St. R. Co.*, 56 Am. & Eng. R. Cas. 571, 112 Mo. 420, 20 S. W. Rep. 642.—DISTINGUISHING *Correll v. Burlington, C. R. & M. R. Co.*, 38 Iowa 120.

An instruction that the deceased was required to exercise only such care as might be expected of a boy of his age and capacity, and that the same degree of care in avoiding danger is not required from a person of tender years and imperfect discretion as from a person of maturer years and greater discretion, under similar circumstances, was erroneous in assuming that the deceased was a person of imperfect discretion, instead of leaving that question to the determination of the jury; and also in failing to direct the jury that before plaintiff could recover it must appear that the deceased was using, at the time of the injury, the care and caution of one of his age and capacity. *Lynch v. Metropolitan St. R. Co.*, 56 Am. & Eng. R. Cas. 571, 112 Mo. 420, 20 S. W. Rep. 642.

In an action against a railway company for causing the death of a boy 10 years old, it was error to instruct the jury that the boy was required to exercise only such care and prudence as might be expected of a boy of his age and capacity under similar circumstances, and that the same degree of care and prudence in avoiding danger is not required of a person of tender years and imperfect discretion as from a person of maturer years, while refusing the charge to the effect that he was guilty of negligence if he was old enough to know the danger of getting in front of a moving car and stooping down on the track without looking for the car; and if, in the exercise of such prudence as a boy of his age ought to exercise, he ought to have known that the car was coming, then the absence of bells could not be said to concur in causing his injury, since the instruction assumed that the boy was a boy of imperfect discretion, which was a

question for the jury to determine. *Lynch v. Metropolitan St. R. Co.*, 56 Am. & Eng. R. Cas. 571, 112 Mo. 420, 20 S. W. Rep. 642.

The question of due care, when negligence is charged against a railway company on account of leaving its turntable unfastened, is one for the jury; and a charge, that the failure of the company to fasten its table under a condition of facts stated would be negligence, would be an invasion of the province of the jury, and was properly refused. *Houston & T. C. R. Co. v. Simpson*, 60 Tex. 103.—DISTINGUISHED IN *Daniels v. New York & N. E. R. Co.*, 154 Mass. 349.

177. Instructions outside the issue.—In an action for damages for injuries to a child of tender years alleged to have been placed in charge of a coal car on a down-grade, where the only testimony in regard to the difficulty of operating the car-brake was that of the injured child, who had no experience with brakes generally, an instruction on the question of defective brakes is not proper to the case. *Guley v. North Western C. & T. Co.*, 7 Wash. 491, 35 Pac. Rep. 372.

A boy having safely alighted from a street-car while it was in motion, and, while running across the street from behind the car, having been struck and injured by another car going in the opposite direction, it is error to leave to the jury the question as to whether the conductor's failure to stop the car for the boy to alight contributed to the injury. *Dunn v. Cass Ave. & F. G. R. Co.*, 21 Mo. App. 188.—DISTINGUISHING *Fortune v. Missouri R. Co.*, 10 Mo. App. 252.—REVIEWED IN *Hudson v. Wabash & W. R. Co.*, 32 Mo. App. 667.

An instruction to the jury to find for plaintiffs, if they "believe from the evidence that plaintiffs negligently permitted their son to wander from his home and to go upon the turntable of defendant, and that the son was killed by said turntable, and that he was so young and inexperienced as not to possess sufficient judgment to warn him of the danger of the place or character of the machinery, and that he was killed by negligence and carelessness of defendant in not properly guarding and protecting said turntable and keeping children from playing on the same"—held, to be clearly erroneous; but it was also held that, be-

2 D. R. D., —52.

cause of said instruction, the court would not reverse the judgment where it appeared that there was no evidence whatever that plaintiffs ever assented to or approved of their child going on the turntable; but, on the contrary, they prohibited his so doing. *Koons v. St. Louis & I. M. R. Co.*, 65 Mo. 592.—APPROVED IN *Evansich v. Gulf, C. & S. F. R. Co.*, 6 Am. & Eng. R. Cas. 182, 57 Tex. 126.

178. Erroneous instructions favorable to appellant.—Where it appears that a company is guilty of a high degree of negligence in injuring a boy who may have been guilty of some negligence, the company cannot complain of an instruction that tells the jury that the company's employes were required to exercise only ordinary care to give warning of the approach of trains by a bell or whistle, and, if given, defendant was not liable, and if plaintiff was guilty of negligence he cannot recover, unless defendant became aware of the danger and could have avoided the injury by ordinary care, as such instruction is more favorable to the defendant than the law authorizes. *Kentucky C. R. Co. v. Smith*, (Ky.) 20 S. W. Rep. 392.

179. Directing verdict.—While boys were playing on a sand-laden car standing on a switch within the city limits, the train was moved, and while in motion the conductor ordered the boys off. The youngest, a boy of seven years, in jumping off fell under the wheels and was injured. In actions brought by the father of the child, and by the child, against the company, plaintiffs offered to prove the above facts and others showing negligence by defendant's servants. Held, that the court below properly refused to admit plaintiffs' offers, and properly directed verdicts for defendant. *Cauley v. Pittsburgh, C. & St. L. R. Co.*, 2 Am. & Eng. R. Cas. 4, 95 Pa. St. 398.—LIMITED IN *Darwin v. Charlotte, C. & A. R. Co.*, 23 So. Car. 531, 55 Am. Rep. 32.

180. What instructions must be given even without request.—When a case involves the question whether a boy under the age of 14 years was guilty of contributory negligence, it is the duty of the court, without request, to instruct the jury as to the care and discretion required of children. *Wright v. Detroit, G. H. & M. R. Co.*, 42 Am. & Eng. R. Cas. 140, 77 Mich. 123, 43 N. W. Rep. 765.

5. Amount of Recovery; Damages.

181. Generally.—Under California Code of Civil Pro. §§ 376, 377, allowing a parent to sue for injuries negligently inflicted upon his minor child, the parent can recover only such damages as he has himself sustained. Any damages personal to the child must be recovered in a suit in its name. *Durkee v. Central Pac. R. Co.*, 25 *Am. & Eng. R. Cas.* 350, 56 *Cal.* 388, 38 *Am. Rep.* 59.—QUOTING *Oldfield v. New York & H. R. Co.*, 14 *N. Y.* 318.—APPROVED IN *Hedrick v. Ilwaco R. & N. Co.*, 4 *Wash.* 400. DISTINGUISHED IN *Baker v. Flint & P. M. R. Co.*, 91 *Mich.* 298.

In such action it is error to instruct the jury that their verdict should be the amount of money which would compensate the child for his injuries. *Durkee v. Central Pac. R. Co.*, 25 *Am. & Eng. R. Cas.* 350, 56 *Cal.* 388, 38 *Am. Rep.* 59.

Where a suit is brought to recover for the wrongful death of a minor child, it is within the province of the jury to form an estimate of the damages, both present and prospective, resulting to the next of kin. In such case the jury may estimate the pecuniary damages from the facts proven, in connection with their own knowledge and experience, and it is not necessary that any witnesses should have expressed an opinion of the amount of such pecuniary loss. *Union Pac. R. Co. v. Dunden*, 34 *Am. & Eng. R. Cas.* 88, 37 *Kan.* 1, 14 *Pac. Rep.* 501.

To authorize a verdict for substantial damages, in an action by a parent for the negligent killing of his infant child, it is not necessary to make proof of the amount of damages sustained. The jury may infer this from all the facts in evidence. *Nagel v. Missouri Pac. R. Co.*, 10 *Am. & Eng. R. Cas.* 702, 75 *Mo.* 653, 42 *Am. Rep.* 418.

In an action by a father for damages to his minor son, it is competent for the jury to take into consideration the loss arising from the neglect of plaintiff's business during his son's illness; also the prospective loss to the father likely to arise from the crippled state of his son. *Black v. Carrollton R. Co.*, 10 *La. Ann.* 33.—EXPLAINED IN *Belknap v. Boston & M. R. Co.*, 49 *N. H.* 358.

182. Loss of services.—(1) *Injuries resulting in death.*—A parent may recover of a company damages for the loss of

future services of a child negligently killed by its train. *St. Louis, I. M. & S. R. Co. v. Freeman*, 4 *Am. & Eng. R. Cas.* 608, 36 *Ark.* 41.

The court instructed the jury that, if plaintiff was entitled to a recovery, she was entitled to a verdict for "such sum as you may, under the evidence, reasonably believe plaintiff might have received from the assistance of the deceased had he not been killed; and you may, in estimating such sum, consider the age of the deceased, the time he might have lived, the age of the plaintiff, the time she might probably live, and any other evidence tending to show what damages, if any, she might have suffered by reason of the killing of" her son. *Held*, that although the measure of the damages is a sum equal to the pecuniary benefit the parent had a reasonable expectation of receiving from her child had he not died, the enumeration of subjects of consideration did not extend the limits of investigation beyond what, from the testimony, the plaintiff reasonably would have received had her son lived, and was not misleading. *Missouri Pac. R. Co. v. Lee*, 35 *Am. & Eng. R. Cas.* 364, 70 *Tex.* 496, 7 *S. W. Rep.* 857.—QUOTING *International & G. N. R. Co. v. Kindred*, 57 *Tex.* 503.

In an action by the father to recover damages by reason of injuries received through defendant's negligence, which resulted in the death of his child, recovery can only be had for loss of the child's services since the death and possibly for funeral expenses; no recovery can be had in such a case for mental anguish and for loss of services, nursing, and expenses incurred prior to the death. *Bunyea v. Metropolitan R. Co.*, 8 *Mackey (D. C.)* 76.

(2) — *not resulting in death.*—Damages for the loss of a child's services cannot be recovered without evidence tending to show the probable value of such services from the time of the injury to the child's majority. *Dunn v. Cass Ave. & F. G. R. Co.*, 21 *Mo. App.* 188.—DISTINGUISHING *Nagel v. Missouri Pac. R. Co.*, 75 *Mo.* 653; *Frick v. St. Louis, K. C. & N. R. Co.*, 75 *Mo.* 542.—APPLIED IN *Buck v. People's St. R., E. L. & P. Co.*, 46 *Mo. App.* 555.

In assessing the damages of a father for the loss of the services of his minor child, when the child has been injured, but not killed, through the negligence of the defendant in the action, no deduction should

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be made for the cost of the support of the child subsequent to the injury. *Schmitz v. St. Louis, I. M. & S. R. Co.*, 46 Mo. App. 380.

The father is entitled to recover, as damages, an amount which will fully compensate him for the loss of service and the care of the child, and expense resulting from the injury, for a period not extending beyond the maturity of the child, including surgical attention, care, nursing, medicine, and the like. *Buck v. People's St. R., E. L. & P. Co.*, 46 Mo. App. 555.—*APPLYING Frick v. St. Louis, K. C. & N. R. Co.*, 75 Mo. 542; *Dunn v. Cass Ave. & F. G. R. Co.*, 21 Mo. App. 188.—*Frick v. St. Louis, K. C. & N. R. Co.*, 10 Am. & Eng. R. Cas. 776, 75 Mo. 542.—*DISTINGUISHED IN Dunn v. Cass Ave. & F. G. R. Co.*, 27 Mo. App. 188.

The parent may recover for loss of services until the child reaches his majority; and if the disability is continuing the child may recover thereafter. *Traver v. Eighth Ave. R. Co.*, 4 Abb. App. Dec. (N. Y.) 422, 6 Abb. Pr. N. S. 46, 3 Keyes 497.

A parent is entitled to recover the whole of the damages which inevitably must result from an injury to his minor child, including the prospective value of his services. *Drew v. Sixth Ave. R. Co.*, 26 N. Y. 49.—*REVIEWED IN Little Rock & Ft. S. R. Co. v. Barker*, 39 Ark. 491.

The parent may recover not only for loss of services up to time of the trial, but for prospective loss during the child's minority. *Cuming v. Brooklyn City R. Co.*, 109 N. Y. 95, 21 Abb. N. Cas. 1, 16 N. E. Rep. 65, 14 N. Y. S. R. 788, 12 Cent. Rep. 219; reversing 38 Hun 362.

The parent is confined to loss of service before suit brought, together with reasonable compensation for the expenses incurred and care bestowed by himself and servants during the illness of the child, and he cannot recover for the prospective loss during the minority unless he has declared specially therefor. *Gilligan v. New York & H. R. Co.*, 1 E. D. Smith (N. Y.) 453.

The damages recoverable by a parent for injuries to a minor child, not resulting in death, are not restricted to the value of the services of the child during its minority, less the expense of feeding and clothing it. *Texas & P. R. Co. v. Morin*, 25 Am. & Eng. R. Cas. 539, 66 Tex. 133.

In a suit by a father for permanent injury, as the loss of an arm, inflicted on his

minor son by the negligence of other employes of the road, when the employment was without the father's consent, the plaintiff is entitled to recover the value of the son's services until he arrives at the age of twenty-one years, the expense of medical attendance and nursing, and such other expenses as are rendered necessary by the injury. *Houston & G. N. R. Co. v. Miller*, 49 Tex. 322.

The father of an injured child having recovered damages for the temporary disability that may have been incurred by his child from negligence on the part of the company in not properly securing its turntable, so that children would not be injured by playing on the same, such minor son, owing services to his father, cannot recover for loss of time or inability to labor or earn money during his minority; and a charge of the court, to the effect that the jury may award damages to the minor individually for such temporary bodily disability, was error. *Gulf, C. & S. F. R. Co. v. Evansich*, 63 Tex. 54.

A mother on the death of her husband succeeds to the obligations of the latter towards their minor child, and therefore, if such child receives personal injury through the negligence of another, and if the mother, in compliance with her obligations, actually supports him thereafter during his minority, she is entitled in the assessment of the damages to all the wages which the child could have earned during its minority, without any deduction for or on account of the support of the child. *Mauerman v. St. Louis, I. M. & S. R. Co.*, 41 Mo. App. 348.—*FOLLOWED IN Schmitz v. St. Louis, I. M. & S. R. Co.*, 46 Mo. App. 380.

183. Medical attendance.—The parent suing for injuries to his child may recover for the expenses incurred for medical attendance. *Black v. Carrollton R. Co.*, 10 La. Ann. 33. *Frick v. St. Louis, K. C. & N. R. Co.*, 10 Am. & Eng. R. Cas. 776, 75 Mo. 542. *Buck v. People's St. R., E. L. & P. Co.*, 46 Mo. App. 555. *Houston & G. N. R. Co. v. Miller*, 49 Tex. 322.

But future and contingent expenses for medical attendance are not recoverable by the parent, but only by the child. *Cuming v. Brooklyn City R. Co.*, 109 N. Y. 95, 21 Abb. N. Cas. 1, 16 N. E. Rep. 65, 14 N. Y. S. R. 788, 12 Cent. Rep. 219; reversing 38 Hun 362.

Where a parent sues for injuries to his

minor child and claims, as an item of damages, for expense of medical attendance, he can only recover those actually incurred or immediately necessary. *Cuming v. Brooklyn City R. Co.*, 109 N. Y. 95, 21 Abb. N. Cas. 1, 16 N. E. Rep. 65, 14 N. Y. S. R. 788, 12 Cent. Rep. 219; reversing 38 Hun 362.—FOLLOWING *Dennis v. Clark*, 2 Cush. (Mass.) 347.—FOLLOWED IN *Cumming v. Brooklyn City R. Co.*, 1 Silv. Sup. Ct. 327. REVIEWED IN *Lang v. New York, L. E. & W. R. Co.*, 4 N. Y. Supp. 565.

184. Expenses, care, and nursing.—Where a child has been injured through a company's negligence, the father may recover damages as compensation for surgical attention, care, nursing, and medicines purchased. *Buck v. People's St. R., E. L. & P. Co.*, 46 Mo. App. 555. *Black v. Carrollton R. Co.*, 10 La. Ann. 33. *Frick v. St. Louis, K. C. & N. R. Co.*, 10 Am. & Eng. R. Cas. 776, 75 Mo. 542. *Gilligan v. New York & H. R. Co.*, 1 E. D. Smith (N. Y.) 453. *Houston & G. N. R. Co. v. Miller*, 49 Tex. 322.

In an action by a father to recover damages for injuries to an infant child, caused by defendant's negligence, he is entitled to recover his pecuniary loss, i. e., the value of the services of the child while incapacitated because of the injury, and the reasonable expenses necessarily incurred in the effort to restore the child to health. *Barnes v. Keene*, 132 N. Y. 13, 29 N. E. Rep. 1090, 42 N. Y. S. R. 853.

In such an action it appeared that the father, who had had experience as a nurse himself, in that capacity took the entire charge of the child. After proving the value of his services as such he was permitted to prove, under objection and exception, that in order to care for his child he gave up a lucrative business engagement, and also to prove the amount of the agreed compensation; the court refused to charge that the jury was not at liberty to allow more than what would have been paid to a competent trained or professional nurse. *Held*, error; that while plaintiff was entitled to recover the value of his services as a nurse, he was not entitled to recover in addition thereto what he might have made had he not abandoned the business engagement. *Barnes v. Keene*, 132 N. Y. 13, 29 N. E. Rep. 1090, 42 N. Y. S. R. 853.

If a child suffers physical injury through the negligence of a railway company, its

father is entitled to recover, as part of his damages, reasonable compensation for the services of both his wife and himself in nursing the child. *Schmitz v. St. Louis, I. M. & S. R. Co.*, 46 Mo. App. 380.—FOLLOWING *Blair v. Chicago & A. R. Co.*, 89 Mo. 334.

It is error, in an action by a mother for personal injury to her minor child, to direct the jury to include in the assessment of the damages the value of the care given by the mother to such son owing to the injuries received by him, if there is no evidence of the value of such care. *Maurer v. St. Louis, I. M. & S. R. Co.*, 41 Mo. App. 348.

Where a father sues for injuries to his minor child it is proper to instruct the jury to allow damages for the care and nurture of the child, so far as made more expensive by the injury, where it appears that the injury of necessity will make the child more helpless, though there be no direct proof that there would be greater expense. From the nature of the case there can be no direct evidence as to the amount of the damages. *Lang v. New York, L. E. & W. R. Co.*, 51 Hun (N. Y.) 603, 22 N. Y. S. R. 110, 4 N. Y. Supp. 565; affirmed in 123 N. Y. 656, mem.—DISTINGUISHING *Cuming v. Brooklyn City R. Co.*, 109 N. Y. 95. FOLLOWING *O'Mara v. Hudson River R. Co.*, 38 N. Y. 445.

In an action brought by a parent for loss of services of a minor child, disabled by the tortious act of defendant, the plaintiff is entitled to recover for expenses actually and necessarily incurred, or which are immediately necessary, in consequence of the injury in the care and cure of the child; but not for future prospective contingent expenses of this kind. *Cuming v. Brooklyn City R. Co.*, 109 N. Y. 95, 21 Abb. N. Cas. 1, 16 N. E. Rep. 65, 14 N. Y. S. R. 788, 12 Cent. Rep. 219; reversing 38 Hun 362.—DISTINGUISHED IN *Lang v. New York, L. E. & W. R. Co.*, 51 Hun (N. Y.) 603, 22 N. Y. S. R. 110.

In an action by a father to recover damages for injuries to his child resulting in death no recovery can be had for nursing and expenses incurred prior to the death. *Bunyea v. Metropolitan R. Co.*, 8 Mackey (D. C.) 76.

Where a child sues for personal injuries, no recovery can be had for necessary expenses of the parent, or for loss of the

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185. Pain, suffering, and mental anguish.—(1) *Not recoverable.*—Where parents sue for injuries to a minor son resulting in death, their mental suffering cannot form an element of damages. *Galveston v. Barbour*, 62 Tex. 172. *Bunyea v. Metropolitan R. Co.*, 8 Mackey (D. C.) 76.

And in such action it is proper to instruct the jury that the plaintiff is not entitled to recover damages for the pain or suffering which his son experienced from the injuries which he received, or for his disfigurement therefrom. *Durkee v. Central Pac. R. Co.*, 25 Am. & Eng. R. Cas. 350, 56 Cal. 388, 38 Am. Rep. 59.

Where a parent sues to recover for injuries to his minor child, resulting in death, the damages must be limited to the expenses he has incurred for medical attendance, his care in nursing, etc., and any loss of services from the time of the injury to the time of death. No damages can be allowed for injured feelings or mental suffering. *Covington St. R. Co. v. Packer*, 9 Bush (Ky.) 455. —CRITICISING *Ford v. Monroe*, 20 Wend. (N. Y.) 210. REVIEWING *Oakland R. Co. v. Fielding*, 48 Pa. St. 320.

(2) *Recoverable.*—In an action by the child for personal injury, a recovery may be had for pain, suffering, and permanent injury. *Chicago & A. R. Co. v. Lammert*, 12 Ill. App. 408. *Western & A. R. Co. v. Young*, 37 Am. & Eng. R. Cas. 489, 81 Ga. 397, 7 S. E. Rep. 912.

Where parents sue for injuries to a minor child, the pain that the child has suffered may be considered in estimating the damages, so far as such pain has affected the value of the child's services. *Walker v. Second Ave. R. Co.*, 6 N. Y. Supp. 536, 25 J. & S. 141, 24 N. Y. S. R. 961; affirmed in 126 N. Y. 668, mem., 37 N. Y. S. R. 936.

In estimating the damages in an action for injury to a child, the jury should consider the health and condition of the plaintiff before the injury complained of, as compared with its present condition in consequence of such injury, and whether the injury is in its nature permanent, and how far it is calculated to disable the plaintiff from engaging in those mechanical employments and pursuits for which, in the absence of such injury, he would have been qualified; and also the physical and mental suf-

fering to which he was subjected by reason of the injury; and such damages should be allowed as, in the opinion of the jury, would be a fair and just compensation for such injury and suffering. *Bannon v. Baltimore & O. R. Co.*, 24 Md. 108.

In an action for injuries to a boy seven years old, which necessitated amputation of both legs, the jury were instructed that in assessing damages they should give adequate compensation for the plaintiff's physical and mental pain and suffering, past and future, occasioned by his injuries; "also for the mortification and anguish of mind which he has suffered, and will in the future suffer, by reason of the mutilation of his body and the fact that he may become an object of curiosity or ridicule among his fellows." *Held*, not error, the words quoted not being intended to specify new elements or grounds for damages, but merely to indicate the causes from which the mental pain and suffering would be likely to arise. *Heddles v. Chicago & N. W. R. Co.*, 77 Wis. 228, 46 N. W. Rep. 115.

186. Remote and speculative damages.—Where a father sues for injuries to his minor child, the defendant cannot complain of a charge to the jury that the contract wages lost by the father while nursing the child may be considered in estimating the damages, but not speculative or uncertain earnings. *Bridger v. Asheville & S. R. Co.*, 27 So. Car. 456, 13 Am. St. Rep. 653, 3 S. E. Rep. 860.

187. Nominal damages.—In a statutory action to recover for death caused by negligence, when the next of kin for whose benefit the action is prosecuted were so related to the deceased as to be entitled to his services, or to support from him (e.g., the father of a minor son), the law presumes such loss, and when it appears that the deceased was a man engaged in active employment, presumably remunerative, and that he was nine months less than twenty-one years of age, a recovery may be had, in behalf of the father, of more than merely nominal damages. *Robel v. Chicago, M. & St. P. R. Co.*, 35 Minn. 84, 27 N. W. Rep. 305.

188. Mitigation or aggravation of damages.—(1) *Disease.*—Though the damage done to a child by an injury appears to be aggravated by a latent hereditary hysterical diathesis, which had never exhibited itself before the accident and might never

have developed but for it, the party in fault will be held for the entire damage as the direct result of the accident. *Lapleigne v. Morgan's L. & T. R. & S. Co.*, 37 *Am. & Eng. R. Cas.* 348, 40 *La. Ann.* 661, 1 *L. R. A.* 378, 4 *So. Rep.* 875.

(2) *Financial condition of parent.*—The amount of the loss recoverable is not affected by the financial condition of the parent. *Barnes v. Keene*, 132 *N. Y.* 13, 29 *N. E. Rep.* 1090, 42 *N. Y. S. R.* 853.

In an action to recover damages for a personal injury to a youth—held, that testimony as to the number of the father's family, and the means of his support, was admissible in evidence as tending to inform the jury whether the position and reasonable expectations in life of the youth were such as would render the same pursuits as the father followed probable and necessary for a livelihood for him. But such evidence was not admissible merely to show the father's poverty, or for the purpose of influencing the jury to increase on that account the damages to be given to the son. *Baltimore & O. R. Co. v. Shipley*, 31 *Md.* 368.

189. Diminished capacity to earn money.—Where an infant sues for personal injuries, the recovery is not limited to actual injury and pain and suffering up to the time of the trial, but may include prospective damages for the disabling effect of the injury. *Bay Shore R. Co. v. Harris*, 67 *Ala.* 6.—FOLLOWING *South & N. Ala. R. Co. v. McLenden*, 63 *Ala.* 266.

In an action by an infant to recover for a personal injury, the jury may take into consideration, in estimating the damages, the diminished capacity of the child for labor after it arrives at the age of twenty-one years. *Ft. Worth & D. C. R. Co. v. Robertson*, (Tex.) 16 *S. W. Rep.* 1093. *Western & A. R. Co. v. Young*, 37 *Am. & Eng. R. Cas.* 489, 81 *Ga.* 397, 7 *S. E. Rep.* 912.

In a suit brought by a minor, through his next friend, to recover damages for personal injuries, he is not entitled to compensation for his diminished capacity to earn money during the time intervening between the injury and his arrival at majority. *Texas & P. R. Co. v. Morin*, 66 *Tex.* 225.—DISTINGUISHING *Texas & P. R. Co. v. O'Donnell*, 58 *Tex.* 42.

A diminution in his capacity to earn money during that period gives cause of action to his parent, but not to the minor,

unless it be shown that he had been emancipated by the parent. *Texas & P. R. Co. v. Morin*, 66 *Tex.* 225.—REVIEWING *Abeles v. Bransfield*, 19 *Kan.* 16.—DISTINGUISHED IN *Baker v. Flint & P. M. R. Co.*, 91 *Mich.* 298.

When, however, the verdict and judgment are for the plaintiff, and there is no complaint that it is excessive, the judgment will not be reversed for a failure of the charge of the court to thus limit the liability of the defendant. *Houston & T. C. R. Co. v. Booser*, 34 *Am. & Eng. R. Cas.* 63, 70 *Tex.* 530, 8 *S. W. Rep.* 119.

Where an orphan child sues for personal injuries his right to recover for reduced capacity to earn money during his minority will not be defeated by the fact that another person is at the time acting in the relation of a parent, but who has not adopted the child. *Ft. Worth St. R. Co. v. Witten*, 74 *Tex.* 202, 11 *S. W. Rep.* 1091.

190. Measure of damages.—For a personal injury to a child nine years of age, including deprivation of a member, the law furnishes no measure of damages other than the enlightened conscience of impartial jurors, guided by all the facts and circumstances of the particular case. Among the results of the injury to be considered are pain and suffering, disfigurement and mutilation of the person, and impaired capacity to pursue the ordinary vocations of life at and after attainment of majority. *Western & A. R. Co. v. Young*, 37 *Am. & Eng. R. Cas.* 489, 81 *Ga.* 397, 7 *S. E. Rep.* 912.—APPROVING *Davis v. Central R. Co.*, 60 *Ga.* 329.

The measure of actual damages in a suit by a parent for the killing of his son is the actual pecuniary injury which resulted from the act complained of; and this is not necessarily confined to the period of the son's minority. *Houston & T. C. R. Co. v. Cowser*, 57 *Tex.* 293.—FOLLOWING *March v. Walker*, 48 *Tex.* 375.

The measure of damages to which a parent is entitled for the negligent killing of his son suggested as being such a sum as would purchase an annuity equal to the value of the pecuniary aid which the parent would have derived from the deceased, calculated on the basis of all the facts and circumstances of the particular case, reasonably accessible in evidence, and including the probable duration of life. In such a case the plaintiff should give evidence of

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such facts as would furnish the basis for a verdict, such as the circumstances of the deceased, his occupation, age, health, habits of industry, his sobriety and economy, his skill and capacity for business, his annual earnings, and the probable duration of his life. In the absence of such evidence, there is no standard by which to test the correctness of a verdict in such a case. *Houston & T. C. R. Co. v. Cowser*, 57 Tex. 293.

191. Exemplary damages.—The jury cannot take into consideration the shock to parental feelings, in consequence of the injury to the child, and assess vindictive damages in favor of the parent, such damages being recoverable only by those who, in their own proper persons, are victims of the misconduct of the servants of such companies. *Black v. Carrollton R. Co.*, 10 La. Ann. 33.

The child, if living, or his personal representative, but not the parent, suing for his own benefit, could maintain an action and recover exemplary damages for mental suffering upon facts showing an injury from negligence, as provided in the Ky. act of March 10, 1854. *Covington St. R. Co. v. Packer*, 9 Bush (Ky.) 455.

A long train of freight cars was being slowly backed by a locomotive around a curve near which were houses which prevented the engineer from seeing the rear-most car, upon which a boy had climbed and was riding, holding by the bumper, with his feet upon the brake-bar; a sudden jolt threw him upon the road, the cars passing over and maiming him. It was shown that he had been driven from similar trains on former occasions and complaint made to his parents; it was admitted that there was no employé of the company on the rear end of the hindmost car or walking in advance of it while moving backwards. In an action for damages—*held*, that the above facts were not evidence of gross negligence such as would warrant an instruction to the jury, that if they should find such negligence on the part of the agents of the company, they might allow punitive or exemplary damages. *Bannon v. Baltimore & O. R. Co.*, 24 Md. 108.

192. Damages, when excessive.*—A verdict for \$10,000 for personal injuries,

* Excessive damages in actions for death of child, see DEATH, etc., 433-435.

New trials for excessive damages in actions for, see NEW TRIAL, 34.

in favor of a father for injuries to his son, eleven years old, resulting in the loss of an arm, who belongs to a laboring family without property, will not be set aside as excessive. *Ketchum v. Texas & P. R. Co.*, 38 La. Ann. 777.

Twenty-five thousand dollars damages reduced to \$2000 damages, for the death of plaintiff's son, between eighteen and nineteen years of age, who was robust, earning \$25 per month, and who was a dutiful son employing his wages for the benefit of his father's family. *Myhan v. Louisiana E. L. & P. Co.*, 41 La. Ann. 964, 7 L. R. A. 172, 6 So. Rep. 799.

A boy between seven and eight years old was injured, necessitating the amputation of both limbs, one at the knee and the other at the ankle. *Held*, that a verdict in his favor of \$30,000 was excessive. *Heddles v. Chicago & N. W. R. Co.*, 39 Am. & Eng. R. Cas. 645, 74 Wis. 239, 42 N. W. Rep. 237.

193. Damages, when not excessive.—(1) *For personal injury.*—A verdict for \$3833.33 is not excessive for personal injuries to a five-year-old child who was struck by a train running at a very high rate of speed through the street of a town. *Chicago & A. R. Co. v. Gregory*, 58 Ill. 226, 11 Am. Ry. Rep. 92.

A boy received injuries from having been run over by a car, with the ordinary consequences of pain, etc., and, moreover, a permanent limp and incapacity to straighten his leg. *Held*, \$3000 damages were not excessive. *Buck v. People's St. R.*, E. L. & P. Co., 52 Am. & Eng. R. Cas. 512, 108 Mo. 179, 18 S. W. Rep. 1090.

A verdict of \$7000 in favor of a boy four years of age, for personal injuries rendering him a cripple for life, and causing intense suffering for many months, will not be disturbed as excessive. *Fl. Worth St. R. Co. v. Witten*, 74 Tex. 202, 11 S. W. Rep. 1091.

A verdict for \$5000 for personal injuries occasioned to a child of three years while riding on a railway train in charge of its mother—*held*, in this case not to be excessive. *Texas C. R. Co. v. Stuart*, 1 Tex. Civ. App. 642, 20 S. W. Rep. 962.

Three thousand five hundred dollars is not excessive as the verdict for injuries sustained by a ten-year-old child at a turntable, it appearing that his right foot was completely crushed. *Houston & T. C. R. Co. v. Simpson*, 60 Tex. 103.

(2) — *loss of legs and arms.*—Where plaintiff, a girl seven years of age, was run over by a car and had one leg cut off and her right hand so crushed as to cause the amputation of two fingers, besides being otherwise injured, a verdict for \$8100—*held*, to be not unreasonable. *Chicago & A. R. Co. v. Murray*, 71 Ill. 601.—QUOTING *Washington & G. R. Co. v. Gladmon*, 15 Wall. (U. S.) 408.

Where a boy under twelve years of age has suffered a personal injury resulting in the loss of an arm and a disfigured face, with other injuries, a verdict in his favor of \$6000 will not be set aside as excessive. *Evans v. American I. & T. Co.*, 42 Fed. Rep. 519, 24 Ohio L. J. 140.

A verdict of \$8000 for the loss of an arm of a boy some two years old, the son of a poor woman who boarded the railroad hands, though large, will not be set aside as excessive. (Bonner, J., dissenting.) *Texas & P. R. Co. v. O'Donnell*, 10 Am. & Eng. R. Cas. 712, 58 Tex. 27.—DISTINGUISHED IN *Texas & P. R. Co. v. Morin*, 66 Tex. 225.

A verdict for \$18,500 for injuries to a boy seven years old, necessitating the amputation of both legs and impairing his mental capacities, is not excessive. *Heddles v. Chicago & N. W. R. Co.*, 77 Wis. 228, 46 N. W. Rep. 115.

(3) — *blindness, deafness, and dumbness.*—An infant, by her next of kin, sued for personal injuries occurring when the child was about two months old. The evidence showed that the child received injuries which were cured in a few months, but at the time of the trial she was deaf and dumb, and there was evidence tending to show that her condition was the result of the injury, while there was other evidence showing that both her parents were deaf mutes, and tending to show that the child's condition was not the result of the accident. *Held*, that a verdict of \$700 in favor of the child would not be disturbed as inadequate. *Davis v. Central R. Co.*, 60 Ga. 329.—APPROVED IN *Western & A. R. Co. v. Young*, 37 Am. & Eng. R. Cas. 489, 81 Ga. 397, 7 S. E. Rep. 912.

A verdict in favor of a boy thirteen years old of \$3000, for personal injuries, will not be set aside as excessive, where the boy was confined to his bed for a month or six weeks, and there was medical evidence tending to show that he would never re-

cover his eyesight. *New Jersey R. & T. Co. v. West*, 32 N. J. L. 91.

A verdict in favor of a boy thirteen years old of \$7500 will not be disturbed, where it appears at the time of the trial that the injuries he received were not slight or superficial, but serious, and had resulted in permanent impairment of his sight, permanent injury to his urinary organs, and permanent loss of strength in his hands and arms, and probably a permanent affection of his whole nervous system. *McDonald v. Union Pac. R. Co.*, 42 Fed. Rep. 579.

(4) *For death.*—A mother sixty years old sued to recover damages for the death of her son, twenty-two years old. The evidence showed that he earned from \$60 to \$65 per month, one half of which he gave his mother. *Held*, that a verdict in her favor for \$3550 damages was not excessive. *Missouri Pac. R. Co. v. Henry*, 75 Tex. 220, 12 S. W. Rep. 828.

A verdict for \$2000 for causing the death of their son, a vigorous child aged eighteen months, and apportioned equally between the parents, approved. *Houston City St. R. v. Sciacca*, 80 Tex. 350, 16 S. W. Rep. 31.

No mental grief or agony can be computed in a case of this sort, but only actual compensatory pecuniary damages, if any, can be recovered; and in estimating damages the age and character of the child and its pecuniary benefit to plaintiffs up to its arrival at 21 years of age may be considered, after allowing all reasonable expense of its rearing and education for the same period. *Houston City St. R. Co. v. Sciacca*, 80 Tex. 350, 16 S. W. Rep. 31.

Damages of \$1000, awarded for the killing of a healthy boy sixteen months old, whose parents were poor and approaching middle life—*held*, not excessive. *Hoppe v. Chicago, M. & St. P. R. Co.*, 19 Am. & Eng. R. Cas. 74, 61 Wis. 357, 21 N. W. Rep. 227.

(5) *For loss of services, etc.*—Both a child and its mother sued to recover damages for personal injuries to the child. The latter recovered \$10,000 damages and the mother recovered a verdict of \$5000. Under the law of the state the mother was not compelled to support her child so long as it had property of its own. *Held*, that the verdict in favor of the mother would not be set aside as excessive, as the jury were authorized to consider not only the damage for loss of services, but also the extra care and expense imposed upon the mother.

Cumming v. Brooklyn City R. Co., 24 N. Y. S. R. 718, 52 Hun 613, 1 Silv. Sup. Ct. 327, 5 N. Y. Supp. 476.

Verdict for \$1200 not excessive in favor of a father for loss of his son's services for two years and twelve days. The son was crippled while in the employ of a railway company. *Texas Pac. R. Co. v. Brick*, 83 Tex. 526, 18 S. W. Rep. 947.

6. Judgment; Findings; Review.

194. Judgment.—A moneyed judgment in favor of a minor will not authorize the next friend who prosecuted the suit to receive the money. It can be paid over only to some one who has qualified as guardian of the minor's estate, or must be retained in the custody of the court until the minor is twenty-one years old. *Galveston City R. Co. v. Hewitt*, 67 Tex. 473, 3 S. W. Rep. 705. *Gulf, C. & S. F. R. Co. v. Styron*, 66 Tex. 421, 1 S. W. Rep. 161.

A recovery by a minor son, in a negligent case prosecuted by his father as his next friend, for the value of the loss of his services during minority, which is insisted upon by the father as an element of the son's damages, is a bar to a recovery by the father for the loss of such services in a suit thereafter brought in his own name. *Baker v. Flint & P. M. R. Co.*, 54 Am. & Eng. R. Cas. 131, 91 Mich. 298, 51 N. W. Rep. 897. —**DISTINGUISHING** *Wilton v. Middlesex R. Co.*, 125 Mass. 130; *Texas & P. R. Co. v. Morin*, 66 Tex. 225; *Central R. Co. v. Brinson*, 64 Ga. 475; *Durkee v. Central Pac. R. Co.*, 56 Cal. 388.

An action was brought for and in the name of an infant, who sued by *prochein ami*, and judgment having been recovered by the plaintiff, the amount thereof was paid by the defendant to the attorney of record, who was regularly employed by the *prochein ami* to conduct the action; and by order of the attorney the judgment was entered "satisfied"; at the time of the payment to the attorney there was no regularly constituted guardian of the beneficial plaintiff to receive and receipt for the money recovered. *Held*, that the payment by the defendant to the attorney of record was a good discharge of the judgment; and his act in receiving the money and directing satisfaction of the judgment to be entered was binding upon the infant plaintiff. *Baltimore & O. R. Co. v. Fitzpatrick*, 36 Md. 619.

195. Findings.—A finding that employes of defendant did not know that the child injured was at or near the crossing is not a finding that the employes did not know that people were frequently in the habit of crossing and recrossing the track at that place with the knowledge and consent of defendant. *Schindler v. Milwaukee, L. S. & W. R. Co.*, 87 Mich. 400, 49 N. W. Rep. 670. —**DISTINGUISHED IN** *Schaible v. Lake Shore & M. S. R. Co.*, 97 Mich. 318.

In an action against a street-railway company for injuries to a child three years of age at a street crossing, the jury found specially that the injuries were the result of the negligence of the driver of the car which ran against the child, "taking into account the condition of the street, the extent to which it was used, the steepness of the grade, and all the facts and circumstances of the case bearing upon the question;" and that there was no contributory negligence on the part of those in charge of the child. *Held*, that these findings entitled the plaintiff to judgment, although the jury further found that when the driver first saw the child, "or could have seen him, in the exercise of proper care," the car was about ninety feet distant from the child; that the child suddenly started from the place where he was first seen by the driver and ran towards the horses and the car; that he ran between the horses and the car before he could be prevented, and before the car could be stopped; that the driver did not have any reason to expect that the child would undertake to cross the street at the time; and that the defendant company was not guilty of any negligence other than that of the driver, which caused the injury. *Shenners v. West Side St. R. Co.*, 46 Am. & Eng. R. Cas. 187, 78 Wis. 382, 47 N. W. Rep. 622.

196. Review.—In an action brought to recover from a street-railway company for injury to a boy while stealing a ride, the same being alleged to have occurred through being kicked off a moving car by the conductor thereof—*held*, that in view of the fact that pantomimic as well as spoken rehearsals of their testimony had been gone through in the office of plaintiff's attorney, and that the testimony of the only other corroborative witness was by deposition, and suspicious at that, judgment will be reversed. *Chicago W. D. R. Co. v. Conley*, 43 Ill. App. 347.

CINDERS.

- Falling of, as an element of damages in eminent domain, see ELEVATED RAILWAYS, 157-159.
 — on persons in street, liability of company for, see ELEVATED RAILWAYS, 218.

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- Appeals from, to United States Supreme Court, see FEDERAL COURTS, 19.
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- Authority to construct bridges under contract with, see BRIDGES, ETC., 12.
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 — — — construction of elevated railways, see ELEVATED RAILWAYS, 17.
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 — — maintain lookout while running through, see TRESPASSERS, INJURIES TO, 49.
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 — — — license ticket brokers, see TICKETS AND FARES, 150.
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